

**OFFICIAL CODE
OF
GEORGIA
—
ANNOTATED**



VOLUME 1

Constitution of the United States

2007 Edition



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OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and

The Editorial Staff of LexisNexis®



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Volume 1 2007 Edition

Constitution of the United States

Including Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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2007

OFFICIAL CODE OF GEORGIA
ANNOTATED

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Volume I
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Preface

This volume cumulates and replaces the 1990 edition of Volume 1 of the Official Code of Georgia Annotated, as supplemented by the 2006 Cumulative Supplement. The 1990 edition of Volume 1 and its 2006 Cumulative Supplement may thus be recycled or, if so desired, may be retained for historical purposes.

This volume contains the Constitution of the United States and amendments thereto. This volume also contains case annotations reflecting decisions posted to LexisNexis® through May 25, 2007. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume also contains the Act that enacted the Official Code of Georgia Annotated; a foreword by the Chairman of the Code Revision Commission; a history of the codification of the laws of Georgia; and a user's guide.

Georgia Laws 2007, p. 47, § 54, effective May 11, 2007, reenacted, except for Title 47, the Official Code of Georgia Annotated, as amended by the text and Code section numbering contained in the 2006 supplements to the Code. See the editor's notes to Code Section 1-1-1 for the text of the 2007 reenacting Act. For Acts reenacting the Official Code of Georgia Annotated as amended by the text and numbering contained in the 1982 through 2006 supplements, see Ga. L. 1983, p. 3, § 1; Ga. L. 1984, p. 22, § 54; Ga. L. 1985, p. 149, § 54; Ga. L. 1986, p. 10, § 54; Ga. L. 1987, p. 3, § 54; Ga. L. 1988, p. 13, § 54; Ga. L. 1989, p. 14, § 54; Ga. L. 1990, p. 8, § 54; Ga. L. 1991, p. 94, § 54; Ga. L. 1992, p. 6, § 54; Ga. L. 1993, p. 91, § 54; Ga. L. 1994, p. 97, § 54; Ga. L. 1995, p. 10, § 54; Ga. L. 1996, p. 6, § 54; Ga. L. 1997, p. 143, § 54; Ga. L. 1998, p. 128, § 54; Ga. L. 1999, p. 81, § 54; Ga. L. 2000, p. 136, § 54; Ga. L. 2001, p. 4, § 54; Ga. L. 2002, p. 415, § 54; Ga. L. 2003, p. 140, § 54; Ga. L. 2004, p. 631, § 54; Ga. L. 2005, p. 60, § 54; and Ga. L. 2006, p. 72, § 54, respectively.

Acts of the General Assembly of the State of Georgia or portions thereof shall be construed as references to the Official Code of Georgia Annotated, to provide for other matters relative to the foregoing; to provide an effective date; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. At the 1977 regular session, the General Assembly of Georgia created the Code Revision Commission and authorized the commission to select a publisher to conduct a revision of the Code and the laws of Georgia. Pursuant to such authority, the Code Revision Commission entered into a contract with the Michie Company of Charlottesville, Virginia, on June 19, 1978, for the recodification and publication of Georgia laws in a new Official Code of Georgia Annotated. It is the purpose of this Act to enact the statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company.

Section 2. The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company which is on file in the office of the Secretary of State is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia.

Section 3. The statutory portion of the codification is contained in 24 volumes entitled "Code of Georgia 1981 Legislative Edition" plus one volume entitled "Code of Georgia 1981 Legislative Edition Supplement." Material contained in such supplement consists of Acts and resolutions of the General Assembly enacted at the 1981 regular session. The material contained in such supplement shall supersede correspondingly numbered material in the other 24 volumes and shall be in addition to the material in the other 24 volumes where such material is not correspondingly numbered.

OFFICIAL CODE OF GEORGIA ANNOTATED
ADOPTED.

No. 1 (House Bill No. 2).

AN ACT

To enact the statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company; to provide for a statement of purpose; to provide for the publication of the Official Code of Georgia Annotated; to provide the method and time at which such Code shall take effect; to provide that the material contained in the supplemental volume shall supersede material contained in the remaining 24 volumes of the statutory portion of such codification; to provide that references in local or special laws to certain other Acts or resolutions of the General Assembly or to prior codes of the State of Georgia or portions thereof shall be construed as references to the Official Code of Georgia Annotated; to provide for other matters relative to the foregoing; to provide an effective date; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

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Section 4. The statutory portion of such codification shall be merged with annotations, captions, catchlines, history lines, editorial notes, cross-references, indexes, and other materials pursuant to the contract; shall be published by authority of the state pursuant to such contract; and, when so published, shall be known and may be cited as the "Official Code of Georgia Annotated."

Section 5. The codification enacted pursuant to Section 2 of this Act shall take effect on November 1, 1982, as provided in Code Section 1-1-9 of such codification.

Section 6. Any reference in any local or special law of this state to any Act or resolution of the General Assembly or to any title, chapter, section, or other portion of any prior code of this state shall be construed to be a reference to the appropriate title, chapter, article, part, subpart, Code section, subsection, paragraph, subparagraph, division, or subdivision of the Official Code of Georgia Annotated which is enacted by this Act.

Section 7. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 8. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved September 3, 1981.

FOREWORD

At the 1981 extraordinary session, the General Assembly of Georgia enacted the statutory portion of the Official Code of Georgia Annotated, the first complete and official recodification of the laws of Georgia since the Code of 1933. Since the adoption of the Code of 1933, there has been a significant increase in both the number and complexity of the laws of Georgia. State government has grown in size and has undergone several significant reorganizations. State government is operating under its fourth state constitution since 1933.

In recognition of the many changes in the laws and the government of the State of Georgia, the General Assembly created the Code Revision Study Committee in 1976. The committee was composed of the following members:

Honorable Wayne Snow, Jr., Chairman
Honorable Howard T. Overby, Vice Chairman
Honorable Hugh Brown McNatt, Secretary
Honorable Peter L. Banks
Honorable Roy Barnes
Honorable Robert W. Crenshaw, Jr.
Honorable Roger Johnson
Honorable Randolph C. Karrh
Honorable J. Beverly Langford
Honorable Preston B. Lewis, Jr.
Honorable Lewis R. Slaton
Honorable Hugh D. Sosebee
Honorable J. Douglas Stewart
Honorable Albert W. Thompson
Honorable Larry Walker

The committee was directed to conduct a thorough study of the subject of code revision, including the need therefor, the time involved, the cost thereof, and all other matters relative thereto. In December, 1976, the committee submitted its report to the General Assembly. In its findings the committee stated: "The time for a complete, bulk revision and recodification of this state's statutory law is long overdue and must be accomplished as quickly as possible. Any attempt to accomplish code revision on a title-by-title basis is not a practicable or feasible solution to the problem. The most economical and satisfactory method to accomplish code revision within the State of Georgia is through a negotiated contract with a publishing firm possessing the necessary expertise and manpower to accomplish a complete recodification as quickly as possible."

The committee then recommended that the General Assembly create a Code Revision Commission and vest in the commission the responsibility of

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selecting an appropriate firm to accomplish the code revision project and to resolve the myriad of details connected with the code revision project.

To carry out the recommendations of the Code Revision Study Committee, the General Assembly created the Code Revision Commission at the 1977 session and gave the commission the powers necessary to carry out the code revision project. The commission is composed of the Lieutenant Governor and four members of the Senate, the Speaker of the House of Representatives and four additional members of the House of Representatives, and five members appointed by the president of the State Bar of Georgia, one of whom is a judge or senior judge of the superior courts and one of whom is a district attorney. The members of the commission as of the date of enactment of the Official Code of Georgia Annotated were:

Honorable Wayne Snow, Jr., Chairman
Honorable Thomas B. Murphy
Honorable Larry Walker
Honorable Randolph C. Karrh
Honorable J. C. Daugherty
Honorable Zell Miller
Honorable Roy Barnes
Honorable J. Nathan Deal
Honorable Bill Littlefield
Honorable Charles Wessels
Honorable R. W. Crenshaw, Jr.
Honorable Hugh Brown McNatt
Honorable Lewis R. Slaton
Honorable Hugh D. Sosebee
Honorable J. Douglas Stewart

In addition to the members listed above, Honorable Peter L. Banks, Honorable Howard T. Overby, Honorable J. Beverly Langford, and Honorable Albert W. Thompson served as members of the commission during the recodification process.

The Office of Legislative Council of the General Assembly provided staff for the commission. Terry A. McKenzie, Betty J. Clements, Martin Moody Wilson, G. Joseph Scheuer, Dolores McDonald, and Patterson Harp served as members of the Code Revision Division of the Office of Legislative Counsel and as the staff of the commission. In addition, Frank H. Edwards, Legislative Counsel, Gloria Anderson, and the other employees of the Office of Legislative Counsel provided valuable assistance in the preparation of the Official Code of Georgia Annotated.

Following presentations by five law publishers, the commission selected The Michie Company to prepare and publish the Official Code of Georgia Annotated on behalf of the State of Georgia. Following the execution of a contract between the commission and The Michie Company, the commis-

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sion and staff developed the uniform numbering system and rules of style which are used in the new Code. The commission adopted an arrangement of laws consisting of 53 Code titles. A statute copy consisting of the Code of 1933, all Georgia laws enacted since 1933, and those laws which were inadvertently omitted from the Code of 1933 but which are still in effect was prepared and arranged into the 53 titles. The editorial staff of The Michie Company, under the direction of David P. Harriman, Stephen C. Willard, James J. Watson, and J. Gerald Kail, performed a title-by-title examination of the statute copy. Numerous memoranda were prepared and sent to the commission for each title. The questions and proposals for changes contained in the memoranda were examined by the staff of the commission, proposed responses were developed, and the questions and proposals were then considered and resolved by the commission. Over 100,000 questions were resolved in this manner. In addition to the questions contained in the memoranda, grammatical changes, the correction of typographical errors, the renumbering of 1933 Code sections and portions thereof, the correction of cross-references within text, and changes necessitated by rules of style were marked directly onto the statute copy by the editors and were examined and approved by the commission and its staff. Upon completion of this process, each title was typeset in a page-proof format and was again examined completely by the editors and the commission's staff. The page proofs were proofread several times and every memoranda question and response was compared with the page proofs to ensure that the editorial work was correct. Throughout this process, every effort was made to avoid changes in the substance of the law. In those instances in which the commission felt that a substantive change had to be made, a separate bill was introduced in the General Assembly to accomplish the change. These bills were enacted in the 1980 and 1981 regular sessions of the General Assembly. Upon completion of the editorial process, a manuscript entitled the *Code of Georgia 1981 Legislative Edition* was prepared, presented to the General Assembly, and enacted at the 1981 extraordinary session of the General Assembly. Annotations, indexes, editorial notes, and other materials have been added to that manuscript to produce the Official Code of Georgia Annotated, the first official Code to be published under authority of the State of Georgia since the Code of 1933.

In reviewing the memoranda and page proofs, the commission and its staff received the assistance of several hundred people. The Code Revision Overview Committee of the State Bar of Georgia and a number of committees, sections, and individual members of the bar reviewed memoranda or page proofs and provided valuable assistance to the commission. In addition, each department of state government and a number of organizations assigned people to work with the commission in the recodification project. This project could not have been completed without the expertise provided by these individuals and the Code Revision Commission wishes to express its gratitude for their assistance.

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The adoption and publication of the Official Code of Georgia Annotated represents years of painstaking effort by the General Assembly of Georgia, the Code Revision Commission, the Office of Legislative Counsel, the State Bar of Georgia, and The Michie Company. It has been the goal of all who have contributed their time, labor, and expertise to this project to produce a complete, thorough, accurate, and usable Code for the State of Georgia and its citizens. We sincerely hope and believe that this goal has been accomplished.

Code Revision Commission
Honorable Wayne Snow, Jr.
Chairman, 1981
Honorable Larry Walker
Chairman, 1990

HISTORY OF THE CODIFICATION OF THE LAWS OF GEORGIA

The development of the codification of the laws of Georgia has been divided by one commentator into three separate stages — compilation, digest, and code.

The compilation stage began with the provisions of the Constitution of 1798 that the body of laws of the state should be “revised, digested and arranged under proper heads.” Pursuant to this provision, a compilation of laws was published by Robert Watkins in 1801, followed the next year by a compilation prepared by Horatio Marbury and William H. Crawford. Both compilations covered much the same field, specifically, the years 1755 to 1800. Later, pursuant to an Act of 1809 providing for decennial compilations, three separate compilations were prepared. The first, covering the years 1800 to 1810, was prepared by Augustin Smith Clayton. The second, covering the years 1810 to 1819, was prepared by Lucius Q. C. Lamar. The third, covering the years 1819 to 1829, was prepared by William H. Dawson. These volumes encompassed all laws and resolutions passed during the periods in question, regardless of the public and general or private and local nature of the laws and resolutions included and regardless of whether they were in force.

The next stage of development, the digest period, began with an Act of 1819 directing the preparation of a digest of laws of the state. The digest was to embrace all Acts and resolutions passed prior to the 1819 Session as well as those Acts and resolutions passed during that session. The Act directing the preparation of the digest contemplated a condensed volume which would exclude repealed laws and laws of a private and local nature. Pursuant to this legislative authorization, Oliver H. Prince prepared a digest volume which was approved by the Governor in January 1822 and which was revised in 1837. The 1837 revision of Prince’s Digest contained an index of local laws. Pursuant to a resolution of the General Assembly passed December 23, 1843, William A. Hotchkiss prepared a digest of the statutory law of Georgia. This work was the subject of a state subscription upon its completion in 1845. In 1851, Thomas R. R. Cobb published another legislatively authorized digest which was based on the arrangement and plan developed by Prince. Both Prince’s Digest and Cobb’s Digest contained an alphabetical listing of titles and a chronological arrangement of legislative Acts and resolutions. Next, Howell Cobb prepared “A Compilation of the General and Public Statutes of the State of Georgia.” This work was subscribed to by the state in 1859.

The next and most innovative step in the evolution of Georgia codified law was the Georgia Code of 1863. In 1858, a bill was introduced in the General Assembly proposing the codification of Georgia law. The resulting enactment provided for the formation of a three-man commission to

prepare for the people of Georgia a code “which should, as near as practicable, embrace, in a condensed form, the laws of Georgia, whether derived from the common law, the constitutions, the statutes of the state, the decisions of the supreme court, or the statutes of England in force in the State.” This was to be the first code in the United States giving statutory effect to common law and equitable principles.

The commissioners, David Irwin, Thomas R. R. Cobb, and Richard H. Clark, took it upon themselves to add and delete laws in a manner consistent with the existing system of law, with an eye toward meeting existing needs and in anticipation of future needs. In doing so, the commissioners adopted and incorporated suggestions, alterations, modifications, enlargements, and restrictions in the laws of the state. However, the taking of such liberties was ratified when the Code was adopted by the General Assembly.

Because the commissioners omitted historical annotations, the sources of some of the laws contained in the Code of 1863, particularly the part dealing with “Political and Public Organization of the State,” written by Clark, remain undisclosed. Other parts of the Code are clearly traceable to two prior sources, the Judiciary Act of 1799 and the Penal Code of 1833, which were carried almost wholly intact into Parts 3 and 4 of the Code.

Although a number of codes have followed the Code of 1863, few alterations in its form have been made. Some changes have been made for purposes of clarity, but the substance of the original Code has generally been preserved. The succeeding revisions have continued the process initiated by the Code of 1863 of codifying common law principles as they have developed.

Subsequent official Codes of Georgia were commissioned and adopted as follows:

Code of 1868: Committee appointed to examine revised Code, Ga. L. 1865-66, p. 315. Governor authorized to subscribe for copies for use by state, Ga. L. 1866, p. 223. Code ratified by Constitution of 1868, Art. XI, Sec. III.

Code of 1873: Governor authorized to subscribe for copies of revised Code upon favorable report by Attorney General, Ga. L. 1872, p. 524.

Code of 1882: Governor authorized to direct Attorney General to examine revised Code, Ga. L. 1880-81, p. 676. Publication of Code authorized by General Assembly, Ga. L. 1880-81, p. 140.

Code of 1895: Authorization given for appointment of Code commissioners, Ga. L. 1893, p. 119. Code adopted, Ga. L. 1895, p. 98.

Code of 1910: Code commission created, Ga. L. 1909, p. 111. Code adopted, Ga. L. 1910, p. 48.

HISTORY OF CODIFICATION

Code of 1933: Code commission created, Ga. L. 1929, p. 1487. Code adopted, Ga. L. 1933, p. 31; Ga. L. 1935, p. 84.

USER'S GUIDE

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The Official Code of Georgia Annotated may be cited as "O.C.G.A." See Code Section 1-1-8 as to citation of the Official Code of Georgia Annotated.

Arrangement and Numbering System

The Official Code of Georgia Annotated is arranged into 53 Code titles. In addition to the 53 titles, the Constitution of the United States and the Constitution of Georgia are included in separate volumes with their original internal numbering systems retained. No Code title numbers have been assigned to the Constitutions.

With the exception of Title 1, "General Provisions," titles within the Code are arranged in alphabetical order. A list of the Code title numbers and names appears in the front of each volume of the Code.

Where appropriate, titles within the Code are divided into chapters, chapters are divided into articles, articles are divided into parts, and parts are divided into subparts. An exception to this arrangement occurs in Title 11, "Commercial Code." Because of the importance of maintaining the numbering scheme of the Uniform Commercial Code throughout the United States, Title 11 does not follow the numbering scheme used in the remaining titles of the Code.

Titles, chapters, articles, parts, and subparts of the Code are designated with Arabic numerals. If a new title, chapter, article, part, or subpart is

added between two existing titles, chapters, articles, parts, or subparts, it will be designated by the preceding numeral plus a capital letter. Thus, if two new chapters are to be added between Chapters 4 and 5 of a title, they will be designated as Chapters 4A and 4B.

A three-unit numbering system is used to designate Code sections. Thus, Code Section 2-5-1 is the first Code section of Chapter 5 of Title 2. Code section numbers are not consecutive in the Code. At the end of each article, part, and subpart, gaps are left in Code section numbers to allow for future legislation. If a new Code section is added between two existing Code sections, the new Code section will be designated with the preceding Code section number followed by a period and one or more numerals. Thus, if two new Code sections are added between Code Sections 2-5-38 and 2-5-39, the new Code sections will be designated as Code Sections 2-5-38.1 and 2-5-38.2.

Where appropriate, Code sections are divided into subsections, subsections are divided into paragraphs, paragraphs are divided into subparagraphs, subparagraphs are divided into divisions, and divisions are divided into subdivisions. These units are designated as follows:

Subsections—(a), (b), (c), (d), etc.

Paragraphs—(1), (2), (3), (4), etc.

Subparagraphs—(A), (B), (C), (D), etc.

Divisions—(i), (ii), (iii), (iv), etc.

Subdivisions—I, (II), (III), (IV), etc.

If it becomes necessary to add new subsections, paragraphs, subparagraphs, divisions, or subdivisions between existing subsections, paragraphs, subparagraphs, divisions, or subdivisions, the new material will be designated as follows:

Subsection—(a), (a.1), (a.2), (b)

Paragraph—(1), (1.1), (1.2), (2)

Subparagraph—(A), (A.1), (A.2), (B)

Division—(i), (i.1), (i.2), (ii)

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If a Code section has introductory language followed by a list, subsection designations are not used to designate the items in the list, but each item is given a paragraph designation. This helps to maintain the flexibility of the numbering system. Definitions sections are examples of this system of numbering items in a list.

Arrangement of Specific Types of Material Within the Code

Title 1 of the Official Code of Georgia Annotated relates to general provisions applicable either to the adoption of the Code itself or to the enactment of laws generally. Title 1 contains an expression of legislative intent in the enactment of the Code, provides for severability for the Code and future laws as well, preserves certain types of Acts which are not codified, provides for the specific repeal of prior codes and laws, describes classes and categories of persons, provides for rights of persons, provides for rules of statutory construction, and provides for definitions of terms used throughout the Code. All persons are urged to read Title 1 prior to using the Code.

In the same manner that Title 1 contains material which is applicable to the entire Code, most titles within the Code contain a general provisions chapter as Chapter 1 of the title. This chapter contains definitions and other material of general application throughout the particular title.

Within each chapter, article, part, and subpart, certain types of material generally will be arranged in a uniform manner throughout the Code. The short title of a law, if any, will be the first Code section, followed by the Code section stating the purpose or legislative findings, followed by Code section defining certain words and phrases used in that law. Within the body of the chapter, article, part, or subpart, related Code sections will be grouped together. Penalty Code sections are generally at the end of the material to which they relate.

Title and Chapter Analyses

Preceding each title in the Code is a title analysis which lists the numbers and captions of each chapter within the title.

Preceding each chapter in the Code is a chapter analysis which lists each article, part, and subpart within the chapter and each Code section and its catchline.

History Lines

Generally, each Code section is followed by a history line which includes citations to the Georgia Laws and prior official compilations of the laws of the state, pertaining to substantially the same subject matter as the present Code section. Unofficial codes are not cited in the history lines. No history line is included for those Code sections which are enacted by the Official Code of Georgia Annotated itself. Examples of these types of Code sections include those Code sections in Title 1 dealing with the enactment of the Official Code of Georgia Annotated and Code sections in other titles which provide new title-wide definitions not previously included in the law.

Quite often the history lines not only will reflect the most recent specific enactment of a Code section but also will trace similar provisions of law

existing prior to the most recent specific enactment, even though that enactment may not have expressly amended any of the prior similar provisions and may in fact have repealed them. For example, Ga. L. 1977, p. 396 enacted a new game and fish code (now codified primarily at Title 27) which repealed most of the then-existing provisions of law relating to game and fish. However, rather than beginning each history line in Title 27 with the most recent specific enactment (Ga. L. 1977, p. 396), the editors have examined the pre-1977 game and fish Acts, compared the subject matter of those Acts with the subject matter of each section of Ga. L. 1977, p. 396, and added history where appropriate. This tracing procedure serves the purpose of providing more complete historical information and recognizes the fact that many repeals by the General Assembly have the practical effect of amending or renumbering existing provisions of law.

In some cases the history lines may provide a quick method of translating sections of the Code to sections of prior codes. However, since the history lines do not cite unofficial codifications of provisions of Georgia law, reference generally should be made to the conversion tables in Volume 41 whenever a translation of a new Code section to a prior provision of law is desired.

Bill numbers are included in history lines for Acts enacted in 2005 and later.

History lines are provided for those numbered paragraphs of the 1983 Georgia Constitution that have been amended or added since that Constitution was ratified in 1982.

Repeal Lines

When a Code section is repealed, its Code section number and catchline are set out, followed by a notation that the particular section has been repealed. An Editor's note under the repeal line lists citations to the Georgia Laws on which the repealed Code section was based, and refers the user to the Code provisions, if any, now covering the subject of the repealed Code section.

Cross References

Appropriate cross references between related provisions of the Code are included at the beginning of the annotations for a particular title, chapter, article, part, subpart, or Code section.

Case Annotations

LexisNexis® has prepared and included in the Official Code of Georgia Annotated a complete set of case annotations. All decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia and all decisions of the federal courts in cases which arose in Georgia construing any portion of the general statutory law of the state, the Constitution of the United States,

and the Constitution of Georgia have been examined and appropriate annotations have been prepared and included under a "Judicial Decisions" heading following the title, chapter, article, part, subpart, or Code section designation of the Official Code of Georgia Annotated to which they relate. Annotations contain the name of the case, the complete official and unofficial citations, and the year of the decision. Normally, constructions of statutes relating to constitutionality thereof appear first in the annotations for a particular provision of the Code.

Editor's Notes and Code Commission Notes

If the editorial staff of LexisNexis®, the Code Revision Commission, or the commission's staff felt that an explanatory note would be helpful to users of the Code, such notes were added as editor's notes or Code Commission notes.

Law Reviews

Appropriate articles and notes from each law review which is published in the State of Georgia are noted following the title, Code section, or other designation to which they relate.

Opinions of the Attorney General of Georgia

Where appropriate, annotations are included concerning relevant opinions of the Attorney General of Georgia, and citations to those opinions are given. These annotations are included under the heading "Opinions of the Attorney General" following the particular title, Code section, or other designation to which they relate.

Advisory Opinions of the State Bar

Where appropriate, annotations are included concerning relevant advisory opinions of the State Bar of Georgia, and citations to those opinions are given. These annotations are included under the heading "Advisory Opinions of the State Bar" following the particular title, Code section, or other designation to which they relate.

Decisions and Opinions Under Prior Law

Editor's notes or the subheadings "Decisions Under Prior Law" and "Opinions Under Prior Law" appear in the case annotations and the annotations to Attorney General opinions. These editor's notes and subheadings are utilized to indicate a judicial decision or an Attorney General opinion under a provision of law which was specifically repealed subsequent to the decision or opinion but which was succeeded by a provision similar to the repealed provision, so that the decision or opinion has continued relevance to an effective provision of law.

Research References

To aid in legal research, collateral references have been included to appropriate material in American Jurisprudence, Corpus Juris Secundum,

American Law Reports, and Uniform Laws Annotated. These annotations are included under the heading "Research References" following the particular title, Code section, or other designation to which they relate.

Indexes

—*General Index*

The Official Code of Georgia Annotated contains a completely new general index prepared by LexisNexis®. Index entries have been produced by an actual reading of the body of the statutes and other material and not merely from headings or catchlines. All major headings in the Code are represented in the index.

—*Volume Indexes*

In addition to the general index, each volume of the Code contains an individual volume index covering the material contained in that volume. Individual volume indexes will not be revised in the annual supplements to the volumes but will be revised and updated when a volume is recompiled and republished.

—*Index of Local and Special Laws and General Laws of Local Application*

In addition to the general index, a complete, new index to local and special laws and general laws of local application has been compiled and published as a part of the Code. This index contains citations to the Georgia Laws from 1730 to the present. Entries are divided into current and noncurrent laws in order to eliminate the necessity of having to examine repealed laws when attempting to locate currently effective laws. Index entries were prepared after a complete reading of each statute. After the index was prepared, each entry was compared with the Georgia Laws to ensure the accuracy of the index entries.

For further information regarding the index to local and special laws and general laws of local application, see the foreword to that index and the user's guide preceding the portion of that index dealing specifically with general laws of local application.

Conversion Tables

Conversion tables have been included in Volume 41 to assist the user of the Code in converting citations between the Official Code of Georgia Annotated and the Georgia Code Annotated, the Code of Georgia of 1933, and all previous codes of the State of Georgia. Also included are a table showing the location of each section of the Georgia Laws which has been codified in the Official Code of Georgia Annotated and tables which indicate corresponding provisions of the 1877 Constitution of Georgia, the 1945 Constitution of Georgia, the 1976 Constitution of Georgia, and the 1983 Constitution of Georgia. Conversion tables for the present and prior Constitutions of Georgia are also contained in Volume 2.

Dictionary

In the preparation of this Code, the Code Revision Commission and The Michie Company utilized Funk & Wagnalls Standard College Dictionary, copyright 1977 by Harper & Row, Publishers, Inc., as a standard reference work.

Secretary of State's Certificates

In each statutory volume as well as in the volume containing the Constitution of Georgia, there is included in the front matter a certification by the Secretary of State of Georgia that the statutes or constitutional provisions contained in that volume are true and correct copies of such material as enacted by the General Assembly of Georgia, all as the same appear of file and record in the office of the Secretary of State.

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Laws Varying Compensation for Services of Senators and Representatives.

Editor's notes. — The article, amendment, and section headings appearing in brackets have been inserted in this printing of the original Constitution. They generally

follow those in the printing contained in The Constitution of the United States (5th Ed., 1952), published by the Library of Congress.

CONSTITUTION OF THE UNITED STATES

[Preamble]

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

Law reviews. — For article, "The Literary Force of the Preamble," see 39 Mercer L. Rev. 879 (1988). For introduction to symposium on religious dimensions of American constitutionalism, see 39 Emory L.J. 1 (1990). For article, "Religious Dimensions in the Development of American Constitu-

tionalism," see 39 Emory L.J. 21 (1990). For article, "Constitutionalism as the American Religion: The Good Portion," see 39 Emory L.J. 203 (1990).

For note, "The Application of the Constitution Outside the Continental Limits of the United States," see 21 Ga. B.J. 246 (1958).

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State prisoners. — Constitutionally protected freedoms enjoyed by citizens-at-large may be withdrawn or constricted as to state prisoners, so far as justified by the considerations underlying our penal system. Polakoff v. Henderson, 370 F. Supp. 690 (N.D. Ga. 1973), aff'd, 488 F.2d 977 (5th Cir. 1974).

In order to raise a question as to the constitutionality of a "law," at least three things must be shown: (1) statute or partic-

ular part or parts of statute which the party would challenge must be stated or pointed out with fair precision; (2) the provisions of the Constitution, which it is claimed have been violated, must be clearly designated; and (3) it must be shown wherein the statute, or some designated part of it, violates such constitutional provision. Lockaby v. City of Cedartown, 151 Ga. App. 281, 259 S.E.2d 683 (1979).

ARTICLE I.

Law reviews. — For article, “Closes When Congress Doesn’t Do Its Job,” see 40 Emory L.J. 1007 (1991).

Section 1.

[Legislative Powers]

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Law reviews. — For article discussing validity of “executive privilege” as defense to congressional demand for information, see 8 Ga. L. Rev. 809 (1974). For article discussing the separation of powers implications of implied rights of actions, see 34 Mercer L. Rev. 973 (1983). For article, “Congress: The Purse, the Purpose, and the Power,” 21 Ga. L. Rev. 1 (1986). For article, “The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy,” 21 Ga. L. Rev. 17 (1986). For article, “Congress As Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine,” 21 Ga. L. Rev. 57 (1986). For article, “Separation of Political Powers: Boundaries or Balance?,” 21 Ga. L. Rev. 171 (1986). For article, “The Framers’ Understanding of Constitutional Deliberation in Congress,” 21 Ga. L. Rev. 217 (1986). For article, “An Overview of the New

Federal Sentencing Guidelines,” see 25 Ga. St. B.J. 16 (1988). For article, “The Separation of Powers in a Federal System,” see 37 Emory L.J. 538 (1988). For introduction to symposium on separation of powers, see 37 Emory L.J. 535 (1988). For article, “Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the ‘Blending’ of Powers,” see 37 Emory L.J. 587 (1988). For article, “The Preservation of Individual Liberty Through the Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immortality,” see 37 Emory L.J. 613 (1988). For article, “The Illegitimacy of the Public Interest Standard at the FCC,” see 38 Emory L.J. 714 (1989).

For note, “Bowsher v. Synar: Bright-Line Rule or Dice-Toss Approach to Separation of Powers?,” see 38 Mercer L. Rev. 969 (1987).

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Congress may fix standard and delegate details. — Legislative power of Congress cannot be delegated, but it is equally well settled that Congress may declare its will, and, after fixing a primary standard, devolve upon administrative officers the “power to fill up the details” by prescribing administrative rules. It is difficult to define the line which separates legislative power to make laws from administrative authority to make regulations, but when Congress has legislated and indicated its will, it can give to those who are to act under such general provisions power to fill up the details by the establishment of administrative rules and regulations, violation of which can be punished by fine or imprisonment fixed by Congress. *Richmond Hosiery Mills v. Camp*, 7 F.

Supp. 139 (N.D. Ga. 1934), *aff’d*, 74 F.2d 200 (5th Cir. 1934).

Delegation of rule-making authority not delegation of legislative power. — That Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution; but the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense. So long as a policy is laid down and a standard established by a statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate

rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply; but the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has

been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate if our constitutional system is to be maintained. *United States v. Griffin*, 12 F. Supp. 135 (S.D. Ga. 1935).

RESEARCH REFERENCES

ALR. — Constitutionality and construction of Emergency Price Control Act as relating to rent, 148 ALR 1403; 149 ALR 1467; 150 ALR 1462; 151 ALR 1465; 152 ALR 1462; 153 ALR 1434; 154 ALR 1460; 155 ALR 1461; 156 ALR 1459; 157 ALR 1457; 158 ALR 1464.

Constitutionality, construction, and application of Emergency Price Control Act, 148 ALR 1429; 149 ALR 1472; 150 ALR 1470; 151 ALR 1469; 152 ALR 1472; 153 ALR 1444; 154 ALR 1468; 155 ALR 1467; 156 ALR 1467; 157 ALR 1463; 158 ALR 1474.

Power and duty of court where Legislature renders constitutional mandate ineffectual by failing to enact statute necessary to make it effective or by repealing or amending statute previously passed for that purpose, 153 ALR 522.

Implied cause of action for damages for violation of provisions of state constitutions, 75 ALR5th 619.

Validity, construction, and effect of domestic currency transaction reporting requirement based upon 31 U.S.C.S. § 5313(a), 89 ALR Fed. 770.

Section 2.

[House of Representatives, How Constituted, Power of Impeachment]

The House of Representatives, shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Cross references. — Qualifications of electors, Ga. Const. 1983, Art. II, Sec. I; Ga. Const. 1983, Art. II, Sec. II; and § 21-2-219. Factors disqualifying a person from nomination or election, §§ 21-2-7, 21-2-8. Filling vacancies, § 21-2-543.

Editor's notes. — U.S. Const., amend. 14, sec. III, modifies clause 2 of this section by imposing additional, but probably anachronistic, disqualifying criteria. The phrase "three fifths of all other persons" in clause 3 of this section referred to slaves and has been rendered obsolete by U.S. Const., amend. 13. The entire first sentence of clause 3 was subsequently superseded by U.S. Const., amend. 14, sec. II.

Law reviews. — For article analyzing constitutionally permissible modifications in qualifications established for representatives and senators, see 17 J. of Pub. L. 103 (1968). For article, "Reapportionment Recapitulated: 1960-1970," see 7 Ga. St. B.J. 191 (1970). For article considering the power of the United States House of Representatives to expel a member and the power of the judiciary to review such an expulsion, see 5 Ga. L. Rev. 203 (1971). For survey of com-

mercial law, see 34 Mercer L. Rev. 31 (1982). For article, "Georgia and the Development of Constitutional Principles: An Essay in Honor of the Bicentennial," see 24 Ga. St. B.J. 6 (1987). For article, "Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860," see 39 Emory L.J. 65 (1990).

For comment on *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950) denying federal jurisdiction in case involving apportionment, see 2 Mercer L. Rev. 275 (1950). For comment on *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 81 (1964), congressional districting, see 15 Mercer L. Rev. 504 (1964). For comment discussing "one man, one vote" doctrine in light of *Wilkins v. Davis*, 205 Va. 803, 139 S.E.2d 849 (1965), see 16 Mercer L. Rev. 446 (1965). For comment on *Jenness v. Little*, 306 F. Supp. 925 (N.D. Ga. 1969), on motion for stay on appeal and injunctive relief sub nom., *Matthews v. Little*, 396 U.S. 1223, 90 S. Ct. 17, 24 L. Ed. 2d 45 (1969), as to the constitutionality of requiring a filing fee as prerequisite to candidacy in municipal elections, see 21 Mercer L. Rev. 369 (1969).

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States can, within limits, specify qualifications of voters in both state and federal elections; the Constitution makes voters' qualifications rest on state law even in federal elections. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

Command that representatives be chosen "by the People of the several States" means that as nearly as is practicable one person's vote in a congressional election is to be worth as much as another's. *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964).

Within the states, legislatures may not draw lines of congressional districts in such a way as to give some voters a greater voice

than others in choosing a congressional representative. *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964).

U.S. Const., art. I, sec. II, cl. 2 provides the sole and exclusive qualifications which must be met by a candidate for election to the United States House of Representatives. *Lowe v. Fowler*, 240 Ga. 213, 240 S.E.2d 70 (1977).

Judicial review of census not a political question. — Judicial review of the accuracy of the federal census does not raise a nonjusticiable political question under U.S. Const., art. I, sec. II, cl. 3, which grants the exclusive power to Congress to determine the manner in which the census is con-

ducted but does not exclude judicial review. *City of Willacoochee v. Baldridge*, 556 F. Supp. 551 (S.D. Ga. 1983).

Cited in *Consolidated Utils. Co. v. Commissioner*, 84 F.2d 548 (5th Cir. 1936); *In re Cent. of Ga. Ry.*, 47 F. Supp. 786 (S.D. Ga.

1942); *King v. Chapman*, 62 F. Supp. 639 (M.D. Ga. 1945); *Pollard v. State*, 128 Ga. App. 470, 197 S.E.2d 158 (1973); *Smith v. State*, 138 Ga. App. 226, 225 S.E.2d 744 (1976); *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981).

OPINIONS OF THE ATTORNEY GENERAL

Section enumerates qualifications for federal office. — The only qualifications a candidate must possess to be eligible to seek the office of United States representative are those enumerated in U.S. Const., art. I, sec. II, cl. 2. 1983 Op. Att'y Gen. No. 83-62.

Other residency requirements unenforce-

able. — Insofar as they require a candidate for the United States House of Representatives to be a registered voter or to be a resident of the district from which election is sought, Ga. Const. 1983, Art. II, Sec. II, Para. III and O.C.G.A. § 21-2-132 are unenforceable. 1983 Op. Att'y Gen. No. 83-62.

RESEARCH REFERENCES

ALR. — Constitutionality of statute permitting payment of taxes in instalments, 101 ALR 1335.

Section 3.

[The Senate, How Constituted, Impeachment Trials]

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Cross references. — Factors disqualifying a person from nomination or election, §§ 21-2-7, 21-2-8.

Editor's notes. — The manner in which senators are "chosen" and vacancies filled, as prescribed by clauses 1 and 2 of this section, respectively, has been modified by U.S. Const., amend. 17. United States Const., amend. 14, sec. III, modifies clause 3 of this section by imposing additional, but

probably anachronistic, disqualifying criteria.

Law reviews. — For article analyzing constitutionally permissible modifications in qualifications established for representatives and senators, see 17 J. of Pub. L. 103 (1968). For article, "Chief Justice Burger and Extra-Case Activism," see 20 J. of Pub. L. 533 (1971).

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Cited in South v. Peters, 89 F. Supp. 672 (N.D. Ga. 1950); Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964); Bond v. Floyd, 251 F. Supp. 333 (N.D. Ga.

1966); Public Citizen, Inc. v. Miller, 813 F. Supp. 821 (N.D. Ga.), aff'd, 992 F.2d 1548 (11th Cir. 1993).

Section 4.

[Elections of Senators and Representatives, Meetings]

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Cross references. — Manner of holding elections, Ga. Const. 1983, Art. II and §§ 21-2-267, 21-2-280, 21-2-380 through 21-2-390, 21-2-400 et seq., and 21-2-540. Times of elections, §§ 21-2-150, 21-2-541. Places of elections, §§ 21-2-265, 21-2-266, 21-2-269.

Editor's notes. — The date on which

Congress shall assemble each year has been modified by U.S. Const., amend. 20, sec. II.

Law reviews. — For article, "Speech and Campaign Reform: Congress, The Courts and Community," see 14 Ga. L. Rev. 195 (1980).

For comment on South v. Peters, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950)

denying federal jurisdiction in case involving apportionment, see 2 Mercer L. Rev. 275 (1950).

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State congressional apportionment laws. — Nothing in the language of U.S. Const., art. I, sec. IV gives support to a construction that would immunize state congressional apportionment laws which debase citizen's right to vote from power of courts to protect constitutional rights of individuals from legislative destruction. *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964).

Regulation of mixed state-federal election. — The United States Constitution's necessary and proper clause, U.S. Const.,

art. I, sec. VIII, cl. 18, along with U.S. Const., art. I, sec. IV, empowers Congress to regulate mixed federal-state elections, even if the federal candidate is unopposed. *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999).

Cited in *Cook v. Fortson*, 68 F. Supp. 624 (N.D. Ga. 1946); *South v. Peters*, 89 F. Supp. 672 (N.D. Ga. 1950); *Bond v. Fortson*, 334 F. Supp. 1192 (N.D. Ga. 1971); *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993).

Section 5.

[Quorum, Journals, Meetings, Adjournments]

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Law reviews. — For article considering the power of the United States House of Representatives to expel a member and the power of the judiciary to review such an expulsion, see 5 Ga. L. Rev. 203 (1971). For article discussing validity of "executive privilege" as defense to congressional demand

for information, see 8 Ga. L. Rev. 809 (1974).

For comment on *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950) denying federal jurisdiction in case involving apportionment, see 2 Mercer L. Rev. 275 (1950).

JUDICIAL DECISIONS

Judicial interference only upon showing of denial of due process. — If judicial interference can be successfully invoked under U.S. Const., art. I, sec. V, cls. 1 and 2, it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law. *Bond v. Floyd*, 251 F. Supp. 333 (N.D. Ga.), rev'd on other grounds, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

Senate power of self-protection. — Under the Constitution, the Senate of the United States necessarily possesses the inherent power of self-protection. *Bond v. Floyd*, 251 F. Supp. 333 (N.D. Ga.), rev'd on other grounds, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

Courts of this state have jurisdiction of a proceeding brought under Art. 13, Ch. 2, T. 21, to obtain a recount of all or a portion of the ballots cast in an election for a representative to either House of Congress. *Blackburn v. Hall*, 115 Ga. App. 235, 154 S.E.2d 392 (1967).

A generalized assertion of privilege yields to a demonstrated, specific need for evidence in a pending criminal trial. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Privilege may not be invoked at expense of defendant's rights. — The legislative branch is not entitled to invoke privilege of confidentiality at the expense of an individ-

ual accused's right to evidence at a criminal trial. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Since the government that prosecutes an accused also has the duty to protect the defendant's constitutional rights, it may not undertake prosecution and then invoke its governmental privileges to deprive the accused of anything that might be material to the defense. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Scope of power to investigate. — Although the power of Congress to investigate for legislative purposes is inherent, it is not unlimited, and is always subject to limitations imposed by the individual guarantees of the Bill of Rights. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

There is no presidential privilege to withhold evidence that is demonstrably relevant in a criminal trial because of the guarantee of due process of law and the necessity to protect basic function of the courts. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

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ALR. — State court jurisdiction over contest involving primary election for member of Congress, 68 ALR2d 1320.

Section 6.

[Compensation, Privileges, Disabilities]

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same;

and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Cross references. — Comparable prohibition against holding multiple offices or accepting office created during elected officer's term, Ga. Const. 1983, Art. III, Sec. II, Para. IV. Comparable privilege from arrest for General Assembly members, Ga. Const. 1983, Art. III, Sec. IV, Para. IX.

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For note discussing parameters of speech and debate clause as a defense in private civil suits and proposing balancing test to limit the privilege, see 10 Ga. L. Rev. 953 (1976).

For comment on Methodist Fed'n for Social Action v. Eastland, 141 F. Supp. 729 (D.C. Cir. 1956) (three judges sitting), holding that the federal district court could not prevent the publication of a congressional handbook even though it falsely and defamatorily stated that plaintiff organization was a communist front, see 19 Ga. B.J. 366 (1957). For comment on Eastland v. United States Servicemen's Fund, 421 U.S. 491, 955 S. Ct. 1813, 44 L. Ed. 324 (1975), refusing to allow a first amendment exception to the privilege of legislative immunity, see 27 Mercer L. Rev. 1195 (1976).

JUDICIAL DECISIONS

Comparable Georgia Constitution provision. — Georgia Const. 1976, Art. III, Sec. V, Para. XII (see Ga. Const. 1983, Art. III, Sec. IV, Para. IX) is similar to U.S. Const., art. I, sec. VI, cl. 1. Village of N. Atlanta v. Cook, 219 Ga. 316, 133 S.E.2d 585 (1963).

Violation of speech or debate clause. — The speech or debate clause prohibited inquiry into a member of Congress's committee assignments even if the member's specific legislative acts were not mentioned since the privilege protects legislative status as well as legislative acts and the government's inquiry into defendant's committee memberships actually amounted to an inquiry into legislative acts where the government was allowed to argue a permissive inference that the defendant knew the details of the money-laundering statutes because of the defendant's status as a member of the Banking and Judiciary Committees. United States v. Swindall, 971 F.2d 1531

(11th Cir. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 683, 126 L. Ed. 2d 650 (1994).

Because the indictment charged that the defendant, a former member of the United States House of Representatives, had discussed money laundering transactions with an undercover agent and an intermediary, and then falsely testified to a grand jury to conceal the extent of the defendant's involvement in these discussions, questioning the defendant before the grand jury about the committee memberships violated the speech or debate clause of the United States Constitution; it was error to allow reference to be made to the defendant's committee memberships both in the grand jury proceeding and at trial; and the remedy for the violations of the privilege was dismissal of the affected counts. United States v. Swindall, 971 F.2d 1531 (11th Cir. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 683, 126 L. Ed. 2d 650 (1994).

RESEARCH REFERENCES

ALR. — Constitutional provision against increase in compensation of public officer during term of office as applicable to statute providing for first time for compensation for office, 144 ALR 685.

Incompatibility of offices or positions in the military and in the civil services, 147 ALR 1419; 148 ALR 1399; 150 ALR 1444.

Section 7.

[Procedure in Passing Bills and Resolutions]

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Cross references. — Effective date of Georgia Acts, § 1-3-4.

Editor's notes. — Unless otherwise provided in the subject legislation itself, a bill takes effect as of the date of its enactment. *Lapeyre v. United States*, 87 U.S. (17 Wall.) 191, 26 L. Ed. 606 (1872).

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the Veto Power in Georgia," see 8 Ga. St. B.J. 513 (1972). For survey of 1987 Eleventh Circuit cases on administrative law, see 39 Mercer L. Rev. 1057 (1988). For article, "The Illegitimacy of the Public Interest Standard at the FCC," see 38 Emory L.J. 714 (1989).

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ALR. — What amounts to an adjournment within constitutional provision that bill shall become a law if not returned by executive within specified time, unless adjournment prevents its return, 64 ALR 1446.

Power of executive to sign bill after adjournment, or during recess of Legislature, 64 ALR 1468.

Validity of veto as affected by failure to

give reasons for vetoing or objections to measure vetoed, 119 ALR 1189.

Application of constitutional requirement that bills for raising revenue originate in lower House, 4 ALR2d 973.

Effect of simultaneous repeal and re-enactment of all, or part, of legislative Act, 77 ALR2d 336.

Section 8.

[Powers of Congress]

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Cross references. — Organization and training of militia, Ga. Const. 1983, Art. III, Sec. VI, Para. II and §§ 38-2-24, 38-2-27, 38-2-132. Weights and measures standards, §§ 10-2-2, 10-2-3. Appointment of militia officers, §§ 38-2-150, 38-2-152, 38-2-210. State cession authority, §§ 50-2-22, 50-2-25. Limited concurrent state and federal jurisdiction over ceded territory, §§ 50-2-23, 50-2-25 through 50-2-27.

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Mayflower Transit Co. v. Board of R.R. Comm'rs, 332 U.S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947), see 10 Ga. B.J. 381 (1948). For comment on *United States v. Sullivan*, 332 U.S. 689, 68 S. Ct. 331, 92 L. Ed. 297 (1948), holding federal regulation of all retail sales is constitutional where product has once moved in interstate commerce, see 10 Ga. B.J. 484 (1948). For comment on *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949), holding playing of baseball games in "organized baseball" constitutes interstate commerce, see 12 Ga. B.J. 100 (1949). For comment discussing constitutionality of state taxation of interstate motor carriers, in light of *Capital Greyhound Lines v. Brice*, 339 U.S. 542, 70 S. Ct. 806, 94 L. Ed. 1053 (1950), see 13 Ga. B.J. 364 (1951). For comment on *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951), holding unconstitutional five-mile limit placed on pasteurization of milk, see 13 Ga. B.J. 480 (1951). For comment discussing state regulation of interstate natural gas pipelines, in light of *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 71 S. Ct. 215, 95 L. Ed. 190 (1950), see 13 Ga. B.J. 488 (1951). For comment on *Beard v. City of Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), upholding constitutionality of "Green River" ordinances, see 14 Ga. B.J. 258 (1951). For comment on immunity of judicial sale held by trustee in bankruptcy from taxation by state, in light of *California State Bd. of Equalization v. Goggin*, 191 F.2d 726 (9th Cir. 1951), cert. denied, 342 U.S. 909, 72 S. Ct. 302, 96 L. Ed. 680 (1952), see 1 J. of Pub. L. 504 (1952). For comment on *Specter Motor Serv. Co. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951), holding Connecticut Corporation Tax Act of 1935 violative of the commerce clause of the United States Constitution, see 14 Ga. B.J. 371 (1952). For comment on *Kitchens v. Steele*, 112 F. Supp. 383 (W.D. Mo. 1953), holding that a statute providing for the confinement of an accused found to be mentally incompetent until such time as the accused shall be mentally competent to stand trial is valid under the constitutional provision relating to "incidental powers," see 16 Ga. B.J. 236 (1953). For comment on *Castle v. Hayes Freight Lines*, 348 U.S. 61, 75 S. Ct. 191, 99 L. Ed. 68 (1954), holding the Federal Motor Carrier Act does not allow the

state to suspend or revoke the right of interstate carriers for violations of state highway regulation, see 17 Ga. B.J. 403 (1955). For comment on *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S. Ct. 1, 100 L. Ed. 8 (1955), holding necessary and proper clause does not permit subjection of ex-servicemen to trial by court-martial, see 7 Mercer L. Rev. 385 (1956). For comment discussing revocation of citizenship for concealment of a material fact, see 18 Ga. B.J. 506 (1956). For comment concerning state taxation of federal property, in light of *Offutt Hous. Co. v. County of Sarpy*, 351 U.S. 253, 76 S. Ct. 814, 100 L. Ed. 1151 (1956), see 19 Ga. B.J. 247 (1956). For comment on *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), and *Kinsella v. Krueger*, 351 U.S. 470, 76 S. Ct. 886, 100 L. Ed. 1342 (1956), as to military authority overseas over dependents of servicemen, see 6 J. of Pub. L. 540 (1957). For comment on *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957), upholding the enjoining under a New York statute of distribution of certain obscene books, see 6 J. of Pub. L. 548 (1957). For comment on *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956), see 19 Ga. B.J. 550 (1957). For comment on *West Point Whsle. Grocery Co. v. City of Opelika*, 38 Ala. App. 444, 87 So. 2d 661 (1956), see 20 Ga. B.J. 403 (1958). For comment on *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959), applying discrimination test for state taxation affecting interstate commerce, see 10 Mercer L. Rev. 327 (1959). For comment on *Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959), upholding constitutionality of state net income tax levied on revenues of foreign corporation derived from interstate commerce where tax is "fairly apportioned," see 22 Ga. B.J. 107 (1959). For comment discussing constitutionality of legislation requiring employees to pay dues to railway union in order to maintain employment, in light of *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961), see 24 Ga. B.J. 432 (1962). For comment discussing taxpayer standing to challenge federal spending, in light of *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947

(1968), see 17 J. of Pub. L. 419 (1968). For comment on *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967), as to constitutionality of imposing state use taxes on out of state mail order form, see 19 Mercer L. Rev. 257 (1968). For comment on *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 291 (1969), as to limits of court-martial's jurisdiction to try serviceman, see 18 J. of Pub. L. 471 (1969). For comment discussing limits on the military's jurisdiction and the constitutional rights of servicemen in light of *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), see 21 Mercer L. Rev. 311 (1969). For comment on *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970), as to implied power of the executive to sue, see 20 J. of Pub. L. 337 (1971). For comment on *Anderson v. Laird*, 316 F. Supp. 1081 (D.C. Cir. 1970), as to religious regulations at military academies, see 5 Ga. L. Rev. 400 (1971). For comment on *Reeves, Inc. v. Kelley*, 586 F.2d 1230 (8th Cir. 1978), vacated and remanded, 444 U.S. 1031, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979), as to whether a state acting in a proprietary capacity as an interstate seller is restricted by the commerce clause, see 13 Ga. L. Rev. 1086 (1979). For comment on the commerce clause and economic self-protection, see 14 Ga. L. Rev. 101 (1979). For comment on *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980), regarding the constitutionality of the ten percent set aside for minority contractors, etc., see 29 Emory L.J. 1127 (1980). For comment, "A Rose by Any Other Name: Computer Programs and the Idea-Expression Distinction," see 34 Emory L.J. 741 (1985). For comment, "Commerce and Outer Space: A Legal Survey," see 37 Mercer L. Rev. 1551 (1986). For comment,

"A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict," see 35 Emory L.J. 163 (1986). For comment, "Private Citizens in Foreign Affairs: A Constitutional Analysis," see 36 Emory L.J. 285 (1987). For comment, "The Colorization Dispute: Moral Rights Theory as a Means of Judicial and Legislative Reform," see 38 Emory L.J. 237 (1989). For comment, "Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture," see 39 Emory L.J. 1261 (1990). For comment, "Copyright Protection for Computer Languages: Creative Incentive or Technological Threat?" see 39 Emory L.J. 1293 (1990). For comment, "Can Anyone Own a Piece of the Clock?: The Troublesome Application of Copyright Law to Works of Historical Fiction, Interpretation, and Theory," see 42 Emory L.J. 253 (1993). For comment on general copying for classroom use as fair use under the copyright law, see 46 Emory L.J. 1363 (1997). For comment, "Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act," see 47 Emory L.J. 819 (1998). For comment, "The Government's Right to Read: Maintaining State Access to Digital Data in the Age of Impenetrable Encryption," see 49 Emory L.J. 711 (2000). For comment, "Hegel's Secret: Personality and the Housemark Cases," see 52 Emory L.J. 515 (2003). For comment, "Verizon Maryland, Inc. v. Public Service Commission of Maryland: Reaffirming *Ex parte Young* and the Necessity of Finding Regulatory Hand-Back Schemes to a Gift or Gratuity," see 52 Emory L.J. 1519 (2003). For comment on the effect of *Devlin v. Scardelletti* and amendments to Federal Rule of Civil Procedure 23(e) on class action "minimal diversity" concerns, see 52 Emory L.J. 1877 (2003).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SPENDING

TAXATION

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1. INTERSTATE AND FOREIGN COMMERCE TRANSACTIONS
2. POWER OF CONGRESS TO REGULATE
3. POWER OF STATE TO REGULATE
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COINING OF MONEY AND REGULATION OF LEGAL TENDER
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 WAR-MAKING POWERS
 REGULATION OF ARMED FORCES
 EXCLUSIVE JURISDICTION

General Consideration

This section grants powers but it does not authorize Congress to delegate those powers. — Congress has power to enact a law to become effective when certain conditions come into existence and may delegate to an administrative officer the authority to determine, in accordance with the standard laid down by Congress, when the conditions have come into existence. Or, Congress may declare a policy and fix a definite standard by which the administrator is to be controlled and authorize him to make subordinate rules for the administration of the Act. Congress cannot, however, permit the administrator to determine what the law shall be. *Payne v. Griffin*, 51 F. Supp. 588 (M.D. Ga. 1943).

Extent of congressional authority. — The Constitution grants Congress the authority to make all laws necessary to effectuate its authority. However, this authority is not unchecked. Congress may pass only those laws which are consistent with the limits contained within the Constitution. *United States v. Hill*, 750 F. Supp. 524 (N.D. Ga. 1990).

Power to establish criminal defenses. — Congress clearly has the authority to establish and prescribe by law those defenses that are available to the defendants accused of federal criminal conduct. *United States v. Hill*, 750 F. Supp. 524 (N.D. Ga. 1990).

Regulation of mixed state-federal election. — The necessary and proper clause of this section, along with U.S. Const., art. I, sec. IV, empowers Congress to regulate mixed federal-state elections, even if the federal candidate is unopposed. *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999).

Cited in *City of Waycross v. Bell*, 169 Ga. 57, 149 S.E. 641 (1929); *In re Moore*, 42 F.2d 475 (N.D. Ga. 1930); *Citizens' & S. Nat'l Bank v. City of Atlanta*, 46 F.2d 88 (N.D. Ga. 1931); *Richardson v. Johnson Furn. Co.*, 176 Ga. 28, 166 S.E. 662 (1932); *In re Glover Casket Co.*, 1 F. Supp. 743 (N.D. Ga. 1932);

Richmire v. Legg, 3 F. Supp. 787 (N.D. Ga. 1933); *Atlantic Coast Line R.R. v. Nash Loan Co.*, 179 Ga. 52, 175 S.E. 247 (1934); *Rollins v. Legg*, 179 Ga. 85, 175 S.E. 382 (1934); *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935); *Green v. Page*, 9 F. Supp. 844 (S.D. Ga. 1935); *Dean v. Georgia Pub. Serv. Comm'n*, 193 Ga. 401, 18 S.E.2d 756 (1942); *Derrick v. City Council*, 138 F.2d 507 (5th Cir. 1943); *Perkins v. Brown*, 53 F. Supp. 176 (S.D. Ga. 1943); *Sykes v. Sanford*, 150 F.2d 205 (5th Cir. 1945); *United States ex rel. Goodman v. Hearn*, 153 F.2d 186 (5th Cir. 1946); *Benton v. Callaway*, 165 F.2d 877 (5th Cir. 1948); *Brown v. Sanford*, 79 F. Supp. 146 (N.D. Ga. 1948); *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E.2d 610 (1949); *Zuber v. Pennsylvania R.R.*, 82 F. Supp. 670 (N.D. Ga. 1949); *Capitol Distrib. Co. v. Redwine*, 206 Ga. 477, 57 S.E.2d 578 (1950); *Williams v. Cedartown Textiles, Inc.*, 208 Ga. 659, 68 S.E.2d 705 (1952); *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 75 S.E.2d 161 (1953); *United States v. Denmark*, 119 F. Supp. 647 (S.D. Ga. 1953); *Bisson v. Howard*, 224 F.2d 586 (5th Cir. 1955); *Looper v. Georgia, S. & Fla. Ry.*, 213 Ga. 279, 99 S.E.2d 101 (1957); *Smith v. UMW*, 180 F. Supp. 796 (M.D. Ga. 1958); *Stockham Valves & Fittings, Inc. v. Williams*, 214 Ga. 803, 108 S.E.2d 314 (1959); *Central of Ga. Ry. v. Brower*, 102 Ga. App. 462, 116 S.E.2d 679 (1960); *Coke v. City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960); *Heart of Atlanta Motel, Inc. v. United States*, 231 F. Supp. 393 (N.D. Ga. 1964); *U.S. Steel Corp. v. Undercofler*, 220 Ga. 553, 140 S.E.2d 269 (1965); *Independent Publishing Co. v. Hawes*, 224 Ga. 728, 164 S.E.2d 559 (1968); *Gilstrap v. United States*, 389 F.2d 6 (5th Cir. 1968); *Cross v. State*, 122 Ga. App. 208, 176 S.E.2d 517 (1970); *DeKalb County v. Empire Distributions, Inc.*, 229 Ga. 497, 192 S.E.2d 346 (1972); *United States v. Crow, Pope & Land Enters., Inc.*, 340 F. Supp. 25 (N.D. Ga. 1972); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975); *Michelin Tire Corp. v. Wages*, 423

General Consideration (Cont'd)

U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976); *DeKalb Cablevision Corp. v. Press Ass'n*, 141 Ga. App. 1, 232 S.E.2d 353 (1977); *Fred Whitaker Co. v. E.T. Barwick Indus., Inc.*, 551 F.2d 622 (5th Cir. 1977); *General Fin. Corp. v. Garner*, 556 F.2d 772 (5th Cir. 1977); *United States v. Southern Motor Carriers Rate Conference*, 439 F. Supp. 29 (N.D. Ga. 1977); *City of Macon v. Marshall*, 439 F. Supp. 1209 (M.D. Ga. 1977); *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 240 Ga. 743, 242 S.E.2d 69 (1978); *High Ol' Times, Inc. v. Busbee*, 449 F. Supp. 364 (N.D. Ga. 1978); *Keenan Co. v. Pamlico, Inc.*, 245 Ga. 842, 268 S.E.2d 334 (1980); *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980); *Joyner v. Golden Dome Inv. Co.*, 7 Bankr. 596 (M.D. Ga. 1980); *United States v. Yeatts*, 639 F.2d 1186 (5th Cir. 1981); *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981); *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982); *Bleakley v. Jekyll Island-State Park Auth.*, 536 F. Supp. 236 (S.D. Ga. 1982); *McCroan v. Bailey*, 543 F. Supp. 1201 (S.D. Ga. 1982); *Chemical Bank v. Grigsby's World of Carpet, Inc. (In re WWG Indus., Inc.)*, 44 Bankr. 287 (N.D. Ga. 1984); *Geowaste of Ga., Inc. v. Tanner*, 875 F. Supp. 830 (M.D. Ga. 1995).

Spending

Monetary awards for intentional torts. — Spending clause statutes may authorize monetary awards for intentional violations. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992).

Power of Congress to provide for payment of obligations in legal tender. — Sections 462 and 463 of 31 U.S.C., providing for discharge, by payment in legal tender, of obligations for payment in gold or any particular coin or currency, or in money of the United States measured thereby, of the then standard weight and fineness, are not unconstitutional as in violation of this section, as the exercise of a power not delegated to Congress, nor in violation of the due process clause of U.S. Const., amend. 5 or amend. 10. *Smith v. Bukofzer*, 180 Ga. 585, 180 S.E. 358 (1935).

Congress authorized to impose conditions upon receipt of federal funds. — Congress has the authority under the spending clause to impose conditions that attach by the terms of the statute involved upon the receipt of federal funds offered under a federal act. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983), vacated on other grounds, 468 U.S. 1213, 104 S. Ct. 3582, 82 L. Ed. 2d 880 (1984).

Taxation

Business conducted by state for gain. — The immunity implied from dual sovereignty recognized by Constitution does not extend to business enterprises conducted by states for gain. *Allen v. Regents of Univ. Sys.*, 304 U.S. 439, 58 S. Ct. 980, 82 L. Ed. 1448 (1938), overruled on other grounds, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

Power of judiciary to impinge upon rules of taxation established by Congress. — Congress bears the responsibility for establishing rules of taxation, and as long as Congress has acted within its constitutional powers, the judiciary cannot use its broad powers to frustrate specific statutory language. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), aff'd, 518 F.2d 1405 (5th Cir. 1975).

Congress does not have an unlimited right to tax the citizenry. — A federal statute passed under the taxing power may be so arbitrary and capricious as to violate due process clause of U.S. Const., amend. 5. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), aff'd, 518 F.2d 1405 (5th Cir. 1975).

Unconstitutionality of tax measure derives neither from unequal imposition nor from unequal incidence, but rather from that special instance where the law is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), aff'd, 518 F.2d 1405 (5th Cir. 1975).

Within constitutional limitations, there is no equity in tax law. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), aff'd, 518 F.2d 1405 (5th Cir. 1975).

Commerce

1. Interstate and Foreign Commerce Transactions

“Interstate commerce” defined. — Interstate commerce consists of intercourse and traffic between citizens or inhabitants of different states, and includes the purchase, sale, and exchange of commodities. *American Mills Co. v. Doyal*, 46 Ga. App. 236, 167 S.E. 312 (1933).

Determination of whether cause affects interstate commerce. — Where interstate commerce is affected, it is not a question of whether the affecting cause is a transaction in interstate or intrastate commerce, or an intrastate process, or intrastate understanding or combination, but rather a question of whether the cause really and substantially affects interstate commerce. *Richmond Hosiery Mills v. Camp*, 7 F. Supp. 139 (N.D. Ga. 1934), *aff’d*, 74 F.2d 200 (5th Cir. 1934).

Plaintiff made a *prima facie* showing that if manufacturer had minimum contacts with Georgia sufficient to support personal jurisdiction on a stream of commerce theory. *Maxwell Chase Techs., L.L.C. v. KMB Produce, Inc.*, 79 F. Supp. 2d 1364 (N.D. Ga. 1999).

Determination of whether transaction constitutes interstate commerce. — In determining what does and does not constitute commerce, the circumstances, continuance, and extent of the transaction in question may be considered, and no court has ever attempted to lay down a definite and unvarying formula by which the problem may be solved. Commerce is not a technical, legal conception, but rather a practical one, drawn from the course of business. The exigencies of trade determine what is essential to the business or process of interstate commerce in that trade. Interstate commerce is increased and enlarged with each additional degree and development of transportation and communication. *Fleming v. Alterman*, 38 F. Supp. 94 (N.D. Ga. 1941).

Passage of a person from one state to another is interstate commerce within meaning of Constitution, and enactment by Congress of statute making it a federal offense to do so for purpose of escaping prosecution for a crime, is within the power of Congress. *Simmons v. Zerbst*, 18 F. Supp. 929 (N.D. Ga. 1937).

Federal commerce power encompasses the movement in interstate commerce of persons as well as commodities. *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).

State cannot authorize violation of commerce clause. — A state cannot authorize activity which violates the commerce clause; thus, if the Georgia statute enabling authorities to enter into agreements for exclusive rights with respect to solid waste disposal is interpreted to exclude competition from the solid waste disposal market, then it would conflict with the commerce clause, and, accordingly, conduct of authorities pursuant to the statute would not be entitled to state action immunity. *Pine Ridge Recycling, Inc. v. Butts County*, 855 F. Supp. 1264 (M.D. Ga. 1994).

If the contract is for sale of article and for its delivery to buyer in another state, transaction is one of interstate commerce. *American Mills Co. v. Doyal*, 46 Ga. App. 236, 167 S.E. 312 (1933).

Manufacturing alone, within a single state, is not commerce and the fact that the things manufactured are to be shipped or used in interstate commerce does not make their production a part thereof. *Richmond Hosiery Mills v. Camp*, 7 F. Supp. 139 (N.D. Ga. 1934), *aff’d*, 74 F.2d 200 (5th Cir. 1934).

One who ships interstate is unquestionably engaged in commerce, and one whose business is to all practical purposes exclusively the receipt and distribution of such shipments by wholesale and in such manner as to produce a constant and continuous recurrence thereof is as much a part thereof by the day-in and day-out receipt and distribution of such goods as one who ships them. Each activity is a part of the whole of commerce among the several states, and the whole includes the parts. *Fleming v. Alterman*, 38 F. Supp. 94 (N.D. Ga. 1941).

Question of whether there is subsequent interstate shipment furnishes one test of interstate commerce, but does not supply a definite and unvarying standard which may be applied to all transactions to measure and define their interstate or intrastate character. Of necessity, each transaction and business must be determined in the light of all surrounding circumstances. *Fleming v. Alterman*, 38 F. Supp. 94 (N.D. Ga. 1941).

If transportation has acquired an interstate character it continues at least until the

Commerce (Cont'd)**1. Interstate and Foreign Commerce Transactions (Cont'd)**

load reaches the point where the parties originally intended that the movement should finally end. *Fleming v. Alterman*, 38 F. Supp. 94 (N.D. Ga. 1941).

Commerce in tobacco is overwhelmingly interstate and foreign. *Mulford v. Smith*, 24 F. Supp. 919 (M.D. Ga. 1938), aff'd, 307 U.S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939).

Nationwide business of local sales contracts. — A nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944) (decided under prior law).

Radio broadcasting or communications are all interstate; this is so although such broadcasting may be intended for intrastate transmissions only. Radio broadcasting is an instrumentality of interstate commerce and subject to regulation under the commerce clause of the Constitution. *Regents of Univ. Sys. v. Carroll*, 78 Ga. App. 292, 50 S.E.2d 808 (1948), aff'd, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363 (1950).

Private transactions of public utility not subject to regulation as interstate commerce. — Although radio broadcasting is truly an interstate proposition, and an operator of radio broadcasting station is an operator of public utility and thus subject to regulation as any other public utility engaged in interstate transactions would be under the authority given Congress by the commerce clause of the Constitution, its private transactions, not affected with a public interest and not connected with its operation as an interstate public utility, are not subject to regulation and control by Federal Communications Commission under the Federal Communications Act of 1934, as amended (47 U.S.C. § 151 et seq.), or any other governmental agency empowered to regulate interstate transactions of a public utility; matters of private concern and contracts affecting private rights, which do not have as their subject matter the rights conferred by a license or do not substantially affect such rights, are not within the scope of the commission's power to regulate and control, in

the public interest, broadcasting by radio stations and licenses to such stations. *Regents of Univ. Sys. v. Carroll*, 78 Ga. App. 292, 50 S.E.2d 808 (1948), aff'd, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363 (1950).

Under facts, restaurant engaged in interstate commerce. — Because witnesses testified that upon presenting themselves for service no inquiry was made as to their place of residence, and because the restaurant had several large signs on two important business route portions of federal highways, and because the restaurant itself was situated on a main business route, a federal interstate highway, and because it was clear beyond any question that a very substantial part of the dollar value of the food and other products served or sold by the restaurant originated outside of the state and thus had moved in commerce, the restaurant was engaged in interstate commerce. *Willis v. Pickrick Restaurant*, 231 F. Supp. 396 (N.D. Ga. 1964), appeal dismissed sub nom. *Maddox v. Willis*, 382 U.S. 18, 86 S. Ct. 72, 15 L. Ed. 2d 13 (1965).

Noncommercial, illegal, or sporadic transactions. — Not only may transactions be commerce though noncommercial, but they may also be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944) (decided under prior law).

Acquisition of firearms by felons, etc., subject to regulation as interstate commerce. — The acquisition of firearms by convicted felons and persons under indictment for felonies, although arguably intrastate activity, imposes a sufficient burden upon interstate commerce to be a proper subject for federal regulation. *United States v. Nelson*, 458 F.2d 556 (5th Cir. 1972).

Federal statute prohibiting firearm possession by domestic violence offenders. — Federal statute prohibiting anyone convicted of a domestic violence misdemeanor from possessing or receiving a firearm did not violate the commerce clause. *National Ass'n of Gov't Employees v. Barrett*, 968 F. Supp. 1564 (N.D. Ga. 1997), aff'd sub nom. *Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998).

Organizations affecting commerce may not escape coverage of social legislation by showing that they were created for fraternal or religious purposes. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

2. Power of Congress to Regulate

Scope of power. — Power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the Constitution. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941); *Drake v. Hirsch*, 40 F. Supp. 290 (N.D. Ga. 1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964).

Power to regulate commerce is the power to prescribe the rule by which commerce is to be governed. It extends not only to those regulations which aid, foster, and protect the commerce, but embraces those which prohibit it. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

Power of Congress over interstate commerce is not confined to regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the power granted to Congress to regulate interstate commerce. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); *Willis v. Pickrick Restaurant*, 231 F. Supp. 396 (N.D. Ga. 1964), appeal dismissed sub nom. *Maddox v. Willis*, 382 U.S. 18, 86 S. Ct. 72, 15 L. Ed. 2d 13 (1965).

Commerce clause gives exclusive power to Congress to regulate interstate commerce, and its failure to act on the subject in area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the states. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959) (decided under prior law).

Supremacy of federal power. — Regulations of commerce by Congress, including

those of persons carrying it on and the instrumentalities used in it, although they may fall within field of ordinary police power, such as laws regulating employers' liability, hours of service of employees, safety appliances on equipment, and the like, will override police regulations of state when in conflict with them, because of the supremacy of the federal Constitution and laws, although in the absence of congressional legislation such state regulation would stand. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

Where Congress assumes regulation and control of interstate commerce its power is supreme and any state regulations to the contrary are of no effect. *Tucker v. Casualty Reciprocal Exch.*, 40 F. Supp. 383 (N.D. Ga. 1941).

If interstate and intrastate commerce are served by same instrumentalities of common carrier, and it appears that a state regulation applied directly to intrastate business may in fact burden interstate commerce, such state regulation must yield to the federal power to assure adequate interstate service. *Western Union Tel. Co. v. State*, 207 Ga. 675, 63 S.E.2d 878 (1951).

Commerce clause is restricted by its terms to the control of interstate commerce. *Montgomery & Atlanta Freight Lines v. Georgia Pub. Serv. Comm'n*, 175 Ga. 826, 166 S.E. 200 (1932).

Whatever affects interstate commerce in a substantial and direct way may be regulated by Congress, regardless of whether the affecting cause is a transaction in intrastate process or agreement. *Richmond Hosiery Mills v. Camp*, 7 F. Supp. 139 (N.D. Ga. 1934), aff'd, 74 F.2d 200 (5th Cir. 1934).

Congress has power to regulate transactions in and affecting interstate commerce by removing discriminations against and burdens upon it and by measures to foster and promote its growth and insure its safety. *Richmond Hosiery Mills v. Camp*, 7 F. Supp. 139 (N.D. Ga. 1934), aff'd, 74 F.2d 200 (5th Cir. 1934).

Exercise of congressional power to regulate. — Commerce means something more than traffic; it is intercourse, and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse. *Simmons v. Zerbst*, 18 F. Supp. 929 (N.D. Ga. 1937).

Commerce (Cont'd)**2. Power of Congress to Regulate (Cont'd)****Elements of Congress' regulatory power.**

— Any rule which is intended to foster, protect, and conserve commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits, the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and, a fortiori, to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation. *Mulford v. Smith*, 307 U.S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939).

If regulation of interstate commerce of any kind is needed, Congress, not the states, must furnish it; and it may be of any kind not prohibited by other constitutional provisions. *Mulford v. Smith*, 24 F. Supp. 919 (M.D. Ga. 1938), *aff'd*, 307 U.S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939).

Federal power over intrastate railroad tracks and agencies. Congress's preemption of state regulatory authority over intrastate railroad tracks and agencies is a valid exercise of its authority to regulate under the commerce clause. *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573 (N.D. Ga. 1996).

Intrastate rates may be controlled by Congress when so involved with interstate commerce as to make it necessary. *Mulford v. Smith*, 24 F. Supp. 919 (M.D. Ga. 1938), *aff'd*, 307 U.S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939).

Within its sphere, the power of Congress to regulate interstate commerce is in its nature a police power, to be exerted for the public good and in any way, not prohibited, which Congress deems calculated to achieve the desired regulatory effect. This may involve affecting or controlling what would usually pertain to the state police power. *Mulford v. Smith*, 24 F. Supp. 919 (M.D. Ga. 1938), *aff'd*, 307 U.S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939).

Power to regulate certain local activities.

— While agriculture, mining, manufacturing, and the like, are in themselves local activities, the regulation of which generally

belongs to the states and not to Congress, and sales made within the state are not intended at the time to result in removing the goods from the state, it may not be maintained that such intrinsically local matters do not under some circumstances become so interwoven with interstate and foreign commerce as to render it necessary and proper for Congress to affect to control them in order to regulate the interstate and foreign commerce which springs from them. The power of Congress to regulate such commerce is paramount and very broad. *Mulford v. Smith*, 24 F. Supp. 919 (M.D. Ga. 1938), *aff'd*, 307 U.S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939).

Motive and purpose of regulation of interstate commerce are matters for legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

Congress can regulate traffic though it consists of intangibles. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944) (decided under prior law).

Incidental regulation of intrastate commerce. — The execution by Congress of its power to regulate interstate commerce is not limited by fact that intrastate transactions may have become so interwoven therewith that effective control of interstate commerce by Congress incidentally controls intrastate commerce. *Western Union Tel. Co. v. State*, 207 Ga. 675, 63 S.E.2d 878 (1951).

No sort of trade can be carried on to which this power does not extend. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964).

Authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964).

Determinative test of the exercise of power by Congress under the commerce clause is simply whether the activity sought to be regulated is commerce which concerns more states than one and has a real and substantial relation to the national interest. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964).

Tenth amendment does not operate upon a valid exercise of power delegated to Congress by the commerce clause. *United States v. Collier*, 478 F.2d 268 (5th Cir. 1973).

Direct regulation of interstate carriage, including regulation of the persons carrying and their vehicles, is vested in federal government. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

Federal power over interstate waterways. — The power of the United States over its waters capable of use as interstate highways stems from the authority to regulate commerce among the several states delegated to Congress under U.S. Const., art. I, sec. VIII, cl. 3. Such power extends to the entire bed of the stream and includes lands below the ordinary high-water mark. Federal jurisdiction over such waters embraces the whole surface of bodies of water subject to tidal action no matter how shallow or obstructed. A common sense view permits no distinction upon the ground of navigability between the shallows and depths of navigable waters. *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973).

Elimination of racial discrimination. — Congressional power to legislate in furtherance of the elimination of racial discrimination is derived from the thirteenth amendment, the power over interstate commerce, the power under the fourteenth amendment, and the power under the fifteenth amendment. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Prohibition of injurious articles. — Congress, following its own conception of public policy concerning restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals, or welfare, even though the states have not sought to regulate their use. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

Application of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., to a county is not an unconstitutional exercise of power under the commerce clause. *Prickett v. DeKalb County*, 92 F. Supp. 2d 1357 (N.D. Ga. 2000).

Congress lacks transcendent legislative authority with regard to labor relations; its

authority to prescribe labor-management ordinances derives from its power over interstate commerce. *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980).

Requiring disclosure of credit information within congressional power. — A statutory scheme requiring disclosure by creditors of credit information expressed in a uniform manner, as well as disclosure of the actual annual interest rate to the debtor, is within the power granted to Congress under the commerce clause. *Thomas v. Myers-Dickson Furn. Co.*, 479 F.2d 740 (5th Cir. 1973).

Commerce power is subject to the due process clause of the fifth amendment. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976).

There is no requirement of national uniformity when Congress exercises its power under the commerce clause. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976).

Regulations not infringing constitutional prohibition. — Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the commerce clause. *Alewine v. City Council*, 505 F. Supp. 880 (S.D. Ga. 1981), aff'd in part and rev'd in part on other grounds, 699 F.2d 1060 (11th Cir. 1983), cert. denied, 470 U.S. 1027, 105 S. Ct. 1391, 84 L. Ed. 2d 781 (1985).

Federal arson statute authorized. — Federal arson statute (18 U.S.C. § 844(i)) was within the regulatory authority of Congress. *United States v. Chowdhury*, 118 F.3d 742 (11th Cir. 1997).

Purely intrastate disputes do not fall within the commerce clause and therefore are not subject to the federal Lanham Act's regulation of service marks. *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833 (11th Cir. 1983).

Court's jurisdiction invoked by fact business uses service mark in interstate commerce. — The fact that a business uses its service mark in interstate commerce is sufficient to invoke the federal court's jurisdiction. There is no requirement that the business of an infringer be shown to be interstate as well. *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833 (11th Cir. 1983).

Commerce (Cont'd)**3. Power of State to Regulate**

State law that frustrates or conflicts with lawful objective of federal statute must yield to the federal authority. *United States v. Composite State Bd. of Medical Exmrs.*, 656 F.2d 131 (5th Cir. 1981).

Mere privilege of engaging in interstate commerce is not derived from the state and cannot be conditioned by a state upon procuring a license or paying a tax. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

General police power and general taxing power are reserved to the state government, and these may usually be exercised without excepting persons and instrumentalities engaged in interstate commerce, provided there is no discrimination against interstate commerce, and provided no direct and unreasonable burden is put upon it. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

State may license or refuse to license, may condition or charge for, the use of its improved roads, when they are turned from their common uses and purposes to the carrier's business, since an interstate carrier has no better right than any other to use the state's improved highways without its consent, or without paying for it. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

Certificate of public convenience and necessity, with a reasonable fee therefor, and an annual license fee for trucks, are legally demandable by state as a nondiscriminatory prerequisite for use of highways for carrier purposes, even though the commerce involved is wholly interstate. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

State statute imposing duty of ordinary care not unreasonable burden. — In absence of action by Congress authorizing particular acts, complained of as negligence, or in prescribing degree of care and diligence to be exercised by railroad company in operating interstate trains at public crossings, it cannot be said that general duty to exercise ordinary care, imposed by law of state upon its citizens generally, constitutes an unreasonable burden upon interstate commerce because persons engaged in interstate com-

merce incidentally come within purview of such general laws. *Seaboard Air Line Ry. v. Benton*, 43 Ga. App. 495, 159 S.E. 717 (1931), rev'd on other grounds, 175 Ga. 491, 165 S.E. 593 (1932); *Powell v. Smith*, 70 Ga. App. 754, 29 S.E.2d 521 (1944).

State has full power and authority to regulate and control business within its jurisdiction, unless such regulations and control conflict with terms of its own or the federal Constitution. *Montgomery & Atlanta Freight Lines v. Georgia Pub. Serv. Comm'n*, 175 Ga. 826, 166 S.E. 200 (1932).

Elements of regulation of intrastate and interstate motor carriers. — Use of public highways by private intrastate and interstate motor carriers of goods may be conditioned by the state upon the carrier's obtaining a license, complying with reasonable regulations, paying a reasonable license fee and tax for expenses of highway administration, and maintenance and reconstruction of the highways covered by the license, and upon the filing of an insurance policy as security against injuries from carrier's negligent operations to persons and property other than passengers and property he carries. In the exercise of its right to demand compensation for special highway facilities it has provided, and of its power to regulate use of its highways in the interest of public safety, a state may properly treat motor vehicles as a special class, because of the special damage to the highways and special dangers to the public attending their operation. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 179 Ga. 431, 176 S.E. 487 (1934), aff'd, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935).

Law regulating insurance. — Provision of O.C.G.A. § 33-34-3 that motor vehicle insurance policies issued by insurers authorized to transact business in the state are deemed to provide the minimum coverage required by Georgia law when the insured is involved in an accident in Georgia is shielded from attack under the commerce clause by the McCarran-Ferguson Act. *Bankers Ins. Co. v. Taylor*, 267 Ga. 134, 475 S.E.2d 619 (1996).

Mere existence of power does not deprive states of authority. — The mere existence of congressional power, no conflict with its exercise being shown, does not deprive the states of their authority to safeguard their local interests by legislation which does not

directly burden transactions in interstate or foreign commerce. *Townsend v. Yeomans*, 301 U.S. 441, 57 S. Ct. 842, 81 L. Ed. 1210 (1937).

Absent congressional legislation on subject, state laws which are not regulations of commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

Appropriate local regulations adopted primarily to promote safety upon streets of municipality are not obnoxious to commerce clause where the indirect burden upon interstate commerce is not unreasonable. *Lowe v. City Council*, 45 F. Supp. 143 (S.D. Ga. 1942).

Limitations on local power to regulate. — Local or internal commerce, not affecting other states and with which it is not necessary to interfere for purpose of executing some of the general powers of the government, may be controlled by local authorities; but if a city government may control the commerce that flows through it from outside state by such exactions as make the movement no longer profitable or possible, other states are affected and the general powers of the national government are circumscribed beyond the limits the Constitution allows. *Lowe v. City Council*, 45 F. Supp. 143 (S.D. Ga. 1942).

Validity of municipal ordinance regarding taxicab owners operating interstate and intrastate. — Provisions of municipal ordinance requiring operators of taxicabs to maintain office, telephone, and attendant on duty at all times within city is void as to taxicab owners residing outside state who are engaged in interstate business, because it conflicts with the commerce clause; but provisions of municipal ordinance dealing with prevention of cruising upon streets, proscribing use of one street, where traffic congests, for more than one block at a time, limiting number of passengers in one automobile, and requiring operator to drive with care and prudence in compliance with police regulations, are not directed at and do not discriminate against those engaged in interstate commerce. Local taxicabs and like vehicles operating intrastate are bound by them. *Lowe v. City Council*, 45 F. Supp. 143 (S.D. Ga. 1942).

A city ordinance that puts an undue burden on commerce is offensive to U.S.

Const., art. I, sec. VIII, cl. 3. — Not all burdens upon commerce, but only undue or discriminatory ones, are forbidden. *Graves v. City of Gainesville*, 78 Ga. App. 186, 51 S.E.2d 58 (1948).

Barrier to trade with other states. — A state consistently with the commerce clause cannot put a barrier around its borders to bar trade from other states and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power to regulate commerce with foreign nations and among the several states. *Graves v. City of Gainesville*, 78 Ga. App. 186, 51 S.E.2d 58 (1948).

The twenty-first amendment removes spirituous liquors and alcohol from protection of commerce clause to the extent necessary to allow the states to adopt and enforce appropriate laws and regulations dealing with the subject, and thus to burden interstate commerce to this extent. Even in the absence of any protection under U.S. Const., amend. 21, the sovereign states in the exercise of their reserved police power may, without offending the commerce clause, adopt and enforce necessary laws and regulations to effectuate their own protection against illegal traffic and trade in such liquors. *Atkins v. Manning*, 206 Ga. 219, 56 S.E.2d 260 (1949); *Redwine v. Schenley Indus., Inc.*, 210 Ga. 769, 83 S.E.2d 16 (1954).

Supremacy of federal power over state regulations burdening interstate commerce. — If interstate and intrastate commerce are served by same instrumentalities of common carrier, and it appears that a state regulation applied directly to intrastate business may in fact burden interstate commerce, such state regulation must yield to the federal power to assure adequate interstate service. *Western Union Tel. Co. v. State*, 207 Ga. 675, 63 S.E.2d 878 (1951).

State may exercise power of eminent domain although interstate commerce may be indirectly or incidentally involved. *Elberton S. Ry. v. State Hwy. Dep't*, 211 Ga. 838, 89 S.E.2d 645 (1955).

State's inherent right to regulate internal commerce. — Although Congress has the exclusive power to regulate interstate commerce, and while the courts have held that a state cannot impose undue burdens on interstate commerce, a state has an inherent

Commerce (Cont'd)**3. Power of State to Regulate (Cont'd)**

and reserved right to regulate its local, domestic, and internal commerce, even though by so doing it may indirectly or incidentally affect interstate commerce. *Elbertson S. Ry. v. State Hwy. Dep't*, 211 Ga. 838, 89 S.E.2d 645 (1955); *Southern Ry. v. State Hwy. Dep't*, 219 Ga. 435, 134 S.E.2d 12 (1963).

Commerce clause gives exclusive power to Congress to regulate interstate commerce, and its failure to act on the subject in area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the states. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959) (decided under prior law).

Federal law excludes local regulation, even though the latter does no more than supplement the former. Complementary state regulations are as invalid as state regulations which conflict with the federal scheme. *Campbell v. Hussey*, 368 U.S. 297, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961).

Limitation on state's power of eminent domain where interstate commerce affected. — A state may exercise its power of eminent domain in acquiring necessary rights of way for state-aid roads although interstate commerce may be indirectly or incidentally involved, but a state cannot by an arbitrary, capricious, and unnecessary exercise of its power of eminent domain take and destroy property which a railway company is using for the purpose of carrying on interstate commerce. *Southern Ry. v. State Hwy. Dep't*, 219 Ga. 435, 134 S.E.2d 12 (1963).

Power of states as to local concerns. — Commerce clause did not withdraw from the states the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it. *Southern Ry. v. Overnite Transp. Co.*, 223 Ga. 825, 158 S.E.2d 387 (1967).

Validity of statutes affecting interstate commerce. — State statutes that only relate to or indirectly affect interstate commerce or cover matters not legislated on by Congress are not invalid as interfering with or burdening interstate commerce. *Southern Ry. v.*

Overnite Transp. Co., 223 Ga. 825, 158 S.E.2d 387 (1967).

Power of state to regulate for public safety. — The United States Supreme Court has recognized the "broad power in the state to protect its inhabitants against perils to health or safety, fraudulent traders, and highway hazards, even by use of measures which bear adversely upon interstate commerce." *General GMC Trucks, Inc. v. GMC Truck & Coach Div.*, 239 Ga. 373, 237 S.E.2d 194, cert. denied, 434 U.S. 996, 98 S. Ct. 634, 54 L. Ed. 2d 491 (1977).

Georgia courts, though broadly construing the police power, have traditionally limited power of state to regulate private business under U.S. Const., art. I, sec. VIII, cl. 1. *General GMC Trucks, Inc. v. GMC Truck & Coach Div.*, 239 Ga. 373, 237 S.E.2d 194, cert. denied, 434 U.S. 996, 98 S. Ct. 634, 54 L. Ed. 2d 491 (1977).

Test for validity of statute affecting interstate commerce. — If a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless burden imposed on such commerce is clearly excessive in relation to putative local benefits. *General GMC Trucks, Inc. v. GMC Truck & Coach Div.*, 239 Ga. 373, 237 S.E.2d 194, cert. denied, 434 U.S. 996, 98 S. Ct. 634, 54 L. Ed. 2d 491 (1977).

State law limiting medical suppliers. — State policy that suppliers of durable medical supplies have a valid business license and an in-state business location or be located within a fifty mile radius of the state boundary was violative of the interstate commerce clause. It discriminated against interstate commerce and was not the least burdensome means of accomplishing its stated purpose: reducing the administrative costs of the Medicaid program and protecting the citizens of Georgia. *Nutritional Support Servs. v. Miller*, 830 F. Supp. 625 (N.D. Ga. 1993).

Validity of real estate broker licensure requirements. — Real estate broker licensure requirements, which are not uncommonly imposed by the states, generally withstand attack on the basis of the commerce clause; Supreme Court of Georgia does not find Georgia's invalid. *Krizan v. Newman & Co.*, 246 Ga. 214, 271 S.E.2d 135 (1980).

O.C.G.A. §§ 40-2-111 and 40-2-112 discriminate against interstate commerce because they impose taxes on vehicles registered in certain states which are not imposed on vehicles registered in the State of Georgia. *State v. Private Truck Council of Am., Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988).

State licensing requirements unenforceable where review over federal determination conferred thereby. — A state may not enforce licensing requirements that, though valid in the absence of federal regulation, give the state's licensing board a virtual power of review over the federal determination that a person is qualified to perform certain functions. *United States v. Composite State Bd. of Medical Exmsr.*, 656 F.2d 131 (5th Cir. 1981).

Regulation of taxicabs. — A city ordinance which placed a limit on the number of taxi permits to be issued and which limited the number of certificates of public necessity and convenience to be issued did not violate the commerce clause. *Airport Taxi Cab Advisory Comm. v. City of Atlanta*, 584 F. Supp. 961 (N.D. Ga. 1983).

One-year Georgia residency requirement for holders of certificates of public necessity and convenience to operate taxicabs in Atlanta, Ga., City Code § 162-57(a)(3) violated the commerce clause because the city did not show that discrimination against non-residents was demonstrably justified by a valid factor unrelated to economic protectionism; there was no relationship between the residency requirement and a valid government interest, and the requirement was economic protectionism which created an artificial barrier to commerce. *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 281 Ga. 342, 638 S.E.2d 307 (2006).

Association of taxicab owners had standing to challenge the constitutionality under the commerce clause of a one-year Georgia residency requirement for holders of certificates of public necessity and convenience (CPNC) to operate taxicabs in Atlanta, Ga., City Code § 162-57(a)(3) because the provision erected an existing impediment to the solicitation and eventual consummation of any sale or lease of a CPNC to a nonresident of Georgia; enforcement of § 162-57(a)(3) against them impacted their right to engage freely in those business activities currently authorized by the CPNCs issued to them

under Atlanta, Ga., City Code ch. 162. *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 281 Ga. 342, 638 S.E.2d 307 (2006).

City ordinances which regulated the fares which licensed limousine service companies could charge for trips to and from an airport and prohibited the advertising of any fares that were not in compliance did not violate the commerce clause and the fourteenth amendment. *Executive Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523 (11th Cir. 1986).

Interstate transportation of refuse. — A county's application of O.C.G.A. § 36-1-16, which restricts transportation of refuse, to prohibit a waste management company from operating a landfill, which was owned by a municipality but located in the county, as a regional landfill, i.e., from receiving waste from outside the county and from outside the state, violated the company's constitutional commerce clause right to engage in interstate commerce without discriminatory intervention. *Diamond Waste, Inc. v. Monroe County*, 731 F. Supp. 505 (M.D. Ga. 1990), *aff'd in part, vacated on other grounds*, 939 F.2d 941 (11th Cir. 1991).

County resolution preventing a waste management firm from importing waste of any kind into the county from other counties and other locations violated the commerce clause. *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991).

O.C.G.A. § 36-1-16, which permits Georgia counties to require an application for a permit from those who would bring across state or county boundaries garbage, trash, waste, or refuse for the purpose of dumping such at a publicly or privately owned dump, is constitutional. *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991).

County ordinance regulating the transport of out-of-county waste into the county did not violate the commerce clause on its face. *Diamond Waste, Inc. v. Monroe County*, 796 F. Supp. 1511 (M.D. Ga. 1992).

Landfill operator with solid waste handling permit was within the "zone of interests" protected by the commerce clause because its ability or inability to operate impacted the flow of interstate commerce. *Diamond Waste, Inc. v. Monroe County*, 796 F. Supp. 1511 (M.D. Ga. 1992).

That out-of-state generators may be less

Commerce (Cont'd)**3. Power of State to Regulate (Cont'd)**

trustworthy than in-state generators is an insufficient reason to burden interstate commerce in solid waste disposal since a load of in-state waste is no different from a load of out-of-state waste apart from origin. *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725 (M.D. Ga. 1992).

The state failed to justify its requirements that one must obtain a special solid waste handling permit prior to engaging in out-of-state waste disposal; that an out-of-state waste handler must submit a waste analysis plan, through which the operator must obtain a representative sample from every load of out-of-state waste received and perform a detailed chemical and physical analysis on the sample; that out-of-state waste be accompanied by a manifest at all times that the waste is in the state of Georgia; that \$10.00 per ton be charged as a fee on out-of-state waste; and that the Environmental Protection Division of the Georgia Department of Natural Resources be authorized to inspect at random any out-of-state generators that dispose of their waste in Georgia. *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725 (M.D. Ga. 1992).

The statutory provisions and the rules that apply to the regulation of out-of-state waste, or "special solid waste," specifically former O.C.G.A. § 12-8-27 and Rule 391-3-4.10, in their entirety, and O.C.G.A. § 12-8-24 and Rule 391-3-4.02, insofar as they require a permit for the handling of special solid waste, are unconstitutional burdens upon interstate commerce. *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725 (M.D. Ga. 1992) (decided prior to repeal of § 12-8-27 by Ga. L. 1993, p. 399).

Out-of-county operator had standing to challenge county ordinance on landfills because the ordinance regulated out-of-county waste brought into the county. *Mullis Tree Serv., Inc. v. Bibb County*, 822 F. Supp. 738 (M.D. Ga. 1993).

Landfill operator whose landfill was permitted as a landfill not regulated by a county ordinance but who had obtained special authorization from the state to accept vari-

ous other types of waste, some of which was defined by the county ordinance, had standing to challenge the ordinance. *Mullis Tree Serv., Inc. v. Bibb County*, 822 F. Supp. 738 (M.D. Ga. 1993).

County ordinance treating differently in-county waste from out-of-county waste was subject to strict scrutiny, requiring lower court reconsideration on the issue of facial invalidity. *Diamond Waste, Inc. v. Monroe County*, 814 F. Supp. 83 (M.D. Ga. 1993).

Discrimination regarding transportation of refuse. — County ordinance regulating waste imported into county was unconstitutional under the commerce clause, since it treated waste coming from outside the county differently from waste originating inside the county, and the county failed to meet its burden of showing that there was some reason, apart from county of origin, to treat out-of-county waste differently from in-county waste. *Diamond Waste, Inc. v. Monroe County*, 828 F. Supp. 52 (M.D. Ga. 1993), *aff'd*, 43 F.3d 677 (11th Cir. 1994).

County policy limiting the origin of waste to within 150 miles of the county was violative of the commerce clause, despite the county's assertion that the limitation was necessary to preserve the capacity of its waste facility. The county failed to give any reason why its objectives could not be accomplished without discriminating against other counties. *GSW, Inc. v. Long County*, 999 F.2d 1508 (11th Cir. 1993).

State law regulating waste treatment facilities. — Statutory provisions regulating the issuance of permits and containing transportation restrictions pertaining to biomedical waste thermal treatment facilities were deemed unconstitutional as a violation of the commerce clause. *Environmental Waste Reductions, Inc. v. Reheis*, 887 F. Supp. 1534 (N.D. Ga. 1994).

Georgia "anti-takeover" statute enjoyed a presumption of validity under the supremacy and interstate commerce clauses, where it could not be established with the required degree of legal certainty that the statute denied hostile tender offers for Georgia corporations a meaningful opportunity to succeed. *West Point-Pepperell, Inc. v. Farley, Inc.*, 711 F. Supp. 1096 (N.D. Ga. 1989).

4. Power of State to Tax

Validity of tax on imports. — Where commodity imported into state has come to rest

and become part of common mass of property in state, a nondiscriminatory tax by state upon it, or upon its sale or use, is valid. *Wright v. Fulton County*, 169 Ga. 354, 150 S.E. 262 (1929).

Gasoline imported by distributor from another state but used in conduct of its business loses its interstate character and may be subjected to an excise tax consistently with commerce clause, although it remains in original packages in which it is imported. *Wright v. Fulton County*, 169 Ga. 354, 150 S.E. 262 (1929).

Mere privilege of engaging in interstate commerce is not derived from the state and cannot be conditioned by a state upon procuring a license or paying a tax. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

Control of use of improved roads. — The state may license or refuse to license, may condition or charge for, the use of its improved roads, when they are turned from their common uses and purposes to the carrier's business, since interstate carrier has no better right than any other to use the state's improved highways without its consent, or without paying for it. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

Certificate of public convenience and necessity, with a reasonable fee therefor, and an annual license fee for trucks, are legally demandable by state as a nondiscriminatory prerequisite for use of highways for carrier purposes, even though the commerce involved is wholly interstate. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

Tax on proceeds of interstate commerce. — It is a burden on interstate commerce for a state to tax proceeds of interstate commerce, and a tax by a state upon the gross receipts of goods sold in interstate commerce is a tax on interstate commerce and is contrary to U.S. Const., art. I, sec. VIII, cl.3. *American Mills Co. v. Doyal*, 46 Ga. App. 236, 167 S.E. 312 (1933).

Highway users subject to state regulation. — Highways are public property and users of them, although engaged exclusively in interstate commerce, are subject to regulation by state to ensure safety and convenience and conservation of the highways, and may be required to contribute to their cost and

upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 179 Ga. 431, 176 S.E. 487 (1934), *aff'd*, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935).

To sustain a charge by the state for the use of or privilege of using its roads for interstate transportation, it must affirmatively appear that the charge is exacted as compensation or to pay the cost of policing its highways. *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939).

Validity of tax on interstate carriers for highway use. — While state may not tax privilege of engaging in interstate commerce, it may impose upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for use of public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. As such a tax is a direct burden on interstate commerce, it cannot be sustained unless it appears, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to highway use, by the express allocation of the proceeds of the tax to highway purposes, or otherwise. Where it is shown that the tax is so imposed, it will be sustained, unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory; but the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 179 Ga. 431, 176 S.E. 487 (1934), *aff'd*, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935).

Validity of regulation requiring permit and payment of tax from exclusively interstate carriers. — State regulation providing that, before operating over state highways, common motor carrier shall apply for and obtain certificate or permit from state commission and shall pay an extra tax for maintenance and repair of the highways and for administration and enforcement of the laws governing their use, is constitutional though applied to carriers engaged exclusively in

Commerce (Cont'd)**4. Power of State to Tax (Cont'd)**

interstate commerce. That the tax so exacted is not all used for maintenance and repair of the highways, but some of it for defraying expenses of the commission for administration and enforcement and some for other purposes, is no concern of the taxpayer, it being assessed for a proper purpose and not unreasonable in amount. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 179 Ga. 431, 176 S.E. 487 (1934), *aff'd*, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935).

Validity of tax on corporate income derived from interstate commerce. — Fact that sources of tax imposed on corporation organized under laws of Delaware and domesticated under laws of Georgia incidentally involve interstate commerce transactions in computing the taxable net income of taxpayer does not contravene the commerce clause. *Montag Bros. v. State Revenue Comm'n*, 50 Ga. App. 660, 179 S.E. 563 (1935), *aff'd*, 182 Ga. 568, 186 S.E. 558 (1936).

Validity of municipal tax on operation of radio broadcasting station. — Business of radio broadcasting of programs, some originating in other states and transmitted to broadcasting station in this state by wire, and others originating locally, to listeners in this state and other states, is interstate commerce, and is of such a nature that the business of broadcasting such programs to listeners in this state cannot be discontinued without withdrawing the broadcasting of such programs from listeners in other states. A municipal tax on privilege of operating or the business of operating a radio broadcasting station of the nature described is invalid as a burden on interstate commerce. *City of Atlanta v. Southern Broadcasting Co.*, 184 Ga. 9, 190 S.E. 594 (1937).

State has power to tax income of its resident and domestic corporations derived from transactions both within and without state, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for the enforcing of it. *State Revenue Comm'n v. Edgar Bros. Co.*, 185 Ga. 216, 194 S.E. 505 (1937), appeal dismissed, 303 U.S. 626, 58 S. Ct. 761, 82 L. Ed. 1088 (1938).

Taxation of income of nonresidents as burden on interstate commerce. — As to nonresidents, income tax may be levied upon income received from property within state, and fact that it may require activities of skill and management outside state to bring the income to fruition does not, by reason of the commerce clause, deprive the taxing state of jurisdiction to tax income which arises within its borders, as to nonresidents doing business in a state and whose business is of a unitary character, a tax may be levied based upon the entire net income, but apportioned to that part of the net income attributable to business done in the taxing state, where the enforcement of such tax is left to the ordinary means of collecting taxes. *State Revenue Comm'n v. Edgar Bros. Co.*, 185 Ga. 216, 194 S.E. 505 (1937), appeal dismissed, 303 U.S. 626, 58 S. Ct. 761, 82 L. Ed. 1088 (1938).

Validity of maintenance tax imposed on carriers for use of highways. — Former Code 1933, Ch. 92-29 (see O.C.G.A. Ch. 10, T. 48), which imposes a maintenance tax on the operation of motor buses, trucks, and trailers upon the public roads of this state, in addition to any and all other taxes, licenses, or registration fees required, for the privilege of using the highways of the state, the entire amount of the tax to be allocated for the construction and maintenance of public highways, is not violative of the commerce clause nor does it violate the privileges and immunities clause of U.S. Const., amend. 14. *Dixie-Ohio Express Co. v. State Revenue Comm'n*, 186 Ga. 228, 197 S.E. 887 (1938), *aff'd*, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939).

It is elementary that state may not impose a tax on privilege of engaging in interstate commerce. *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939).

Imposition of charge for use of special facilities furnished by state. — If a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939).

Validity of tax on privilege of possessing cigarettes. — Cigarette tax levied not upon the privilege of receiving cigarettes in this

state, but rather upon the privilege of retaining, keeping, holding, or possessing them for personal use after they have been received, acquired, or brought into this state, is not violative of the commerce clause. *Head v. Cigarette Sales Co.*, 188 Ga. 452, 4 S.E.2d 203 (1939).

Excise tax which effects protectionism is invalid. — An excise tax provision whose purpose and effect is simple economic protectionism is virtually per se invalid under the commerce clause. *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), rev'd on other grounds, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), aff'd, 263 Ga. 609, 437 S.E.2d 782 (1993).

Nondiscriminatory ad valorem tax. — Commerce clause does not exempt either tangible or intangible property from nondiscriminatory ad valorem tax by state, nor would it matter that the same intangibles might also be subject to taxation in state of company's domicile. *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Commerce clause does not exempt either tangible or intangible property from nondiscriminatory ad valorem tax by municipality. *Parke, Davis & Co. v. City of Atlanta*, 200 Ga. 296, 36 S.E.2d 773 (1946).

Taxation of domestic corporate income derived from interstate commerce. — A state, in levying a general income tax upon gains and profits of domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it. *Parke, Davis & Co. v. Cook*, 198 Ga. 457, 31 S.E.2d 728 (1944), appeal dismissed, 323 U.S. 681, 65 S. Ct. 436, 89 L. Ed. 552 (1945).

Merchant's tax on nonresidents. — State is not precluded by commerce clause from imposing merchant's tax upon nonresident manufacturing corporation which has selected a city of that state as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assort them, store them in warehouse, and make delivery in

original packages to customers of manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers whose names are furnished to transfer company, since, under such circumstances, the goods, when stored in warehouse, are no longer in transit but have reached their destination and are held in the state for sale. *Parke, Davis & Co. v. Cook*, 198 Ga. 457, 31 S.E.2d 728 (1944), appeal dismissed, 323 U.S. 681, 65 S. Ct. 436, 89 L. Ed. 552 (1945).

Taxation of corporate income derived from unsolicited orders from outside state. — Before any part of income received by corporations having property or doing business in state can lawfully escape Georgia tax law, it must appear that such part was derived from property owned or business done outside state. Income derived by corporation from unsolicited orders received by it from outside state cannot, under the fourteenth amendment and the commerce clause, be taxed elsewhere than in state. *State v. Coca-Cola Bottling Co.*, 214 Ga. 316, 104 S.E.2d 574 (1958).

Commerce clause gives exclusive power to Congress to regulate interstate commerce, and its failure to act on the subject in area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the states. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959) (decided under prior law).

Tax on net income from interstate commerce, as distinguished from tax on privilege of engaging in interstate commerce, does not conflict with commerce clause. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959) (decided under prior law).

Former Code 1933, § 92-3101 et seq. (see O.C.G.A. Art. 2, Ch. 7, T. 48) does not offend the due process clause or the commerce clause. *Owens-Illinois Glass Co. v. Oxford*, 216 Ga. 316, 116 S.E.2d 293 (1960).

Taxation of an airline sale of food places no burden on interstate commerce such as would offend commerce clause if it is merely a tax due to a local transaction, the sale of the meal. *Undercofler v. Eastern Air Lines*, 221 Ga. 824, 147 S.E.2d 436 (1966).

Commerce (Cont'd)**4. Power of State to Tax (Cont'd)**

No state can tax the privilege of doing interstate business, as that is within the protection of the commerce clause and subject to the power of Congress; but the mere fact that property is used for interstate commerce or has come into owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a state to the upkeep of which he may be asked to bear his fair share. *Independent Publishing Co. v. Hawes*, 119 Ga. App. 858, 168 S.E.2d 904 (1969).

No relief from just tax burden. — It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. *Independent Publishing Co. v. Hawes*, 119 Ga. App. 858, 168 S.E.2d 904 (1969); *Chattanooga Glass Co. v. Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979).

Taxation by states of property shipped interstate, before its movement begins or after it ends, is not forbidden by U.S. Const., art. I, sec. VIII, cl. 3. *Independent Publishing Co. v. Hawes*, 119 Ga. App. 858, 168 S.E.2d 904 (1969).

Validity of use tax on interstate goods at rest. — Things acquired or transported in interstate commerce may be subjected, when once they are at rest, to a nondiscriminatory state tax upon use or enjoyment. *Independent Publishing Co. v. Hawes*, 119 Ga. App. 858, 168 S.E.2d 904 (1969).

Test for validity of tax affecting interstate commerce. — A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if, by the practical operation of a tax, the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. The sole constitutional test is whether the state has given anything for which it can ask return. *Independent Publishing Co. v. Hawes*, 119 Ga. App. 858, 168 S.E.2d 904 (1969).

Nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the states. *Michelin*

Tire Corp. v. Wages, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976).

Underground storage tanks. — The participation fee provided for in O.C.G.A. § 12-13-10 does not constitute an impermissible burden on interstate commerce, in violation of U.S. Const., art. I, sec. VIII, and art. VI. *Luke v. Georgia Dep't of Natural Resources*, 270 Ga. 647, 513 S.E.2d 728 (1999).

Use tax on personalty at rest not a tax on operators of interstate commerce. — A tax on privilege of using items of tangible personal property after they have come to rest in a state and commerce is at an end, is not a tax on the operators of interstate commerce. *Ingalls Iron Works Co. v. Chilivis*, 237 Ga. 479, 228 S.E.2d 866 (1976), appeal dismissed, 429 U.S. 1081, 97 S. Ct. 1086, 51 L. Ed. 2d 528 (1977).

Implementation of hotel/motel tax. — A statute creating special districts for the purpose of implementing a hotel/motel tax did not violate the commerce clause. *Youngblood v. State*, 259 Ga. 864, 388 S.E.2d 671 (1990).

To establish that charge levied against interstate carrier imposes an impermissible burden on interstate commerce, the complaining party must show that the charge: (1) discriminates against interstate commerce in favor of intrastate commerce; (2) is imposed on the privilege of doing interstate business as distinguished from being imposed for the use of facilities provided by the state; or (3) exceeds fair compensation to the state. *Southern Airways, Inc. v. City of Atlanta*, 428 F. Supp. 1010 (N.D. Ga. 1977).

Amount, rather than formula, of charge determinative of fairness. — In determining whether charges for lease of space at city airport are excessive in comparison with government benefit conferred and hence constitute an impermissible burden on interstate commerce, one must focus on amount of charge rather than its formula. If amount of charge levied on interstate carrier is based on some fair approximation of use or privilege for use, it does not impose an impermissible burden upon interstate commerce. *Southern Airways, Inc. v. City of Atlanta*, 428 F. Supp. 1010 (N.D. Ga. 1977).

Taxation of interstate commerce does not per se violate commerce clause principles. *Chattanooga Glass Co. v. Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979).

Apportionment of property tax. — Since the bus company submitted evidence that some of its buses had acquired a tax situs in a state other than Georgia, the United States Constitution's commerce clause required that Georgia's ad valorem tax on property engaged in interstate commerce, such as the bus company's buses, be apportioned; accordingly, the bus company was entitled to have the ad valorem tax assessed on its bus fleet apportioned. *Fulton County Bd. of Tax Assessors v. Harmon Bros. Charter Serv.*, 261 Ga. App. 534, 583 S.E.2d 179 (2003).

Coining of Money and Regulation of Legal Tender

Mint has no power to mint coins unless it has been authorized to do so by Congress. *Mesaros v. United States*, 845 F.2d 1576 (Fed. Cir. 1988).

Requirement that wrecker services accept checks and credit cards does not violate U.S. Const., art. I, sec. VIII since the regulation does not require a wrecker service to accept something other than legal tender to discharge a debt. *Porter v. City of Atlanta*, 259 Ga. 526, 384 S.E.2d 631 (1989), cert. denied, 494 U.S. 1004, 110 S. Ct. 1297, 108 L. Ed. 2d 474 (1990).

A city code section which makes it unlawful for a wrecker service to refuse to accept checks and major credit cards is constitutional, and is not ultra vires the home rule powers conferred by O.C.G.A. § 36-35-6(a). *Upton v. City of Atlanta*, 260 Ga. 250, 392 S.E.2d 244 (1990).

Check backed by lawful money. — Since both Congress and the courts have found federal reserve notes to be legal tender, the court found the check given to homebuyer by a mortgage company was backed by and redeemable in federal reserve notes, coins and lawful money of the United States. *Strickland v. A Mtg. Co.*, 179 Bankr. 979 (Bankr. N.D. Ga. 1995).

Bankruptcy

Bankruptcy power of Congress. — The Constitution of the United States vests authority in Congress to establish uniform laws on the subject of bankruptcies throughout the United States, and the power of Congress is paramount in matters relating to this subject. *Smith v. Folsom*, 190 Ga. 460, 9 S.E.2d 824 (1949).

Under the bankruptcy power Congress has authority to impair obligation of contracts, but may do so only when property is not, contrary to the fifth amendment, taken without due process of law. *In re Philibosian*, 19 F. Supp. 787 (N.D. Ga. 1937).

The impairment or modification of contract rights under the bankruptcy power granted under clause 4 is not prohibited by the fifth amendment. *In re Bullington*, 80 Bankr. 590 (Bankr. M.D. Ga. 1987), aff'd, 89 Bankr. 1010 (M.D. Ga. 1988), 878 F.2d 354 (11th Cir. 1989).

Although the United States Constitution grants Congress the power to establish bankruptcy laws, Art. I, Sec. VIII, cl. 4, that power is subject to the fifth amendment, which proscribes taking private property for public use without just compensation. *GMAC v. Johnson*, 145 Bankr. 108 (Bankr. S.D. Ga. 1992), rev'd on other grounds, 165 Bankr. 524 (S.D. Ga. 1994).

Due process met where noteholder deprived of property through bankruptcy proceedings. — An unsecured note is property whose value rests wholly in the debtor's obligation to pay it and in the right to seize his property to satisfy a judgment on the note. The holder may be deprived of his property by a process of bankruptcy resulting in the bankrupt's discharge without any payment, and due process of law is not lacking. *In re Philibosian*, 19 F. Supp. 787 (N.D. Ga. 1937).

Nullification of rights of secured creditor through bankruptcy. — It is not clear that to deprive a secured creditor of his security through bankruptcy deprives him of property any more than to deprive the unsecured creditor of his debt does, or that the process of bankruptcy is any less a due process of law in the one case than in the other. The true reason why bankruptcy may not nullify a security is not the fifth amendment but the fact that it never has. It lies in the limitations inherent in the bankruptcy power. *In re Philibosian*, 19 F. Supp. 787 (N.D. Ga. 1937).

Delay of realization on security within bankruptcy power. — To delay realization on a security, especially when the security is ample and secured creditor will realize his debt in full or at least the full present value of the security with compensation for the delay, and there are good reasons for the delay, all adjudged by a court, is not unprec-

Bankruptcy (Cont'd)

edented or unreasonable and is within bankruptcy power. In re Philibosian, 19 F. Supp. 787 (N.D. Ga. 1937).

Extent of bankruptcy power. — Although it is true that the exercise of the power to draft laws on the subject of bankruptcies is subject to the strictures of the fifth amendment, the appropriate use of that power by Congress will not be found unconstitutional simply because it upsets previously settled expectations. Joyner v. Golden Dome Inv. Co., 7 Bankr. 596 (M.D. Ga. 1980).

Administration of decedent's estates. — Congress has the power to create bankruptcy jurisdiction over the administration of decedents' estates. Goerg v. Parungao, 844 F.2d 1562 (11th Cir. 1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 850, 102 L. Ed. 2d 981 (1989).

That the Bankruptcy Code's definition of "debtor" excludes decedents' estates does not mean that such exclusion applies in the context of a proceeding ancillary to a foreign proceeding pursuant to 11 U.S.C. § 304. Goerg v. Parungao, 844 F.2d 1562 (11th Cir. 1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 850, 102 L. Ed. 2d 981 (1989).

Power to discharge debtor. — The power to establish uniform laws on bankruptcy throughout the country includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. Caruthers v. Fleet Fin., Inc., 87 Bankr. 723 (Bankr. N.D. Ga. 1988).

Power to cure and reinstate accelerated debts. — The Constitution of the United States empowered Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States," and laws enacted by Congress pursuant to this grant of authority are supreme to those of the states. Bankruptcy provisions allowing the opportunity to cure and reinstate accelerated debts and bankruptcy provisions governing the payment of secured creditors' attorney's fees are no exception to the supremacy clause. In re Centre Court Apts., Ltd., 85 Bankr. 651 (Bankr. N.D. Ga. 1988).

No district or bankruptcy court has any exercisable jurisdiction in bankruptcy cases, matters, or proceedings after December 24, 1982, and a district court cannot confer jurisdiction on a bankruptcy court by adop-

tion of an emergency rule. Williamson v. General Fin. Co., 28 Bankr. 276 (Bankr. M.D. Ga. 1983).

Bankruptcy judges cannot decide peripheral state common-law claims. — Non-Article III bankruptcy judges cannot constitutionally be vested with jurisdictional power to decide state common-law claims brought pursuant to the Bankruptcy Act and related only peripherally to a bankruptcy case adjudicated under federal law. Pettigrew v. Kutak, Rock & Huie, 30 Bankr. 989 (N.D. Ga. 1983).

Patents and Copyrights

Production to which the protection of copyright may be accorded is the property of the author and not of the United States, but the copyright is the creature of federal statutes passed in the exercise of the power vested in Congress by U.S. Const., art. I, sec. VIII, cl. 8. Fox Film Corp. v. Doyal, 286 U.S. 123, 52 S. Ct. 546, 76 L. Ed. 1010 (1932).

Copyrights are not to be deemed instrumentalities of federal government and hence immune from state taxation. The mere fact that a copyright is property derived from a grant by the United States is insufficient to support the claim of exemption from state taxation. Fox Film Corp. v. Doyal, 286 U.S. 123, 52 S. Ct. 546, 76 L. Ed. 1010 (1932).

Generally, right to copyright works of science and the arts is obtained from Constitution of United States. Cartin v. Boles, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

United States Congress has preempted field as to statutory copyrights. Cartin v. Boles, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

Patent rights exist only by virtue of federal statute. Monumental Properties of Ga., Inc. v. Frontier Disposal, Inc., 159 Ga. App. 35, 282 S.E.2d 660 (1981).

Trademark registration that has achieved incontestable status under 15 U.S.C. § 1065 is still subject to attack based on functionality. Pudenz v. Littlefuse, Inc., 177 F.3d 1204 (11th Cir. 1999).

General ideas (theme, plot, etc.) are in public domain and cannot be copyrighted. Cartin v. Boles, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

In literary works, it is not the novelty but the originality of the wording that is pro-

ected by copyright. *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

Test of pirating, infringement, or literary larceny concerns originality and whether the production is the result of independent labor or copying others. Similarities, historical facts, and incidental details which are necessary to the environment or setting of an action are not material of which copyrightable originality consists. *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

If access to the work is admitted, then inquiry as to infringement concerns what, if anything, defendant appropriated. *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

At common law, author has property right in the unpublished manuscript and can obtain redress against anyone who deprives the author of it by infringement or against anyone who obtains a copy and endeavors to realize a profit by its publication through plagiarism or otherwise. *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799 (1980).

Property right in unpatented product is only exclusive until it becomes property of public by being placed on the market. *Monumental Properties of Ga., Inc. v. Frontier Disposal, Inc.*, 159 Ga. App. 35, 282 S.E.2d 660 (1981).

Charge on "common law patent" is erroneous statement of law. *Monumental Properties of Ga., Inc. v. Frontier Disposal, Inc.*, 159 Ga. App. 35, 282 S.E.2d 660 (1981).

Similarity to substantial portion of work is infringement. — Infringement of a copyright may be found where the similarity relates to matter which constitutes a substantial portion of the copyright holder's work — i.e., matter which is of value to the copyright holder. *United States v. O'Reilly*, 794 F.2d 613 (11th Cir. 1986).

Copyright in a compilation does not prohibit the copying of pre-existing material that is in the compilation. *CNN, Inc. v. Video Monitoring Serv. of Am., Inc.*, 940 F.2d 1471 (11th Cir. 1991), appeal dismissed, 959 F.2d 188 (11th Cir. 1992).

Videotaping and selling news reports. — The enforcement of the copyright statute by a television station against a business which videotaped its news broadcasts and sold the tapes to the subjects of the news reports did not violate the copyright clause. *Pacific & S.*

Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 1004, 105 S. Ct. 1867, 85 L. Ed. 2d 161 (1985).

Typical television newscast may be copyrightable in its entirety as a compilation only. *CNN, Inc. v. Video Monitoring Serv. of Am., Inc.*, 940 F.2d 1471 (11th Cir. 1991), appeal dismissed, 959 F.2d 188 (11th Cir. 1992).

Fair use of cable television newscasts. — Any injunction that would prevent the copying of a cable television network's newscasts "in any part" would be inconsistent with the federal Copyright Act, particularly its fair use provisions, and both the copyright clause and the first amendment to the Constitution. *CNN, Inc. v. Video Monitoring Serv. of Am., Inc.*, 940 F.2d 1471 (11th Cir. 1991), appeal dismissed, 959 F.2d 188 (11th Cir. 1992).

War-Making Powers

Compensation for military service. — Under the war-making power conferred by Constitution, Congress is empowered to adopt any means which it may deem necessary to contribute to the success of the undertaking. From this it follows that Congress is authorized to grant allotments, bounties, pensions, and other rewards in return for military service, and may prescribe, as a condition upon which this compensation shall be given, a provision that the federal compensation for military service shall be exempt from all taxation, including state taxation. *Rucker v. Merck*, 172 Ga. 793, 159 S.E. 501 (1931).

In exercise of its exclusive prerogative to wage war, federal government cannot be interfered with by state legislation. *City of Atlanta v. Stokes*, 175 Ga. 201, 165 S.E. 270 (1932).

Even though power of state to tax generally is supreme, that power may not be used to hamper, hinder, annoy, harass, and impede the federal government in the exercise of its unlimited power to carry on war. *City of Atlanta v. Stokes*, 175 Ga. 201, 165 S.E. 270 (1932).

Power of Congress to exempt compensation for war veterans from state taxation. — Where Congress enacts legislation declaring that certain compensation for war veterans shall be exempt from all taxation, Congress is acting within its war powers and the ex-

War-Making Powers (Cont'd)

emption applies to state taxation, including taxation of property purchased by veterans with funds declared tax exempt by Congress. *City of Atlanta v. Stokes*, 175 Ga. 201, 165 S.E. 270 (1932).

Lack of formal declaration of war by Congress is without legal effect on validity of court martial jurisdiction during such undeclared war. *Torres v. Connor*, 329 F. Supp. 1025 (N.D. Ga. 1970).

Regulation of Armed Forces

Although trial by military tribunal deprives one of trial by jury and other constitutional rights, it is not unconstitutional. Military jurisdiction, however, is restricted to the narrowest limits consistent with the power granted Congress in U.S. Const., art. I, sec. VIII, cl. 14. *Torres v. Connor*, 329 F. Supp. 1025 (N.D. Ga. 1970).

Lack of formal declaration of war by Congress is without legal effect on validity of court martial jurisdiction during such undeclared war. *Torres v. Connor*, 329 F. Supp. 1025 (N.D. Ga. 1970).

Only within narrow limits and where first amendment rights are involved will federal courts enjoin state or military prosecution. *Torres v. Connor*, 329 F. Supp. 1025 (N.D. Ga. 1970).

U.S. Const., art. I, sec. VIII, cl. 14 is grant of legislative power. — Express authority of U.S. Const., art. I, sec. VIII, cl. 14 to make rules for government and regulation of land and naval forces is a grant of purely legislative power, and is the prime source of the establishment of the system of military justice. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Exclusive Jurisdiction

Change of domicile by military personnel. — U.S. Const., art. I, sec. VIII, cl. 17, properly construed, does not altogether deny a soldier the right enjoyed by others of changing his domicile from one state to another because he is stationed on a government reservation. He should not unnecessarily be thus discriminated against and limited in

matters not connected with his status as a soldier. *Dicks v. Dicks*, 177 Ga. 379, 170 S.E. 245 (1933).

Exclusive legislation has been construed to mean exclusive jurisdiction in the sense of exclusive sovereignty. *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952).

Nothing in the Constitution of United States can confer upon Georgia Legislature an iota of power to legislate for Georgia. — This court rejects in toto all argument of counsel that U.S. Const., art. I, sec. VIII, cl. 17 imposes or was intended to impose any duty whatever upon any state legislature to act. Its sole intent and meaning are to define the jurisdiction that will result if and when a state legislature by a valid law cedes jurisdiction or consents to purchase. Power does not lie in the federal government to invest the Legislature of Georgia with authority to legislate for this sovereign state, and any attempt to do so, whether by constitutional provision, congressional Act, or judicial decision, would utterly fail. No such attempt has been made by either the Constitution or Congress, and this court does not construe any court decision to constitute such an attempt. *IBM Corp. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957).

Surrender of state sovereignty. — U.S. Const., art. I, sec. VIII, cl. 17 declares that when cession or consent by a state legislature has been given, exclusive legislative power vests in the United States. This court believes the sounder reasoning to the conclusion would be that no legislature, without express constitutional power, can surrender the state's sovereignty. Therefore, the attempt to surrender it is effective only to the extent of allowing the United States to own and use the land free from state interference by taxes or otherwise. Individuals, however, cannot be given such privileges. *IBM Corp. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957).

United States penitentiary is "needful building" within meaning of U.S. Const., art. I, sec. VIII, cl. 17. *Gainey v. United States*, 324 F.2d 731 (5th Cir.), cert. denied, 374 U.S. 842, 83 S. Ct. 1897, 10 L. Ed. 1062 (1963).

Nature of jurisdiction over lands acquired other than by purchase with state's consent. — Where lands are acquired by the United States within the limits of a state in any way other than by purchase with state's consent,

the United States will hold the lands subject to this qualification: that if forts, arsenals, or other public buildings are erected upon such lands for the uses of the federal government, such buildings and their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. *Brittain v. Reid*, 220 Ga. 794, 141 S.E.2d 903 (1965).

Nature of federal possession of land acquired without state's consent. — The federal government may, without consent of the state, acquire land within a state by condemnation or purchase, but without state consent the United States does not obtain the benefits of U.S. Const., art. I, sec. VIII, cl. 17 and its possession is that of an ordinary proprietor. *DeKalb County v. Henry C. Beck Co.*, 382 F.2d 992 (5th Cir. 1967).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

COMMERCE

EXCLUSIVE JURISDICTION

Commerce

Transportation of gambling devices in interstate commerce. — It is illegal under the laws of this state to transport gambling devices within this state in intrastate commerce; however, this state does not attempt to exercise jurisdiction over the transportation of gambling devices in interstate commerce. 1960-61 Op. Att'y Gen. p. 113.

Imposition of state safety inspection standards on interstate busses registered in state. — Any reasonable safety inspection standards which this state might wish to impose upon interstate busses registered in this state would be permissible under U.S. Const., art. I, sec. VIII, cl. 3 of this section. 1972 Op. Att'y Gen. No. 72-33.

Use tax on "cost price" does not violate commerce clause. — Imposition of use tax upon "cost price," as defined by paragraph (2) of O.C.G.A. § 48-8-2, does not violate commerce clause, as it treats taxpayers printing own material out-of-state and taxpayers printing own material within the state equally. 1981 Op. Att'y Gen. No. 81-93.

Exclusive Jurisdiction

U.S. Const., art. I, sec. VIII, cl. 17 gives to Congress the exclusive right of legislation over property or areas within jurisdiction of state where the consent of the legislature of the state is given. 1945-47 Op. Att'y Gen. p. 49.

State authority having power to cede land and jurisdiction to federal government. — The only authority of the state which has

power to consent to acquisition of property within state by federal government so as to deprive state of jurisdiction over same is the General Assembly. 1945-47 Op. Att'y Gen. p. 49.

Building safety counsel has no right or duty to inspect: (a) properties of the federal government such as military reservations; or (b) properties, such as war housing projects, owned by the government but leased to private persons for nongovernmental uses. 1948-49 Op. Att'y Gen. p. 394.

Means of acquiring jurisdiction. — Under U.S. Const., art. I, sec. VIII, cls. 17 and 18, the United States may gain exclusive jurisdiction over lands acquired within a state either by purchase with the consent of the state legislature or by cession of jurisdiction by the state legislature to the United States and acceptance of the cession by Congress. 1952-53 Op. Att'y Gen. p. 8; 1963-65 Op. Att'y Gen. p. 496.

Validity of reservations of authority by state over ceded or purchased territory. — The state legislature, in its Act consenting to purchase by the United States or ceding jurisdiction to the United States, may reserve such authority over the ceded territory as will not be incompatible with the exercise of exclusive jurisdiction by the United States. Reservations of the right to serve process and to resume full jurisdiction if the United States ceases to own the land are not incompatible with the federal requirements. Regulating public utilities in any ceded territory is not incompatible with U.S. Const., art. I, sec. VIII, cl. 17, and the Act effectively cedes

Exclusive Jurisdiction (Cont'd)

jurisdiction over lands used by the Department of Defense. The reservation of the right to administer the criminal laws of the state over such area or the reservation of civil and criminal jurisdiction over persons and citizens within ceded territory, however, is incompatible with the transfer of exclusive

jurisdiction. 1952-53 Op. Att'y Gen. p. 8.

Military bases. — Fort Stewart remains in the exclusive jurisdiction of the federal government and the Juvenile Court of Liberty County does not have jurisdiction over juveniles who have allegedly committed delinquent acts on the military base. 1994 Op. Att'y Gen. No. U94-10.

RESEARCH REFERENCES

ALR. — Power of Congress to exclude commodities from transportation in interstate commerce because of the conditions under which they are produced, 3 ALR 658.

Limitation of time for deportation of alien, 8 ALR 1286.

Transportation by private means as affecting character of transaction as interstate commerce, 10 ALR 512.

Power of federal government over intrastate rates, 22 ALR 1100.

Applicability of state Anti-trust Act to interstate transaction, 24 ALR 787.

Amusement or educational enterprise as interstate commerce, 26 ALR 359; 47 ALR 782.

Interference with operation of plant producing goods destined for shipment out of state as restraint of trade or commerce among the states within inhibition of Sherman Anti-trust Act, 28 ALR 1015; 128 ALR 1075.

Subsequent dealing, by seller, with property sold conditionally in interstate commerce, as taking it out of the protection of the interstate commerce clause, 30 ALR 417.

Power of federal authorities to discontinue a branch, wholly within the state, of an interstate railroad or interurban system, 30 ALR 439.

Power of state to tax debts due from United States under contracts other than loans, 30 ALR 1462.

Right to inventions as between employer and employee, 32 ALR 1037; 44 ALR 593; 85 ALR 1512; 153 ALR 983; 61 ALR2d 356.

Implied promise of employer to pay royalty for use of patented article invented by employee, 32 ALR 1045.

State regulation of carriers by motor vehicle as affected by interstate commerce clause, 36 ALR 1110; 38 ALR 291; 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

Trademark or tradename as asset in case of bankruptcy, insolvency, or assignment for benefit of creditors, 44 ALR 706.

Statute or ordinance in relation to advertising as interference with interstate commerce, 48 ALR 563; 57 ALR 105; 115 ALR 952.

Refusal or failure of consignee to accept goods as terminating interstate shipment, 48 ALR 956.

License tax or fee on automobiles as affected by interstate commerce clause, 52 ALR 533; 115 ALR 1105.

Power of state to tax royalties from patents, 55 ALR 931.

Mill-in-transit operations or similar interruptions of movement in interstate commerce as affecting state power of taxation, 60 ALR 398.

Breaking continuity of passage or shipment as affecting its interstate character, 60 ALR 1465; 155 ALR 936.

Validity and construction of statute creating Federal Trade Commission, 68 ALR 847; 79 ALR 1200.

Constitutionality of statutes relating to grading, packing, or branding of farm products, 73 ALR 1445.

Rules of federal courts or those of state court as applicable in action for tort against carrier arising out of interstate transportation of persons, 76 ALR 428.

Constitutionality of statute relating to taxation of state banks or stock therein as affected by inapplicability of statute to national banks or national bank stock, 82 ALR 874; 83 ALR 1441.

Legal aspects of radio communication and broadcasting, 82 ALR 1106; 89 ALR 420; 104 ALR 872; 124 ALR 982; 171 ALR 765.

Requirement of license for practice of medicine or surgery as affected by interstate commerce clause of federal constitution, 82 ALR 1388.

Attachment or garnishment as interference with foreign or interstate commerce, 85 ALR 1395.

Governmental powers in peacetime emergency, 86 ALR 1539; 88 ALR 1519; 96 ALR 312; 96 ALR 826.

State income tax on resident in respect of income earned outside the state, 87 ALR 380.

Telegraphic or telephonic message between points in same state routed via points out of state as interstate commerce, 87 ALR 1333.

Conflict of Laws, § 11 – Judgment, § 374 – warrant of attorney to confess judgment – validity and effect, 89 ALR 1495.

Enumeration in constitutional provision of subjects of tax as exclusive of power of legislature to add other subjects, 100 ALR 859.

Validity, effect, and enforceability of provision of bonds, coupons, or other obligations of municipal or political body or of statute or ordinance under which they are issued, that they will be accepted in payment of taxes, 100 ALR 1339.

Constitutionality of statute permitting payment of taxes in instalments, 101 ALR 1335.

Assumption of jurisdiction by court as violation of commerce clause, 104 ALR 1075.

State statute or ordinance prohibiting or regulating transportation of intoxicating liquor as interference with interstate commerce, 110 ALR 931; 138 ALR 1150.

Constitutionality, construction, and application of statutes relating to highway transportation of automobiles for purposes of sale, 110 ALR 622.

Constitutionality of chain store tax, 112 ALR 305.

Encouragement or promotion of industry not in nature of public utility, carried on by private enterprise, as public purpose for which tax may be imposed or public money appropriated, 112 ALR 571.

Applicability of state statutes or municipal regulations to contracts for performance of work on land owned or leased by the Federal Government, 115 ALR 371; 127 ALR 827.

Tax as unlawful discrimination against interstate commerce by reason of possibility of taxation in other states, 117 ALR 444.

Right of manufacturer, producer, or wholesaler to control resale price, 125 ALR 1335.

Public regulation of dry cleaning and dyeing establishments, 128 ALR 678.

State taxation of livestock as affected by federal constitutional or statutory provisions relating to imports, exports, or interstate commerce, 130 ALR 969.

Adoption by or under authority of state statute without specific enactment or reenactment of prospective federal legislation or federal administrative rules as unconstitutional delegation of legislative power, 133 ALR 401.

Judicial decisions involving ASCAP, 136 ALR 1438.

Constitutionality and construction of Emergency Price Control Act as relating to rent, 148 ALR 1403; 149 ALR 1467; 150 ALR 1462; 151 ALR 1465; 152 ALR 1462; 153 ALR 1434; 154 ALR 1460; 155 ALR 1461; 156 ALR 1459; 157 ALR 1457; 158 ALR 1464.

Constitutionality, construction, and application of Emergency Price Control Act, 148 ALR 1429; 149 ALR 1472; 150 ALR 1470; 151 ALR 1469; 152 ALR 1472; 153 ALR 1444; 154 ALR 1468; 155 ALR 1467; 156 ALR 1467; 157 ALR 1463; 158 ALR 1474.

Constitutionality, construction, and application of statute or ordinance imposing license fee or tax upon automobiles or trailers used for habitation, 150 ALR 853.

Selective Training and Service Acts, 150 ALR 1420; 151 ALR 1456; 152 ALR 1452; 153 ALR 1422; 154 ALR 1448; 155 ALR 1452; 156 ALR 1450; 157 ALR 1450; 158 ALR 1450.

Collateral business activities incident to, or in aid of, interstate transportation, as related to interstate commerce, 152 ALR 1078.

Constitutionality, construction, and application of federal statute relating to power of national bank to engage in trust business, 153 ALR 410.

Constitutionality, construction, and application of general use tax or other compensating tax designed to complement state sales tax, 153 ALR 609.

Privilege tax in respect of business involving continuous passage and repassage over state lines of laundry or other articles for use and the return of same or similar articles to user, 153 ALR 830.

Judicial decisions involving rationing, 153 ALR 1453; 155 ALR 1475; 156 ALR 1475; 157 ALR 1472; 158 ALR 1489.

State tax in connection with transporta-

tion or distribution of oil or gas through pipe lines as affected by commerce clause, 154 ALR 623.

License or excise tax on merchandise brokers or persons performing similar functions as affected by commerce clause, 155 ALR 239.

Statute or ordinance requiring solicitor to obtain license, imposing tax or fee, as contrary to commerce clause as applied to solicitor of orders for goods to be subsequently shipped in interstate commerce, 162 ALR 857.

Immunity of state and its agencies from federal taxation as affected by the governmental or nongovernmental character of the particular functions involved, 163 ALR 542.

Decision of United States Supreme Court that insurance is interstate commerce as affecting state statutes relating to foreign insurance companies, 164 ALR 500.

Jurisdiction of state court over actions involving patents, 167 ALR 1114.

Break in transit in interstate commerce as affecting immunity of goods from local taxation, 171 ALR 283.

State tax on or in respect of goods shipped in interstate commerce to consignee for sale on consignor's account without previous sale or order for purchase, 4 ALR2d 244.

Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail instalment contracts, 10 ALR2d 447.

Loading or unloading interstate freight in performance of obligation resting upon one other than interstate carrier as interstate commerce as regards local taxation, 10 ALR2d 651.

Subjecting radio broadcasting business to local taxation as burden on commerce, 11 ALR2d 986.

State law or state court decisions as governing, or as rule of decision in federal court, in passing upon question as to what property passes to trustee in bankruptcy under § 70(a)(5) of the Bankruptcy Act, 16 ALR2d 839.

Application and effect of "shop right rule" or license giving employer limited rights in employees' inventions and discoveries, 61 ALR2d 356.

Validity, under Federal Constitution, of state tax on, or measured by, income of foreign corporation, 67 ALR2d 1322.

Apportionment and computation of profits for which copyright infringer is liable, 2 ALR3d 1211.

Prospective assignment of renewal rights in copyright, 2 ALR3d 1403.

What constitutes uttering and passing counterfeit obligation or other security of the United States, with intent to defraud, under 18 USC § 472, 3 ALR3d 1051.

Common-law copyright in the spoken word, 32 ALR3d 618.

Literary property in lectures, 38 ALR3d 779.

Validity of municipal ordinance imposing income tax or license upon nonresident in taxing jurisdiction (commuter tax), 48 ALR3d 343.

Validity, construction, and effect of state franchising statute, 67 ALR3d 1299.

Validity and construction of statute or ordinance requiring return deposits on soft drink or similar containers, 73 ALR3d 1105.

When does statute of limitations begin to run against action for wrongful appropriation of literary property or idea, 79 ALR3d 820.

Validity of state or local regulation dealing with resale of tickets to theatrical or sporting events, 81 ALR3d 655.

Construction, application, and operation of state "retaliatory" statutes imposing special taxes or fees on foreign insurers doing business within the state, 30 ALR4th 873.

Construction and effect of provision of employment contract giving employer right to inventions made by employee, 66 ALR4th 1135.

Workers' compensation: recovery for home service provided by spouse, 67 ALR4th 765.

Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution, 98 ALR5th 167.

Award of attorneys' fees pursuant to § 615(e)(4) of the Education of the Handicapped Act (20 USCS § 1415(e)(4), as amended by the Handicapped Children's Protection Act of 1986, 87 ALR Fed. 500.

Copyright protection for private letters, 87 ALR Fed. 871.

What constitutes a "compilation" subject to copyright protection — modern cases, 88 ALR Fed. 151.

Excuse of omission of copyright notice under 17 USCS § 405, 91 ALR Fed. 336.

Interest on award of damages and profits for federal copyright infringement, 91 ALR Fed. 839.

Burden and sufficiency of proof under

“first sale” doctrine in prosecution for copyright infringement, 94 ALR Fed. 101.

Review by federal civil courts of court-martial convictions—modern status, 95 ALR Fed. 472.

Section 9.

[Limitations upon Powers of Congress]

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Cross references. — State guarantee of writ of habeas corpus, Ga. Const. 1983, Art. I, Sec. I, Para. XV and Ch. 14, T. 9.

Editor's notes. — U.S. Const., art. I, sec. IX, cl. 1 referred to slave trade and was rendered obsolete by U.S. Const., amend. 13. U.S. Const., art. I, sec. IX, cl. 4 has been modified by U.S. Const., amend. 16.

Law reviews. — For article, “Georgia Water Law: Use and Control Factors,” see 19 Ga. B.J. 119 (1956). For article, “The Law of the Land,” focusing on the role of the

Supreme Court, see 6 J. of Pub. L. 444 (1957). For article, “The Legal Status of the American Communist Party: 1965,” see 15 J. of Pub. L. 94 (1966). For article discussing Georgia's habeas corpus statutes in light of federal courts' requirements of exhaustion of state remedies prior to entertaining a habeas petition, see 9 Ga. St. B.J. 29 (1972). For article, “Power, Idealism, and Compromise: The Coordinate Branches and the Writ of Habeas Corpus,” see 26 Emory L.J. 149 (1977). For article, “Problems in Search of

Principles: The First Amendment in the Supreme Court from 1791-1930," see 35 Emory L.J. 59 (1986). For article, "Congress: The Purse, the Purpose, and the Power," 21 Ga. L. Rev. 1 (1986). For lecture, "Government, Society, and Anarchy," see 38 Mercer L. Rev. 753 (1987). For survey of Eleventh Circuit cases on evidence, see 39 Mercer L. Rev. 1259 (1988). For article, "Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860," see 39 Emory L.J. 65 (1990). For article, "Federal and State 'State Action': The Undercritical Embrace of a Hypercriticized Doctrine," see 24 Ga. L. Rev. 327 (1990). For annual eleventh circuit survey of constitutional law — civil, see 43 Mercer L. Rev. 1075 (1992). For article, "Slavery and Race: New Ideas and Enduring Shibboleths in the Interpretation of the American Constitutional System," see 44 Mercer L. Rev. 637 (1993).

For note, "In Search of the Optimum Writ: A Suggestion for the Improvement of

Federal Habeas Corpus," see 22 J. of Pub. L. 465 (1973). For note, "Uncertain Waters: Tennard v. Dretke Provides Swells of Protection for the Mentally Deficient But May Cause Rising Tides of Frivolous Claims," see 56 Mercer L. Rev. 1483 (2005).

For comment on *Winston v. State*, 186 Ga. 573, 198 S.E. 667 (1938), see 1 Ga. B.J. 46 (1939). For comment discussing *Rowe v. Peyton*, 383 F.2d 709 (4th Cir. 1967), as to the availability of habeas corpus to test the validity of a sentence to commence in futuro, see 2 Ga. L. Rev. 116 (1967). For comment on *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831 (1972), see 24 Mercer L. Rev. 491 (1973). For comment discussing interpretation of ex post facto clause, see 28 Emory L.J. 429 (1979). For comment on revival prosecutions and the ex post facto clauses, see 50 Emory L.J. 397 (2001). *Garner v. Jones*: Restricting prisoners' ex post facto challenges to changes in parole systems, see 52 Mercer L. Rev. 761 (2001).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

BILL OF ATTAINDER

HABEAS CORPUS

EX POST FACTO LAWS

APPROPRIATIONS

General Consideration

Cited in *Edwards v. Smyly*, 170 Ga. 487, 153 S.E. 184 (1930); *Consolidated Utils. Co. v. Commissioner*, 84 F.2d 548 (5th Cir. 1936); *Williams v. Ragsdale*, 209 Ga. 274, 53 S.E.2d 339 (1949); *St. Clair v. Hiatt*, 83 F. Supp. 585 (N.D. Ga. 1949); *Sinclair v. Hiatt*, 86 F. Supp. 828 (N.D. Ga. 1949); *Sweeney v. Hiatt*, 89 F. Supp. 416 (N.D. Ga. 1949); *Compagna v. Hiatt*, 100 F. Supp. 74 (N.D. Ga. 1951); *Ivy v. Ferguson*, 82 Ga. App. 600, 62 S.E.2d 191 (1950); *United States v. Raines*, 189 F. Supp. 121 (M.D. Ga. 1960); *Bolton v. State*, 220 Ga. 632, 140 S.E.2d 866 (1965); *Johnson v. State*, 134 Ga. App. 67, 213 S.E.2d 170 (1975); *Bell v. Bell*, 237 Ga. 464, 228 S.E.2d 850 (1976); *Centrif Air Mach. Co. v. Chilivis*, 239 Ga. 253, 236 S.E.2d 606 (1977); *High Ol' Times, Inc. v. Busbee*, 449 F. Supp. 364 (N.D. Ga. 1978); *Joyner v. Golden Dome Inv. Co.*, 7 Bankr. 596 (Bankr. M.D. Ga. 1980); *High Ol' Times,*

Inc. v. Busbee, 515 F. Supp. 176 (N.D. Ga. 1980); *Sorora-Gonzales v. Civiletti*, 515 F. Supp. 1049 (N.D. Ga. 1981); *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982); *Chancey v. State*, 256 Ga. 415, 349 S.E.2d 717 (1986).

Bill of Attainder

Statutory incentive program not bill of attainder. — Federal statutory incentive for physicians to become "participating" Medicare physicians (providing Medicare enrollees with lists of the specialties and phone numbers of participating physicians, more efficient processing of claims and the recognition of increased billing charges to non-Medicare patients in future calculations of participating physicians' "customary" charges) and a statutory enforcement mechanism (civil fines for raising fees and/or barring nonparticipating physicians from treating Medicare patients for a period up to

five years) did not constitute a bill of attainder. *Whitney v. Heckler*, 780 F.2d 963 (11th Cir.), cert. denied, 479 U.S. 813, 107 S. Ct. 65, 93 L. Ed. 2d 23 (1986).

Discovery. — The amended discovery procedure of O.C.G.A. § 17-16-1 et seq. is not a bill of attainder, which refers to legislative imposition of punishment on specific persons or on class of persons without any judicial proceeding. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

Removal of county commissioner from office. — Local act, which had the effect of removing a county commissioner from office before the end of the two-year term to which she had been appointed to fill a vacancy left by a deceased commissioner, was a bill of attainder prohibited by both the Georgia and United States Constitutions. *Fulton v. Baker*, 261 Ga. 710, 410 S.E.2d 735 (1991).

Local deannexation statute that included the area of the city in which the mayor resided, making the mayor ineligible to hold office, was not an unconstitutional bill of attainder because it neither singled out the mayor nor punished the mayor as an officeholder. *Lee v. City of Villa Rica*, 264 Ga. 606, 449 S.E.2d 295 (1994).

Federal statute on firearm possession constitutional. — Federal statute prohibiting anyone convicted of a domestic violence misdemeanor from possessing or receiving a firearm did not impose punishment in violation of the bill of attainder clause. *National Ass'n of Gov't Employees v. Barrett*, 968 F. Supp. 1564 (N.D. Ga. 1997), aff'd sub nom *Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998).

Habeas Corpus

Nature of writ of habeas corpus. — The great writ of habeas corpus has not been, and could not be, suspended by Congress in the absence of a rebellion or invasion. The great writ is of such antiquity that its origin is unknown, but from its inception as a writ designed to put people in jail rather than to get them out its status has been far from static. It is not subject to argument that the great writ cannot be suspended in times of peace, but the proposition is also undebatable that it ought not to be abused in times of war or peace. The right to the writ has never been absolute. The statute from 1789 until the present has required

that for the writ to issue it must be “agreeable to the principles and usages of law.” The petition must be in writing and under oath. *Martin v. Hiatt*, 174 F.2d 350 (5th Cir. 1949).

Prisoner's right to attack detainer or sentence not yet served. — Prisoners in custody under one sentence may attack a sentence which they have not yet begun to serve. A petitioner held in one state may attack a detainer lodged against him by another state. A petitioner can bring his action attacking his sentence in the court that imposed the sentence. *Callahan v. State*, 235 Ga. 359, 219 S.E.2d 717 (1975).

Appointment of counsel for habeas corpus petitioner. — Since habeas corpus is not a criminal proceeding, neither the U.S. Const., amend. 6 nor the Georgia Constitution requires the appointment of counsel for a habeas corpus petitioner. *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Defendant has no right to receive or spend state funds for appointment of experts or investigators in habeas corpus proceedings, including death penalty cases. *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Appropriate remedy for cruel and unusual punishment. — Assuming arguendo that prisoner's allegations of mistreatment demonstrate cruel and unusual punishment, he still would not be entitled to release from prison, the appropriate remedy being to enjoin continuance of any practices or to require correction of any conditions causing him cruel and unusual punishment. *Cook v. Hanberry*, 596 F.2d 658 (5th Cir.), cert. denied, 442 U.S. 932, 99 S. Ct. 2866, 61 L. Ed. 2d 301 (1979).

Error that deprives defendant of constitutional right, unless waived according to law, may be raised on application for habeas corpus. *Rachel v. State*, 247 Ga. 130, 274 S.E.2d 475 (1981).

“Intentional abandonment or withholding” doctrine obtains on a second habeas corpus petition only if petitioner has not previously presented the ground for relief in a federal habeas corpus proceeding. *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir. 1986), cert. denied, 490 U.S. 1028, 109 S. Ct. 1764, 104 L. Ed. 2d 200 (1989).

Habeas Corpus (Cont'd)

Procedural limitations. — The procedural limitations of O.C.G.A. § 40-13-33(a) and (b) neither suspend the writ of habeas corpus, nor cause a court to dismiss an action for habeas without consideration of the equities presented. Rather, the statute provides that in a narrowly defined class of cases — those in which a petitioner who is not in custody seeks habeas relief from a misdemeanor traffic conviction — the petition for habeas corpus must be filed within 180 days of conviction. As such, it imposes a permissible procedural restriction on a limited group of cases. *Earp v. Boylan*, 260 Ga. 112, 390 S.E.2d 577 (1990).

The federal Antiterrorism and Effective Death Penalty Act of 1996, which, inter alia, requires a habeas petitioner to obtain leave from the appellate court before filing a second habeas petition in the district court, constitutes a restraint on abuse of the habeas writ and does not “suspend” the writ in violation of clause 2 of this section. *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996).

Ex Post Facto Laws

An ex post facto law is a retrospective criminal or penal measure that is disadvantageous to the offender because it may impose greater punishment. *United States v. Reed*, 924 F.2d 1014 (11th Cir. 1991).

Applicability to penal statutes only. — The ex post facto provision of the federal constitution applies only to penal statutes, and could not reach the Tort Claim’s Act’s provision for immunity for prison officials for negligence occurring prior to the act’s enactment. *Datz v. Brinson*, 208 Ga. App. 455, 430 S.E.2d 823 (1993).

Ex post facto laws affect substantive right of accused. — Upon the defendant’s constitutional challenge to the retrospective application of three provisions of the Criminal Justice Act, Ga. Laws 2005, p. 20, no reversible error resulted from challenges to the closing arguments and admission of character evidence, as: (1) the former was not distinctly ruled upon by the lower court; and (2) the lower court sustained objections to the admissibility of character evidence, and, thus, the state could not introduce character evidence regarding the defendant’s prior

criminal convictions; moreover, a change in the number of the defendant’s peremptory challenges by the Act did not affect any protected right by the application of the amended version of O.C.G.A. § 15-12-165, as strikes were procedural and not substantive in nature. *Madison v. State*, 281 Ga. 640, 641 S.E.2d 789 (2007).

Law that is merely procedural and does not add to the quantum of punishment cannot violate the ex post facto clause even if it is applied retrospectively. *United States v. Reed*, 924 F.2d 1014 (11th Cir. 1991).

School contract unaffected by subsequent enactment. — A contract made and indebtedness incurred by county superintendent of schools in 1918, on behalf of county board of education, for school supplies and furnishings, which were placed in schoolhouses of county and put to use by pupils thereof, was prior to enactment of Code 1933, § 32-928 (see O.C.G.A. § 20-2-504), and therefore is not void under such provisions, the same not being construed as being applicable to contracts made before its passage. *Board of Educ. v. Southern Mich. Nat’l Bank*, 184 Ga. 641, 192 S.E. 382 (1937).

Discovery. — The amended discovery procedure of O.C.G.A. § 17-16-1 et seq. is not an ex post facto law because it affects purely procedural rights and duties. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

Ex post facto laws prohibited by state and federal Constitutions refer only to laws which aggravate the crime, increase the punishment, or allow conviction on a lesser or different weight of evidence, and not to those which reduce or mollify the penalty. *Barton v. State*, 81 Ga. App. 810, 60 S.E.2d 173 (1950).

Even though a statute, passed after a conviction, uses the conviction as an element of a future offense, this is not an ex post facto law, because the defendant’s punishment for the earlier conviction is not increased, since the statute punishes only for a future offense, and that punishment is rationally enhanced by the prior conviction. *State v. Dean*, 235 Ga. App. 847, 510 S.E.2d 605 (1998).

Amendment changing retroactive effect of prior amendment. — An amendment which changed the retroactive effect of an earlier amendment to O.C.G.A. § 40-5-67.1, the implied consent warning law, so that it applied

only to stops made after the effective date of the earlier amendment, rather than to cases pending on such date, did not violate federal or state *ex post facto* constitutional provisions. *State v. Martin*, 266 Ga. 244, 466 S.E.2d 216 (1996).

Retroactive operation of county zoning plan. — In passing a comprehensive zoning plan and amending it, whereby properties of parties were classified for use as agricultural residential district, board of county commissioners did so under the police power, and action of board in changing the use classification of defendants' property from agricultural use to that of apartment use does not deny plaintiffs equal protection of law, nor operate retroactively in violation of federal and state constitutional provisions prohibiting passage of *ex post facto* laws, nor does such action deny plaintiffs equal protection of law in violation of U.S. Const., amend. 14. *Morgan v. Thomas*, 207 Ga. 660, 63 S.E.2d 659 (1951).

Validity of zoning ordinance. — Because plaintiff, while proceeding to zone property was pending, filed application to authorize building of filling station, and ordinance was later adopted zoning plaintiff's property for residential purposes, such ordinance was not in violation of the federal and state Constitutions as an *ex post facto* or retroactive law. *Gay v. Mayor of Lyons*, 212 Ga. 438, 93 S.E.2d 352 (1956).

As a general rule, any law is *ex post facto* which is enacted after offense was committed, and which, in relation to offense or its consequences, alters the situation of the accused to his disadvantage. A statute, however, cannot be an *ex post facto* law if it is apparent that Legislature in enacting the statute did not make criminal an act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence and require less or different evidence than the law required at time of commission of offense; and did not deprive the accused of any substantial right or immunity he possessed at time of commission of offense. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

Validity of statute removing prior right. — Although it is the rule that no one has a

vested right in a mere mode of procedure, so that a statute merely regulating procedure and leaving untouched all substantial protections with which existing law surrounds the person accused of crime is not within the constitutional prohibition against *ex post facto* laws, yet a statute is void and ineffective as related to previous offenses if it takes from the accused a substantial right given to the accused by law in force at the time to which guilt relates, and such statute cannot be sustained simply because, in a general sense, it may be said to regulate procedure. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

Effect of amending statute governing dates of terms of court. — Amendment of a statutory provision so as to change the dates of commencement of terms of court was not an *ex post facto* law as applied to defendant, who was not at any time entitled to discharge and acquittal of the offenses with which the defendant was charged. *Aspinwall v. State*, 201 Ga. App. 203, 410 S.E.2d 388 (1991).

In order for statute to violate prohibition against *ex post facto* laws, it must affect substantive right of accused. An accused does not have a vested right in a mere mode of procedure. *Eades v. State*, 232 Ga. 735, 208 S.E.2d 791 (1974).

O.C.G.A. § 17-10-1 did not implicate *ex post facto* concerns since an inmate could not have had a substantial right to receive probation, and the revocation of an inmate's probation did not inflict a greater punishment than was permitted at the times the offenses were committed; *Jones v. State*, 260 Ga. App. 401, 579 S.E. 2d 827 (2003), was overruled. *Postell v. Humphrey*, 278 Ga. 651, 604 S.E.2d 517 (2004).

Validity of statute altering procedural conduct of criminal trials. — If the changes effected by enactment of a law constitute merely an alteration in conditions deemed necessary for the orderly and just conduct of criminal trials, they do not deprive defendant of any substantial personal right within meaning of constitutional prohibitions of *ex post facto* laws. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

Statute reducing peremptory strikes. — Retroactive application of O.C.G.A. § 15-12-165's amended reduction of the number of per-

Ex Post Facto Laws (Cont'd)

emptory strikes from 20 to 12 did not violate ex post facto clause, as number of peremptory challenges is solely matter of procedure. *Seats v. State*, 210 Ga. App. 74, 435 S.E.2d 286 (1993).

Jury determination of sentence is not a substantive right coming within proscriptions of ex post facto laws of U.S. Const., art. I, sec. IX, cl. 3. *Adkins v. State*, 134 Ga. App. 507, 215 S.E.2d 270 (1975); *Mealor v. State*, 134 Ga. App. 564, 215 S.E.2d 272 (1975).

Effect of amending statute to reduce number of peremptory jury challenges. — The application to a criminal defendant of the statutory amendment reducing the number of the defendant's peremptory strikes did not violate the constitutional prohibition against ex post facto laws. *Stargel v. State*, 210 Ga. App. 619, 436 S.E.2d 786 (1993).

Effect of amending statute to reduce number of impaneled jurors. — Application of the 1992 amendment to O.C.G.A. § 15-12-160 requiring the court to have 30, rather than 42, impaneled jurors from which the defense and prosecution may strike jurors did not violate the constitutional prohibition against ex post facto laws. *Shuler v. State*, 213 Ga. App. 790, 446 S.E.2d 225 (1994).

Ex post facto law is one that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action; or that aggravates a crime, or makes it greater than it was when committed. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), appeal dismissed and cert. denied, 435 U.S. 904, 98 S. Ct. 1448, 55 L. Ed. 2d 494 (1978); *Federal Election Comm'n v. Lance*, 635 F.2d 1132 (5th Cir.), appeal dismissed, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981).

Mail fraud convictions for conduct that started before enactment of the criminal statute and continued after the effective date thereof did not violate the ex post facto clause. *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996), cert. denied, 521 U.S. 1106, 117 S. Ct. 2483, 138 L. Ed. 2d 992 (1997), cert. denied, 522 U.S. 1014, 118 S. Ct. 598, 139 L. Ed. 2d 487 (1997).

Restriction on judicial, as well as legislative, powers. — The ex post facto clause is a limitation upon the powers of the Legisla-

ture; but the principle on which the clause is based — the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the due process clause. An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law which U.S. Const., art. I, sec. IX, cl. 3 forbids. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904, 98 S. Ct. 1448, 55 L. Ed. 2d 494 (1978).

Retroactive application of note to sentencing guideline. — A note to the United States Sentencing Guidelines, although it took effect after an alien had been sentenced, did not violate the ex post facto clause because the application note was added to clarify an existing guideline, and such a note does not have the force of law, as does a guideline. Thus, the note did not change the law. *United States v. Adeleke*, 968 F.2d 1159 (11th Cir. 1992).

Habitual violator statute allowing consideration of offenses which occurred before enactment of statute is not ex post facto. — The repetition of the criminal conduct aggravates offender's guilt and justifies heavier penalties when he is again convicted, and the penalty is imposed only for the new crime but is heavier if the offender is a habitual violator. The increased penalty is for the latest crime which is considered to be an aggravated offense because it is repetitive. *Cofer v. Crowell*, 146 Ga. App. 639, 247 S.E.2d 152 (1978).

Validity of post-sentence action delaying eligibility for parole. — Although changes in a statute or regulations that are procedural or remedial in nature may apply retroactively, official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription. *United States ex rel. Graham v. United States Parole Comm'n*, 629 F.2d 1040 (5th Cir. 1980).

Validity of statute or regulations affecting prisoner's substantive right to parole. — If the Parole Commission and Reorganization Act (18 U.S.C. § 4201 et seq.) or the regulations promulgated thereunder effectuate only a procedural change in the manner in which the Parole Commission determines

prisoner's eligibility for parole, then the statute and the regulations may be applied retroactively; if, however, the statute or the regulations affect prisoner's substantive right to parole eligibility, neither can be so applied retroactively without violating the ex post facto clause. Because parole regulations were amended to provide that after an interim hearing a presumptive release date or the date of a four-year reconsideration hearing shall not be advanced except under clearly exceptional circumstances, case involving petition for habeas corpus and mandamus was remanded for determination of whether the "clearly exceptional circumstances" test affected prisoner's substantive right to parole eligibility in violation of ex post facto clause. *United States ex rel. Graham v. United States Parole Comm'n*, 629 F.2d 1040 (5th Cir. 1980).

Retroactive change in the method for calculating the tentative parole month. — Retroactive application of Rule 475-3-.05 (2) of the Board of Pardons and Paroles, allowing the board to extend the interval between parole reconsiderations up to a period of eight years for an inmate serving a life sentence, does not violate the ex post facto clause of the United States Constitution. *Ray v. Jacobs*, 272 Ga. 760, 534 S.E.2d 418 (2000).

It is not a violation of ex post facto clause for individual to be sentenced to a penalty less harsh than the one it appeared the defendant would be subjected to, and was given notice of, at the moment of the crime. *Federal Election Comm'n v. Lance*, 617 F.2d 365 (5th Cir. 1980), appeal dismissed, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1980).

Application of the 1984 amendment to Rule 704 of the Federal Rules of Evidence, restricting expert testimony as to the legal insanity of the accused, to a case involving offenses occurring prior to the effective date of the amendment, did not violate equal protection nor the ex post facto clause. *United States v. Alexander*, 805 F.2d 1458 (11th Cir. 1986).

Enhanced sentencing statute for DUI. — Defendant who committed a DUI offense on November 11, 1990, was improperly subjected to the enhanced sentencing provisions contained in O.C.G.A. § 40-6-391(c)(3)(A), which did not become effective until January 1, 1991. *Holtapp v. City of Fayetteville*, 208 Ga. App. 606, 431 S.E.2d 403 (1993).

Election of application of ex post facto law. — Application of the life-without-parole statute to defendant did not violate ex post facto prohibitions where the defendant expressly elected the application, and the statute did not establish a greater penalty or alter the situation to the defendant's disadvantage. *Brantley v. State*, 268 Ga. 151, 486 S.E.2d 169 (1997), cert. denied, 522 U.S. 985, 118 S. Ct. 449, 139 L. Ed. 2d 384 (1997).

Firearm prohibition based on criminal activity. — Federal statute prohibiting anyone convicted of a domestic violence misdemeanor from possessing or receiving a firearm did not violate the ex post facto clause. *National Ass'n of Gov't Employees v. Barrett*, 968 F. Supp. 1564 (N.D. Ga. 1997), aff'd sub nom. *Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998).

Appropriations

Federal Department of Health and Human Services could not be compelled to pay federal funds contrary to the Hyde Amendment. — Congressional funding restrictions directing that no federal funds appropriated to pay the federal share of the Medicaid program were to be used to finance certain abortions — to reimburse the state for funds it expended for medically necessary abortions performed during the period when it was required to fund such abortions pursuant to court order, under the mistaken rationale that the state was liable, under federal law, to fund such abortions even absent federal financial participation. *Georgia ex rel. Dep't of Medical Assistance v. Heckler*, 768 F.2d 1293 (11th Cir. 1985), cert. denied, 474 U.S. 1059, 106 S. Ct. 803, 88 L. Ed. 2d 779 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Determination of existence of process of exportation. — Under decisions of the United States Supreme Court, the federal

Constitution gives tax immunity to the process of exportation; this process begins at that point where there is a manifest certainty

that the destination of the goods is a foreign country. This certainty is established when the goods are delivered to a common carrier consigned to a destination abroad even

though title may pass in this state; in a proper case this certainty may exist when the purchaser takes actual delivery in this state. 1960-61 Op. Att'y Gen. p. 552.

RESEARCH REFERENCES

ALR. — Constitutional or statutory changes affecting grand jury or substituting information for indictment as an ex post facto law, 53 ALR 716.

Effect of statutory change of penalty or punishment after conviction, 55 ALR 443.

Constitutionality of retroactive statute curing defect in private instrument purporting to convey title or create interest in property or as to filing or recording thereof, 57 ALR 1197.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 82 ALR 345; 116 ALR 209; 132 ALR 91; 139 ALR 673.

Retrospective operation of statutes relating to alimony or suit money in divorce, 97 ALR 1188.

Constitutionality of retroactive statute imposing excise, license, or privilege tax, 146 ALR 1011.

Constitutionality of retrospective statutes as regards chattel mortgages, 146 ALR 1100.

Retroactive application, to previous sales, of statutes reducing period of redemption from tax sales, as unconstitutional impairment of contract obligations, 147 ALR 1123.

Retrospective statute subjecting interests of trust beneficiaries to claims of creditors, 151 ALR 1417.

Constitutionality of retroactive statute limiting time for duration or enforcement of existing mortgage, or other real estate lien, or ground rent, 158 ALR 1043.

Effect, as to prior offenses, of amendment increasing punishment for crime, 167 ALR 845.

Power to abolish or discontinue office, 172 ALR 1366.

Retrospective operation of criminal negligence statute, 14 ALR2d 726.

Retrospective operation of legislation affecting estates by the entireties, 27 ALR2d 868.

Retroactive effect of statute fixing minimum value of corporate stock shares or otherwise affecting power of corporation to change par value of existing shares, 54 ALR2d 1289.

Effect of simultaneous repeal and re-enactment of all, or part, of legislative Act, 77 ALR2d 336.

Retroactive effect of statute which imposes, removes, or changes a monetary limitation of recovery for personal injury or death, 98 ALR2d 1105.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence, 37 ALR3d 1438.

Retroactive effect of zoning regulation, in absence of saving clause, on validly issued building permit, 49 ALR3d 13.

Zoning provisions protecting land owner who applies for or received building permit prior to change in zoning, 49 ALR3d 1150.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR3d 564.

Validity of statutory classifications based on population — tax statutes, 98 ALR3d 1083.

Validity, construction, and application of § 504 of Labor-Management Reporting and Disclosure Act (29 USCS § 504), precluding certain convicted persons from serving in union office for specified period, 98 ALR Fed. 481.

Section 10.

[Restrictions upon Powers of States]

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any

Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Cross references. — Bills of attainder, ex post facto laws, or laws which impair the obligations of contracts, Ga. Const. 1983, Art. I, Sec. I, Para. X and § 1-3-5. Authorization for state militia, Ga. Const. 1983, Art. III, Sec. VI, Para. II. Contracts declared unenforceable at law, §§ 13-8-1, 13-8-2. Cooperation with other states generally, Ch. 6, T. 28.

Law reviews. — For article, "Constitutionality of Economic Regulations," see 2 J. of Pub. L. 98 (1953). For article discussing Georgia alimony provisions allowing modification of judgments with respect to federal and state constitutional limitations, see 18 Ga. B.J. 153 (1955). For article, "Patterns of Social Legislation: Reflections on the Welfare State," see 6 J. of Pub. L. 3 (1957). For article, "The Subject-Matter Limitation Upon the Treaty-Making Power," see 11 J. of Pub. L. 122 (1962). For article, "Consolidation by Compact: A Remedy for Preemption of State Food and Drug Laws," see 14 J. of Pub. L. 276 (1965). For article discussing the constitutional parameters of state efforts to stimulate international trade, see 27 Mercer L. Rev. 391 (1976). For article, "The Development of Nonprofit Corporation Law and an Agenda for Reform," see 34 Emory L.J. 617 (1985). For article, "Georgia and the Development of Constitutional Principles: An Essay in Honor of the Bicentennial," see 24 Ga. St. B.J. 6 (1987). For article, "Metaphor and Paradox," see 23 Ga. L. Rev. 1053 (1989). For article, "Ideology, Religion, and the Constitutional Protection of Private

Property: 1760-1860," see 39 Emory L.J. 65 (1990). For article, "Federal and State 'State Action': The Undercritical Embrace of a Hypercriticized Doctrine," see 24 Ga. L. Rev. 327 (1990). For annual eleventh circuit survey of constitutional law — civil, see 43 Mercer L. Rev. 1075 (1992). For article, "Of Rocks and Hard Places: The Value of Risk Choice," see 42 Emory L.J. 1 (1993). For survey of 1995 Eleventh Circuit cases on constitutional civil law, see 47 Mercer L. Rev. 745 (1996).

For note, "Annexation by Municipalities in Georgia," see 2 Mercer L. Rev. 423 (1951). For note, "Lapse or Continuation of Local Constitutional Amendments Under the Constitution of 1983," see 21 Ga. St. B.J. 78 (1984). For note, "Water Wars in the Southeast: Alabama, Florida, and Georgia Square Off Over the Apalachicola Chattahoochee-Flint River Basin," see 9 Ga. St. U.L. Rev. 689 (1993).

For comment on *Watson v. Employer's Liab. Assurance Corp.*, 348 U.S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1954), holding that a statute allowing a direct action by the policy holder against the insurer contrary to the terms of the contract and requiring the consent of the insurer to such action as a prerequisite of doing business in the state was not violative of the Constitution, see 17 Ga. B.J. 529 (1955). For comment discussing state intervention in contracts between private parties, under the contract clause, in light of *Willys Motors v. Northwest Kaiser-Willys*, 142 F. Supp. 469 (D. Minn.

1956), see 6 J. of Pub. L. 250 (1957). For comment on *Sanders v. Harper*, 220 Ga. 649, 141 S.E.2d 156 (1965), see 17 Mercer L. Rev. 311 (1965). For comment on *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976), see 27 Mercer L.

Rev. 1237 (1976). For comment discussing interpretation of ex post facto clause, see 28 Emory L.J. 429 (1979). For comment, "Private Citizens in Foreign Affairs: A Constitutional Analysis," see 36 Emory L.J. 285 (1987).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EX POST FACTO LAWS

1. CIVIL

2. CRIMINAL

IMPAIRMENT OF CONTRACTS

DUTIES ON IMPORTS

General Consideration

Interstate Agreement on Detainers is congressionally sanctioned interstate compact within the context of the compact clause of the United States Constitution. The agreement is, thus, considered a law of the United States. *Seymore v. Alabama*, 846 F.2d 1355 (11th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S. Ct. 816, 102 L. Ed. 2d 806 (1989).

Cited in *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930); *Perkins v. Mayor of Madison*, 175 Ga. 714, 165 S.E. 811 (1932); *Trotzler v. McElroy*, 182 Ga. 719, 186 S.E. 817 (1936); *Hollis v. Jones*, 184 Ga. 273, 191 S.E. 127 (1937); *West v. Trotzler*, 185 Ga. 794, 196 S.E. 902 (1938); *Campbell v. Red Bud Consol. Sch. Dist.*, 186 Ga. 541, 198 S.E. 225 (1938); *Cooper Co. v. State*, 187 Ga. 497, 1 S.E.2d 436 (1939); *Salter v. Bank of Commerce*, 189 Ga. 328, 6 S.E.2d 290 (1939); *National Sur. Corp. v. Gatlin*, 192 Ga. 293, 15 S.E.2d 180 (1941); *FDIC v. Beasley*, 193 Ga. 727, 20 S.E.2d 23 (1942); *Thompson v. Atlantic Coast Line R.R.*, 200 Ga. 856, 38 S.E.2d 774 (1946); *Mayor of Savannah v. Savannah Distrib. Co.*, 202 Ga. 559, 43 S.E.2d 704 (1947); *Co-Op Cab Co. v. Settle*, 171 F.2d 40 (5th Cir. 1948); *South W.R.R. v. Benton*, 206 Ga. 770, 58 S.E.2d 905 (1950); *Bender v. Anglin*, 207 Ga. 108, 60 S.E.2d 756 (1950); *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952); *City of Atlanta v. Anglin*, 209 Ga. 170, 71 S.E.2d 419 (1952); *MacNeill v. Fulton County*, 210 Ga. 119, 78 S.E.2d 40 (1953); *Crawford v. Irwin*, 211 Ga. 241, 85 S.E.2d 8 (1954); *Harper v. City Council*, 212 Ga. 605,

94 S.E.2d 690 (1956); *Southern Ry. v. Georgia Pub. Serv. Comm'n*, 218 Ga. 157, 127 S.E.2d 12 (1962); *Stephenson v. State*, 219 Ga. 652, 135 S.E.2d 380 (1964); *Henson v. Georgia Indus. Realty Co.*, 220 Ga. 857, 142 S.E.2d 219 (1965); *Webb v. Whitley*, 221 Ga. 618, 146 S.E.2d 722 (1966); *Moore v. Moore*, 225 Ga. 340, 168 S.E.2d 318 (1969); *Bugden v. Bugden*, 225 Ga. 413, 169 S.E.2d 337 (1969); *Stith v. Hudson*, 226 Ga. 364, 174 S.E.2d 892 (1970); *Stith v. Hudson*, 231 Ga. 520, 202 S.E.2d 392 (1973); *Centrif Air Mach. Co. v. Chilivis*, 239 Ga. 253, 236 S.E.2d 606 (1977); *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 240 Ga. 743, 242 S.E.2d 69 (1978); *Stith v. Morris*, 241 Ga. 247, 244 S.E.2d 817 (1978); *Newsome v. Richmond County*, 246 Ga. 300, 271 S.E.2d 203 (1980); *Stinchcomb v. Clayton County Water Auth.*, 177 Ga. App. 558, 340 S.E.2d 217 (1986); *Baldwin v. Ledbetter*, 647 F. Supp. 623 (N.D. Ga. 1986).

Ex Post Facto Laws

1. Civil

Validity of statute affecting or changing remedy only. — Statute which changes or affects remedy only and does not destroy or impair vested rights is not unconstitutional as impairing obligation of contract, although it may be retroactive and although, in changing or modifying the remedy, the rights of the parties may be incidentally affected. *Morris v. Interstate Bond Co.*, 180 Ga. 689, 180 S.E. 819 (1935).

Validity of statute eliminating disability payments. — Former Code 1933, § 78-911

(see O.C.G.A. § 47-17-81), which eliminated, under certain conditions, payment for permanent or total disability, did not violate constitutional provisions providing that no ex post facto law, retroactive law, or law impairing the obligation of contracts shall be passed, because in passing former Code 1933, § 78-917 (see O.C.G.A. § 47-17-101) the legislature specifically provided that all rights and benefits conferred would be subject to future legislative change or revision, and that no beneficiary would be deemed to have any vested right to any annuities or benefits provided therein. *Prichard v. Board of Comm'rs of Peace Officers Annuity & Benefit Fund*, 211 Ga. 57, 84 S.E.2d 26 (1954).

Validity of zoning ordinance. — Because plaintiff, while proceeding to zone property was pending, filed application to authorize building of filling station, and ordinance was later adopted zoning plaintiff's property for residential purposes, such ordinance was not in violation of the federal and state Constitutions as an ex post facto or retroactive law. *Gay v. Mayor of Lyons*, 212 Ga. 438, 93 S.E.2d 352 (1956).

Statute is retroactive if it creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. — A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative and ascribes to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character. *Todd v. Morgan*, 215 Ga. 220, 109 S.E.2d 803 (1959); *Adams v. Adams*, 219 Ga. 633, 135 S.E.2d 428 (1964).

Validity of statute destroying vested right to property. — Former Code 1933, § 67-1308 (see O.C.G.A. § 44-14-80), providing that title to real property conveyed to secure debt should revert to grantor when debt became 20 years past due, unless debt was extended or renewed and such renewal recorded, or an affidavit setting out the facts of renewal was recorded with the conveyance, which section imposed conditions upon grantee not in existence at time of execution of the contract, divested the grantee of a vested right to the property, and impaired the obligation of the contract as

applied to such deed, which was executed prior to passage and effective date of the Act, is unconstitutional, because in violation of U.S. Const., art. I, sec. X, cl. 1 and of Ga. Const. 1945, Art. I, Sec. III, Para. II, (see Ga. Const. 1983, Art. I, Sec. I, Para. X), which prohibited this state from passing any retroactive law or any law impairing the obligations of contracts. *Todd v. Morgan*, 215 Ga. 220, 109 S.E.2d 803 (1959).

Validity of statute requiring occupation tax payment pending license application. — It is competent for the legislature to enact that a person entering upon business or occupation upon which a tax provided in ordinance has been imposed, by the terms thereof, should pay the amount of the tax named for the year, or for any period of time within the year, during which the person should choose to apply for a license. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

2. Criminal

Phrase "ex post facto" applies to criminal, not civil, cases. *Hayes v. Howell*, 251 Ga. 580, 308 S.E.2d 170 (1983).

Passing on validity of constitutional amendment not affecting petitioner's rights. — In habeas corpus proceeding based on alleged invalidity of constitutional amendment placing power of granting pardons and paroles in Board of Pardons and Paroles rather than Governor, court would not pass on constitutionality of amendment, since even if it were unconstitutional the prior provision would be in effect, and petitioner would not be entitled to discharge. Court will not pass on constitutionality of law when it is challenged by party whose rights are not affected by it. *Whittle v. Jones*, 198 Ga. 538, 32 S.E.2d 94 (1944), appeal dismissed, 324 U.S. 829, 65 S. Ct. 915, 89 L. Ed. 1396 (1945).

Avoidance of construction rendering amendment void as ex post facto law. — Because a constitutional amendment placing power to grant pardons in Board of Pardons and Paroles instead of Governor was silent as to whether it applied to persons previously convicted, amendment would not be given retroactive operation as to those persons if such construction would render amendment void as an ex post facto law. *Whittle v. Jones*, 198 Ga. 538, 32 S.E.2d 94

Ex Post Facto Laws (Cont'd)
2. Criminal (Cont'd)

(1944), appeal dismissed, 324 U.S. 829, 65 S. Ct. 915, 89 L. Ed. 1396 (1945).

As a general rule, any law is ex post facto which is enacted after offense was committed, and which, in relation to offense or its consequences, alters the situation of the accused to the accused's disadvantage. A statute, however, cannot be an ex post facto law if it is apparent that legislature in enacting the statute did not make criminal an act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence and require less or different evidence than the law required at time of commission of offense; and did not deprive the accused of any substantial right or immunity that the accused possessed at the time of commission of the offense. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

Delayed effective date of statute. — The application of 21 U.S.C. § 862 to deny defendant federal benefits did not violate the Constitution's ex post facto clause; although the statute applied only to persons convicted of conspiracy after September 1, 1989, it was enacted on November 18, 1988, during the course of the conspiracy, and thus defendant had adequate notice of the penalty. *United States v. Bush*, 28 F.3d 1084 (11th Cir. 1994).

Validity of statute removing prior right. — Although it is the rule that no one has a vested right in a mere mode of procedure, so that a statute merely regulating procedure and leaving untouched all substantial protections with which existing law surrounds the person accused of crime is not within the constitutional prohibition against ex post facto laws, yet a statute is void and ineffective as related to previous offenses if it takes from the accused a substantial right given to the accused by law in force at the time to which guilt relates, and such statute cannot be sustained simply because, in a general sense, it may be said to regulate procedure. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

Validity of statute altering procedural conduct of criminal trials. — Because the

changes effected by enactment of a law constitute merely an alteration in conditions deemed necessary for the orderly and just conduct of criminal trials, they do not deprive defendant of any substantial personal right within meaning of constitutional prohibitions of ex post facto laws. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

To invoke protection of ex post facto clause, appellant must show harm by showing trial court's decision would have been different had it been rendered before the decision in question. *Alexander v. State*, 139 Ga. App. 338, 228 S.E.2d 364 (1976).

Ex post facto law is one that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action; or that aggravates a crime, or makes it greater than it was when committed. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904, 98 S. Ct. 1448, 55 L. Ed. 2d 494 (1978).

Restriction on judicial, as well as legislative, powers. — The ex post facto clause is a limitation upon the powers of the legislature; but the principle on which the clause is based — the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the due process clause. An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law which U.S. Const., art. I, sec. X, cl. 1 forbids. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904, 98 S. Ct. 1448, 55 L. Ed. 2d 494 (1978).

Validity of laws not affecting legal protections of accused. — The prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional prohibition against ex post facto laws. *McSears v. State*, 247 Ga. 48, 273 S.E.2d 847 (1981).

After commission of offense, a reduction in size of jury is prohibited as an ex post facto law. *McSears v. State*, 247 Ga. 48, 273 S.E.2d 847 (1981).

Effect of amending statute to reduce number of peremptory jury challenges. — The application to a criminal defendant of the statutory amendment reducing the number of the defendant's peremptory strikes did not violate the constitutional prohibition against ex post facto laws. *Stargel v. State*, 210 Ga. App. 619, 436 S.E.2d 786 (1993).

Effect of amending statute to reduce number of impaneled jurors. — Application of the 1992 amendment to O.C.G.A. § 15-12-160 requiring the court to have 30, rather than 42, impaneled jurors from which the defense and prosecution may strike jurors did not violate the constitutional prohibition against ex post facto laws. *Shuler v. State*, 213 Ga. App. 790, 446 S.E.2d 225 (1994).

An increase in child support did not violate the ex post facto clause as applied to a defendant originally convicted of abandonment of the defendant's children and whose sentence was suspended upon condition that he pay a certain amount of child support per month, since the child support obligation was a pre-existing duty under state law and was neither a part of the sentence nor a punishment. *Hudson v. Dayton*, 770 F.2d 1558 (11th Cir. 1985).

Rules of the State Board of Pardons and Paroles are "laws" within the meaning of the ex post facto clause. *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), aff'd, 987 F.2d 775 (11th Cir. 1993), cert. denied, 501 U.S. 1260, 111 S. Ct. 2915, 115 L. Ed. 2d 1079 (1991), aff'd, 987 F.2d 775 (11th Cir. 1993).

Elimination of an annual parole reconsideration hearing violated the ex post facto clause because the amendment of rules that had required an annual hearing to provide instead for a hearing at least every eight years substantially disadvantaged a prisoner's parole eligibility. *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), aff'd, 987 F.2d 775 (11th Cir. 1993), cert. denied, 501 U.S. 1260, 111 S. Ct. 2915, 115 L. Ed. 2d 1079 (1991), aff'd, 987 F.2d 775 (11th Cir. 1993).

Retroactive change in the method for calculating the tentative parole month of certain crime severity level offenders under the parole decision guidelines did not violate the ex post facto clause because the change did not produce a sufficient risk of increasing the measure of punishment attached to the covered crimes. *Jones v. Georgia State Bd. of Pardons & Paroles*, 59 F.3d 1145 (11th Cir. 1995).

The retroactive application of amendments to the Georgia regulations governing parole consideration, Ga. Comp. R. & Regs. r. 475-3-.05.(2) (1986), violated the ex post facto clause of the United States Constitution. *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999).

The retroactive application of amendments to the Georgia regulations changing the frequency of parole reviews, Ga. Comp. R. & Regs. r. 475-3-.05.(2) (1986), does not violate the ex post facto clause of the United States Constitution. *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000).

Analysis of claims that amendments to Georgia regulations eliminating annual parole reconsideration hearings violates the ex post facto clause when applied to inmates who had been entitled to more frequent parole reconsideration at the time they committed their crimes must be made on a case-by-case basis. *Harris v. Hammonds*, 217 F.3d 1346 (11th Cir. 2000).

Enhanced sentencing statute for DUI. — Defendant who committed a DUI offense on November 11, 1990, was improperly subjected to the enhanced sentencing provisions contained in O.C.G.A. § 40-6-391(c)(3)(A), which did not become effective until January 1, 1991. *Holtapp v. City of Fayetteville*, 208 Ga. App. 606, 431 S.E.2d 403 (1993).

Election of application of ex post facto law. — Application of the life-without-parole statute to defendant did not violate ex post facto prohibitions where the defendant expressly elected the application, and the statute did not establish a greater penalty or alter the situation to the defendant's disadvantage. *Brantley v. State*, 268 Ga. 151, 486 S.E.2d 169 (1997), cert. denied, 522 U.S. 985, 118 S. Ct. 449, 139 L. Ed. 2d 384 (1997).

Impairment of Contracts

Legislature can impose upon county into which another county is merged the burden of performing the contracts and paying the debts of the merged county; an Act so providing for the performance of the contracts and payment of the debts of the merged county does not in any way impair the obligation of the contracts of the merged county

Impairment of Contracts (Cont'd)

in the sense in which that term is used in the Constitution of this state and the Constitution of the United States. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931).

Freedom of contract is a qualified and not an absolute right; there is no absolute freedom to contract as one chooses; liberty implies the absence of arbitrary restraint — not immunity from reasonable regulations. *City of Newnan v. Atlanta Laundries, Inc.*, 174 Ga. 99, 162 S.E. 497, appeal dismissed, 286 U.S. 526, 52 S. Ct. 495, 76 L. Ed. 1269 (1932).

Contracts between individuals or corporations are impaired within the meaning of U.S. Const., art. I, sec. X, cl. 1 whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. *Lynch v. United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934).

Validity of statute affecting or changing remedy only. — Statute that changes or affects a remedy only and does not destroy or impair vested rights is not unconstitutional as impairing obligation of contract, although it may be retroactive and although, in changing or modifying the remedy, the rights of the parties may be incidentally affected. *Morris v. Interstate Bond Co.*, 180 Ga. 689, 180 S.E. 819 (1935).

Contract between the state and an individual is protected by this constitutional prohibition. *Morris v. Interstate Bond Co.*, 180 Ga. 689, 180 S.E. 819 (1935).

Lien once acquired under existing law is regarded as a vested property right which may not be impaired by subsequent legislation. *Morris v. Interstate Bond Co.*, 180 Ga. 689, 180 S.E. 819 (1935).

Validity of statute affecting prior tax lien. — Former Code 1933, § 92-5712 (see O.C.G.A. § 48-5-25), providing that any party having an interest in property returned or assessed with other property for taxation shall be allowed to pay the taxes assessed against any one or more pieces of property in which he is so interested and obtain a release as to such property, is unconstitutional as applied to the lien of a tax execution previously transferred according to law and with the transfer duly recorded, because it would impair the obligation of a contract

in violation of the state and federal Constitutions. *Morris v. Interstate Bond Co.*, 180 Ga. 689, 180 S.E. 819 (1935).

Validity of statute affecting remedy expressly made part of contract. — Remedies existing by law at time of execution of contract may be modified by the legislature without impairing the obligation, provided an efficient remedy is left for its enforcement; the rule is different, however, as to a remedy that the parties have expressly made a part of the contract, because in such case the remedy is integrated as a part of the obligation, and a subsequent statute which affects the remedy impairs the obligation and is unconstitutional. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Validity of statute affecting remedy existing as implicit part of contract. — Remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Obligation of a contract, in constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it, and whatever legislation lessens the efficacy of these means impairs the obligation. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Validity of statutes affecting rights conferred by prior security deed. — Because a security deed executed in 1930 provided that in case of default in payment of debt the grantee might sell the property at the courthouse in a named county different from that in which the property was located, after first advertising the sale for a stated period in a newspaper published in the county in which the sale should be conducted, former Code 1933, § 67-1506 (see O.C.G.A. § 44-14-162), could not be constitutionally applied to such preexisting contract so as to require, in terms of the statute, that the sale should be advertised and conducted at the time and place and in the usual manner of sheriff's sales in the county in which the property, or a part thereof, was located. The same is true of former Code 1933, §§ 67-1503 through 67-1505 (see O.C.G.A. § 44-14-161), relating

to confirmation of sale, which abridges the right to a deficiency judgment after a sale under the security deed. As to the rights conferred by the prior security deed, Code 1933, §§ 67-1503 through 67-1506, is invalid. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Ordinance prohibiting the owning, maintaining, and operating of pinball machines and the like was not violative of the provisions of the federal and state Constitutions prohibiting the passage of laws impairing the obligation of contracts. *Woodward v. City of Lithonia*, 191 Ga. 234, 11 S.E.2d 476 (1940).

Contractual nature of relation between electors and state upon approval and validation of school bonds. — The approval of school bonds by the electors and their validation according to statute created a status analogous to a contractual relation between such electors and the state, which relation could not be destroyed or impaired by a subsequent statute or constitutional provision. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Claim that state statute impairs obligation of contract is an appeal to the United States Constitution and cannot be foreclosed by a state court's determination whether there was a contract or what were its obligations. *Atlantic Coast Line R.R. v. Phillips*, 332 U.S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947).

Contractual nature of franchise granted by city to public service corporation. — It is generally recognized that a franchise granted by a city council to a public service corporation to use its streets and public places, if the city has the charter power to grant such a franchise, is a binding contract and cannot be impaired in view of the prohibition against impairment of the obligation of contracts contained in the United States Constitution. *City of Summerville v. Georgia Power Co.*, 205 Ga. 843, 55 S.E.2d 540 (1949).

Contract clause protects a vested ground of defense from being destroyed by an Act of the legislature. *Guest v. Stone*, 206 Ga. 239, 56 S.E.2d 247 (1949).

Former Code 1933, § 3-108 (see O.C.G.A. § 9-2-20), permitting beneficiary under contract between other parties to recover, could be given no retroactive effect, as to do so would violate the provisions of the United States and state Constitutions as to impairing

the obligations of contracts, by creating a right for one to recover under an existing contract where he previously had no such right and subjecting a party to an existing contract to liability to a third person who previously had no right under the contract. *Guest v. Stone*, 206 Ga. 239, 56 S.E.2d 247 (1949).

Validity of statute eliminating ability payments. — Former Code 1933, § 78-911 (see O.C.G.A. § 47-17-81), which eliminated, under certain conditions, payment for permanent or total disability, did not violate constitutional provisions providing that no ex post facto law, retroactive law, or law impairing the obligation of contracts shall be passed, because in passing former Code 1933, § 78-917 (see O.C.G.A. § 47-17-101) the legislature specifically provided that all rights and benefits conferred would be subject to future legislative change or revision, and that no beneficiary would be deemed to have any vested right to any annuities or benefits provided therein. *Prichard v. Board of Comm'rs of Peace Officers Annuity & Benefit Fund*, 211 Ga. 57, 84 S.E.2d 26 (1954).

Pension is not a gratuity, but a contract based upon a consideration and gives pensioner a vested right which under U.S. Const., art. I, sec. X, cl. 1 cannot be impaired. Such contract cannot be modified, repealed, or defeated by subsequent Acts of the General Assembly after its creation. *Burks v. Board of Trustees of Firemen's Pension Fund*, 214 Ga. 251, 104 S.E.2d 225 (1958).

Validity of statute destroying vested right to property. — Former Code 1933, § 67-1308 (see O.C.G.A. § 44-14-80), providing that title to real property conveyed to secure debt should revert to grantor when debt became 20 years past due, unless debt was extended or renewed and such renewal recorded, or an affidavit setting out the facts of renewal was recorded with the conveyance, which section imposed conditions upon grantee not in existence at time of execution of the contract, divested the grantee of a vested right to the property, and impaired the obligation of the contract as applied to such deed, which was executed prior to passage and effective date of the Act, is unconstitutional, because in violation of U.S. Const., art. I, sec. X, cl. 1 and of Ga.

Impairment of Contracts (Cont'd)

Const. 1945, Art. I, Sec. III, Para. II, (see Ga. Const. 1983, Art. I, Sec. I, Para. X), which prohibited this state from passing any retroactive law or any law impairing the obligations of contracts. *Todd v. Morgan*, 215 Ga. 220, 109 S.E.2d 803 (1959).

Validity of statute empowering courts to revise alimony and support judgments. — Former Code 1933, § 30-220 (see O.C.G.A. §§ 19-6-18 and 19-6-19), conferring jurisdiction and power on courts of this state to revise judgments fixing permanent alimony or support for minor children, does not offend those constitutional provisions of this state and of the United States which provide that no law impairing the obligation of contracts shall be enacted, and this is true even though the amount of alimony or support so awarded by the judgment, as well as the time during which it is to be paid, is agreed to in writing by the parties. *Nelson v. Roberts*, 216 Ga. 741, 119 S.E.2d 545 (1961).

Validity of chapter governing pensions to retired judges of probate courts. — The obligation of the board to pay monthly benefits to retired ordinaries (now judges of probate courts) under former Code 1933, Ch. 24-17A (see O.C.G.A. Ch. 11, T. 47) existed only so long as there existed funds to pay these benefits. When these funds were exhausted, the obligation of the board administering the chapter ended, and thus the chapter is not unconstitutional as violative of the contractual obligation clauses of the federal and state Constitutions. *Sanders v. Harper*, 220 Ga. 649, 141 S.E.2d 156 (1965).

U.S. Const., art. I, sec. X is restricted to the protection of vested rights; it does not render inviolate mere contingent or speculative interests. *Webb v. Whitley*, 114 Ga. App. 153, 150 S.E.2d 261 (1966).

U.S. Const., art. I, sec. X's prohibition of any state law impairing the obligation of contracts is not a limitation on the power of eminent domain. — The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power is a taking, and not an impairment of a contractual obligation. *City of Atlanta v. Airways Parking Co.*, 225 Ga. 173, 167 S.E.2d 145 (1969).

Condemnation of portion of rights of condemnee under its contract with city does

not violate the provision of U.S. Const., art. I, sec. X, cl. 1 prohibiting the passage of a law impairing the obligation of contracts. *City of Atlanta v. Airways Parking Co.*, 225 Ga. 173, 167 S.E.2d 145 (1969).

U.S. Const., art. I, sec. X, cl. 1 does not forbid the equitable modification of a contract. *Selby v. Gilmer*, 240 Ga. 241, 240 S.E.2d 80 (1977).

Impairment of contracts by state for public welfare. — Constitutional restraints upon impairment of obligation of contracts do not prevent state from exercising such powers as are necessary in the exercise of its sovereign right to protect the lives, health, morals, comfort, and general welfare of the public, though contracts previously entered into between individuals may thereby be affected. *Moore v. Georgia Pub. Serv. Comm'n*, 242 Ga. 182, 249 S.E.2d 549 (1978).

Act of General Assembly revoking city charter, thus abolishing municipal offices, is not a law in impairment of contract since the right of an incumbent to an office is not vested, but may be revoked if the law under which the incumbent holds office is capable of being repealed. *City of Mt. View v. Clayton County*, 242 Ga. 163, 249 S.E.2d 541 (1978), appeal dismissed, 440 U.S. 902, 99 S. Ct. 1205, 59 L. Ed. 2d 450 (1979).

Contract clause does not prohibit state from repealing or amending statutes generally or from enacting legislation with retroactive effects. *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir.), cert. denied, 449 U.S. 1015, 101 S. Ct. 574, 66 L. Ed. 2d 474 (1980).

With respect to grants of political or governmental authority to cities, towns, counties, and the like, legislative power of states is not restrained by the contract clause. *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir.), cert. denied, 449 U.S. 1015, 101 S. Ct. 574, 66 L. Ed. 2d 474 (1980).

Preliminary question under contract clause analysis is whether the legislative action impaired or changed a specific contractual obligation. *City of Atlanta v. Metropolitan Atlanta Rapid Transit Auth.*, 636 F.2d 1084 (5th Cir. 1981).

Constitutional provision is not applicable to individual conduct by persons acting under color of state law. *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D.

Ga. 1983), *aff'd*, 746 F.2d 761 (11th Cir. 1984).

Municipality cannot claim statutory immunity to bar employee from recovering pay. — To bar a municipal employee from recovering pay for services the employee performed by allowing the municipality to claim statutory immunity would violate the prohibition against the impairment of a contract which is found in both the state and federal constitutions. *Smith v. City of Atlanta*, 167 Ga. App. 458, 306 S.E.2d 720 (1983).

Reduction in future nonvested retirement benefits. — Since there is no vested right to benefits one was never entitled to receive, the reduction in future benefits to retiree did not violate the retiree's constitutional right to protection against impairment of contract. *Tate v. Teachers' Retirement Sys.*, 257 Ga. 365, 359 S.E.2d 649 (1987).

Retrospective application of judicial construction of insurance contracts. — The interpretation of O.C.G.A. § 33-34-5 by *Jones v. State Farm Mut. Auto. Ins. Co.*, 156 Ga. App. 230, 274 S.E.2d 623 (1980) was based on the insurer's failure to comply with specific requirements of the law and was not an unconstitutional impairment of the insurance contract. *State Farm Mut. Auto. Ins. Co. v. Bates*, 542 F. Supp. 807 (N.D. Ga. 1982).

Franchise tax on gas sales. — Franchise granted in 1940 by town ordinance to gas company allowing for the sale and distribution of gas services to town inhabitants was not granted in perpetuity; thus, 1980 town ordinance providing for a three percent franchise tax on gas sales impaired no contractual rights granted to the assignor of the gas company's franchise, and trial court did not err in refusing to declare the 1980 ordinance unconstitutional as an impairment of contract. *Gas Light Co. v. Town of Bibb City*, 253 Ga. 498, 322 S.E.2d 250 (1984).

Subjecting retirement benefits of retired school teachers to state income taxation did not violate the constitutional prohibition

against state laws impairing the obligation of contracts, where the teachers had no vested right to an irrevocable exemption, such irrevocable exemption being barred under Ga. Const. 1983, Art. VII, § 1, Para. I. *Parrish v. Employees' Retirement Sys.*, 260 Ga. 613, 398 S.E.2d 353 (1990), *cert. denied*, 500 U.S. 353, 111 S. Ct. 2016, 114 L. Ed. 2d 103 (1991).

Duties on Imports

Non-discriminatory ad valorem tax constitutional. — A non-discriminatory ad valorem tax does not violate this section's "import-export" clause, where the imported goods are "no longer in transit". *Los Angeles Tile Co. v. Chatham County Bd. of Tax Assessors*, 209 Ga. App. 245, 433 S.E.2d 82 (1993).

Nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the states. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976).

Imports subject to uniform taxes imposed for services supplied by state. — The import-export clause clearly prohibits state taxation based on foreign origin of imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the state supplies. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976).

Taxable status of packaged and bulk imports. — There is a vast distinction between goods shipped in packaging, such as crates or cartons, and goods shipped in bulk. Packaged imports retain their status as imports, and are not subject to taxation. Bulk imports that have been mingled with other bulk imports, sorted, and arranged for sale do not retain their status as imports, and they are subject to taxation. *Wages v. Michelin Tire Corp.*, 233 Ga. 712, 214 S.E.2d 349 (1975), *aff'd*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976).

OPINIONS OF THE ATTORNEY GENERAL

Validated bonds create a status analogous to a contractual relation which cannot be destroyed or impaired by a subsequent statute. — 1977 Op. Att'y Gen. No. U77-10.

Reciprocal child support enforcement statute not violation of treaty provisions. — So long as a reciprocal child support enforcement statute does not require more

than a routine review of foreign laws, does not directly affect United States foreign policy and does not have a potential for the disruption of foreign policy or embarrassment to the United States government, it does not violate the treaty provisions of the United States Constitution. 1981 Op. Att'y Gen. No. 81-12.

Prohibiting involuntary separation benefits to state employees. — An amendment to the Georgia Constitution prohibiting the grant of involuntary separation retirement benefits to state employees who are by law currently entitled to coverage under the involuntary separation benefits section of the Employees' Retirement System Act would, in all probability, be unconstitutional

under the federal Impairment Clause contained in U.S. Const., art. I, sec. X. 1983 Op. Att'y Gen. No. U83-72.

Retrospective application of provision terminating retirement benefits for conviction of crime. — The General Assembly has the authority to enact a statute which proposes the forfeiture of earned retirement benefits of future public employees due to the conviction of a crime; however, an amendment to the Georgia Constitution proposing such a forfeiture by employees who are currently by law vested with rights under the public retirement system would, in all probability, be unconstitutional under the federal Impairment Clause contained in U.S. Const., art. I, sec. X. 1985 Op. Att'y Gen. No. U85-3.

RESEARCH REFERENCES

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Franchise provisions for free or reduced rates by public service corporations as contract protected from change under contract clause of federal Constitution, 10 ALR 499.

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Effect of war on treaty rights, 47 ALR 457.

Constitutional or statutory changes affecting grand jury or substituting information for indictment as an *ex post facto* law, 53 ALR 716.

Effect of statutory change of penalty or punishment after conviction, 55 ALR 443.

Constitutionality of retroactive statute curing defect in private instrument purporting to convey title or create interest in property or as to filing or recording thereof, 57 ALR 1197.

Construction of statutes of limitation as regards their retrospective application to causes of action already barred, 67 ALR 297.

Constitutionality, construction, and applicability of statute making refusal to pay for commodities a criminal offense, 76 ALR 1338.

Retroactive effect of statutes regarding provisions with reference to avoidance of fire insurance policies, 78 ALR 617.

Imposition of wharfage or dockage fees, by state or municipality, as tonnage duty, 80 ALR 388.

Constitutional provision against impairing obligation of contract as applicable to statutes affecting rights or remedies of holders

or owners of improvement bonds or liens, 85 ALR 244; 97 ALR 911.

Blue Sky Laws, 87 ALR 42.

Statutes in relation to interest as obnoxious to constitutional provision against impairing obligation of contracts, 87 ALR 462.

Power to require filing of schedule of prices as a condition of license for a business or profession, 87 ALR 519.

Raising maximum limit of permissible municipal indebtedness as impairing obligation of existing municipal contracts, 90 ALR 859.

Debtor's exemption statutes as impairing obligations of existing contracts, 93 ALR 177.

Contracts for payment in gold or silver or in gold or silver coin ("gold coin" clauses), 95 ALR 1383; 101 ALR 1318; 114 ALR 820.

Constitutionality of statute changing rights of withdrawing members of building and loan association, 98 ALR 82; 133 ALR 1493.

Validity of statute or ordinance regulating barbers, 98 ALR 1088.

Constitutional provision against impairing obligation of contracts as applied to rights or remedies of owners of property subject to assessment for local improvements, 100 ALR 164.

Constitutionality, construction, and application of statute permitting release of part of property subject to tax liens or special assessments, 100 ALR 418.

Statute affecting mortgagee's rights and remedies in respect of deficiency as uncon-

stitutional impairment of obligation of contract, 108 ALR 891; 115 ALR 435; 130 ALR 1482; 133 ALR 1473.

Tax exemption as unconstitutionally impairing public obligations antedating the exemption, 109 ALR 817.

Constitutional prohibition of ex post facto laws as applicable to statutes relating to joinder of offenses or defendants, 110 ALR 1308.

Constitutionality of crop insurance statutes, 113 ALR 739.

Constitutional provisions against impairment of obligations of contract as applied to sinking funds for retirement of municipal or other public bonds, 115 ALR 220.

Validity and effect, as to previously recorded instrument, of statute which places or changes time limit on effectiveness of record of mortgages or other instruments, 133 ALR 1325.

Constitutionality, construction, and application of compacts and statutes involving cooperation between states, 134 ALR 1411.

Constitutionality of statute which in effect limits judgment creditor after crediting thereon fair market value of property purchased by him at execution sale, 144 ALR 858.

Validity and construction of war legislation in nature of moratory statute, 144 ALR 1508.

Constitutionality and construction of repeal or modification by legislative action of teachers' tenure statute, as regards retrospective operation, 147 ALR 293.

Retroactive application, to previous sales, of statutes reducing period of redemption from tax sales, as unconstitutional impairment of contract obligations, 147 ALR 1123.

Price ceiling, adopted as a war measure, as affecting preexisting contracts, 147 ALR 1286; 149 ALR 1451; 151 ALR 1450.

Retrospective statute subjecting interests of trust beneficiaries to claims of creditors, 151 ALR 1417.

Rights of parties to contract the performance of which is interfered with or pre-

vented by war conditions or acts of government in prosecution of war, 151 ALR 1447; 152 ALR 1447; 153 ALR 1417; 154 ALR 1445; 155 ALR 1447; 156 ALR 1446; 157 ALR 1446; 158 ALR 1446.

Constitutionality, construction, and application of statute or contract regarding deduction from, or adjustment of, wages in respect of defective workmanship, 153 ALR 866.

Constitutionality, construction, and application of statutes affecting the rights or remedies of purchasers under antecedent executory contracts for purchase of real property, 153 ALR 1209.

Retroactive application of statutes regarding enforcement of awards under workmen's compensation acts, 155 ALR 558.

Statute providing for apportionment between lessor and lessee of a tax imposed upon the producer of oil, gas, or other natural production as violation of the constitutional provision against impairment of the obligation of contracts, 160 ALR 980.

Retrospective operation of criminal negligence statute, 14 ALR2d 726.

Validity of statute establishing or authorizing minimum price schedules for barbers, 54 ALR3d 916.

Validity, construction, and effect of state franchising statute, 67 ALR3d 1299.

Validity and construction of state or local regulation prohibiting off-premises advertising structures, 81 ALR3d 486.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR3d 564.

Mandatory retirement of public officer or employee based on age, 81 ALR3d 811.

Zoning: building in course of construction as establishing valid nonconforming use or vested right to complete construction for intended use, 89 ALR3d 1051.

Prohibition, under state civil rights laws, of racial discrimination in rental of privately owned residential property, 96 ALR3d 497.

ARTICLE II.

Law reviews. — For article, "The President as the Head of the Executive-Administrative Hierarchy: A Survey," see 8 J. of Pub. L. 437 (1959). For article discussing

validity of "executive privilege" as defense to congressional demand for information, see 8 Ga. L. Rev. 809 (1974). For article, "Rights as Trumps," see 27 Ga. L. Rev. 463 (1993).

For note, "Haitian Centers Council, Inc. v. McNary: If at First You Don't Succeed ...," 44 Mercer L. Rev. 959 (1993).

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Generalized assertion of privilege yields to demonstrated, specific need for evidence in pending criminal trial. Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

There is no presidential privilege to withhold evidence that is demonstrably relevant in criminal trial because of the guarantee of due process of law and the necessity to protect the basic function of the courts. Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Assertion of presidential privilege must yield to need for evidence in pending criminal trial and to the fundamental demands of due process of law in the fair administration of justice. Calley v. Callaway, 382 F. Supp. 650

(M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Neither doctrine of separation of powers nor need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances, since the impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the judicial branch to do justice in criminal prosecutions plainly conflicts with the function of the courts under U.S. Const., art. III. Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

RESEARCH REFERENCES

ALR. — Presidential and vice-presidential electors, 153 ALR 1066.

Section 1.

[Executive Power, Election, Qualifications of the President]

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States,

directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased or diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Cross references. — Factors disqualifying a person from nomination or election to public office, §§ 21-2-7, 21-2-8. Election of presidential electors, §§ 21-2-10 through 21-2-12.

Editor's notes. — U.S. Const., art. II, sec. I, cl. 3 has been superseded by U.S. Const., amend. 12, which makes the candidates and offices of President and Vice-President distinct in the selection process. United States Const., amend. 14, sec. III modifies U.S. Const., art. II, sec. I, cl. 5 by imposing additional, but probably anachronistic, disqualifying criteria. U.S. Const., art. II, sec. I, cl. 6, concerning the disability of a President or a vacancy of the office, has been superseded by U.S. Const., amend. 25.

Law reviews. — For article analyzing the relationship between the military and the first amendment right of individuals to engage in political activities, see 28 Emory L.J. 3 (1979). For article discussing the separation of powers implications of implied rights

of actions, see 34 Mercer L. Rev. 973 (1983). For article, "Congress: The Purse, the Purpose, and the Power," 21 Ga. L. Rev. 1 (1986). For article, "Separation of Political Powers: Boundaries or Balance?," 21 Ga. L. Rev. 171 (1986). For article, "Article II Courts," see 44 Mercer L. Rev. 825 (1993). For article, "The Trouble with Shadow Government," see 52 Emory L.J. 281 (2003).

For note, "Bowsher v. Synar: Bright-Line Rule or Dice-Toss Approach to Separation of Powers?," see 38 Mercer L. Rev. 969 (1987). For note, "Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements," see 21 Ga. L. Rev. 755 (1987).

For comment on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 72 S. Ct. 775, 96 L. Ed. 1345 (1952), see 15 Ga. B.J. 90 (1952). For comment on *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970), as to implied power of the executive to sue, see 20 J. of Pub. L. 337 (1971).

JUDICIAL DECISIONS

Use of electoral college method in state-wide elections. — The inclusion of the electoral college in the Constitution validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a state in a statewide election. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

Cited in *United States v. Raines*, 189 F. Supp. 121 (M.D. Ga. 1960); *Republic of Cuba v. Arcade Bldg. of Savannah, Inc.*, 104 Ga. App. 848, 123 S.E.2d 453 (1961); *Smith v. State Executive Comm. of Democratic Party*, 288 F. Supp. 371 (N.D. Ga. 1968); *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976).

RESEARCH REFERENCES

ALR. — Constitutional inhibition of increase or decrease in compensation during term as applicable to nonconstitutional officer, 86 ALR 1263.

Constitutional inhibition of change of officer's compensation as applicable to allowance for expenses or disbursements, 106 ALR 779.

Section 2.

[Powers of the President]

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have

the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Law reviews. — For article discussing control of tenure of executive officers by the President and the Governor, see 3 Ga. B.J. 13 (1941). For article, "Jury Trials in Contempt Cases," see 20 Ga. B.J. 297 (1957). For article, "The Subject-Matter Limitation Upon the Treaty-Making Power," see 11 J. of Pub. L. 122 (1962). For article discussing the presidential power of judicial appointment, as exercised under Franklin Roosevelt and Richard Nixon, see 8 Ga. St. B.J. 145 (1971). For article, "The Treaty Power and Family Law," see 7 Ga. L. Rev. 55 (1972). For article, "The Supreme Court and Civil Liberties: 1974-1975," see 24 Emory L.J. 937 (1975). For article discussing problems in pardoning draft evaders and resisters, see 11 Ga. L. Rev. 1 (1976). For article analyzing the relationship between the military and the first amendment right of individuals to engage in political activities, see 28 Emory L.J. 3 (1979). For article, "Federal Preemption, Federal Conscription Under the New Superfund Act," see 38 Mercer L. Rev. 643 (1987). For article, "More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter," see 38 Emory L.J. 615 (1989). For article, "Article II Courts," see 44 Mercer L. Rev. 825 (1993).

For note discussing the doctrine of federal preemption in the allocation of powers between the nation and the states, see 22 J. of Pub. L. 391 (1973). For note, "Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements," see 21 Ga. L. Rev. 755 (1987). For article, "A Constitutional Structure for Foreign Affairs," see 19 Ga. St. U.L. Rev. 1059 (2003).

For comment on *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), upholding constitutionality of exclusion of Japanese-Americans from military arms, see 7 Ga. B.J. 364 (1945). For comment on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 72 S. Ct. 775, 96 L. Ed. 1345 (1952), see 15 Ga. B.J. 90 (1952). For comment on *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) and *Kinsella v. Krueger*, 351 U.S. 470, 76 S. Ct. 886, 100 L. Ed. 1342 (1956) as to military authority overseas over dependents of servicemen, see 6 J. of Pub. L. 540 (1957). For comment on *Goldwater v. Carter*, 444 U.S. 996, 100 S. Ct. 533, 62 L. Ed. 2d 428 (1979), discussing unilateral treaty termination by the President, see 15 Ga. L. Rev. 176 (1980). For comment, "Private Citizens in Foreign Affairs: A Constitutional Analysis," see 36 Emory L.J. 285 (1987).

JUDICIAL DECISIONS

Constitutional power to grant reprieves and pardons includes power to grant commutations on lawful conditions. *Lupo v.*

Zerbst, 92 F.2d 362 (5th Cir. 1937), cert. denied, 303 U.S. 646, 58 S. Ct. 645, 82 L. Ed. 1108 (1938).

Cited in *United States v. Jenkins*, 141 F. Supp. 499 (S.D. Ga. 1956); *United States v. Raines*, 189 F. Supp. 121 (M.D. Ga. 1960);

Block v. Compagnie Nationale Air France, 229 F. Supp. 801 (N.D. Ga. 1964); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975).

OPINIONS OF THE ATTORNEY GENERAL

Reciprocal child support enforcement statute not violation of treaty provisions. — So long as a reciprocal child support enforcement statute does not require more than a routine review of foreign laws, does not directly affect United States foreign pol-

icy and does not have a potential for the disruption of foreign policy or embarrassment to the United States government, it does not violate the treaty provisions of the United States Constitution. 1981 Op. Att'y Gen. No. 81-12.

RESEARCH REFERENCES

ALR. — Relation of treaty to state and Federal law, 4 ALR 1377; 134 ALR 882.

Power of executive to pardon one for contempt, 26 ALR 21; 38 ALR 171; 63 ALR 226.

Constitutionality of statute conferring on court power to suspend sentence, 26 ALR 399; 101 ALR 402.

Distinction between office and employment, 53 ALR 595; 93 ALR 333; 140 ALR 1076.

Pardon as defense to proceeding for suspension or cancellation of license of physician, surgeon, or dentist, 126 ALR 257.

Pardon as affecting impeachment by proof of conviction of crime, 30 ALR2d 893.

Section 3.

[Powers and Duties of the President]

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Law reviews. — For article discussing role of court in the release of presidentially impounded funds, see 24 Emory L.J. 313 (1975). For article, "The Supreme Court and Civil Liberties: 1974-1975," see 24 Emory L.J. 937 (1975). For survey of 1987 Eleventh Circuit cases on administrative law, see 39 Mercer L. Rev. 1057 (1988).

For note, "Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements," see 21 Ga. L. Rev. 755 (1987).

For comment, "Private Citizens in Foreign Affairs: A Constitutional Analysis," see 36 Emory L.J. 285 (1987).

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Cited in *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967).

OPINIONS OF THE ATTORNEY GENERAL

U.S. Const., art. II, sec. III means that laws must be executed as required by other constitutional provisions, such as the one that demands a request from the legislature or

the Governor of the state, before troops are used to put down domestic violence under U.S. Const., art. IV, sec. IV. 1957 Op. Att'y Gen. p. 8.

Section 4.

[Impeachment]

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Law reviews. — For article discussing the presidential power of judicial appointment, as exercised under Franklin Roosevelt and Richard Nixon, see 8 Ga. St. B.J. 145 (1971). For article, "Judicial Removal of Federal Judges," see 11 Ga. St. B.J. 157 (1975). For

article analyzing the relationship between the military and the first amendment right of individuals to engage in political activities, see 28 Emory L.J. 3 (1979). For article, "Removal and Discipline of Federal Judges," see 31 Mercer L. Rev. 681 (1980).

RESEARCH REFERENCES

ALR. — Physical or mental disability as disqualification or ground of removal or impeachment of public officer, 28 ALR 777. Nature of proceedings under statute providing for removal of officer on accusation by grand jury, etc., 81 ALR 1089.

Power to remove public officer without notice and hearing, 99 ALR 336. Removal of public officers for misconduct during previous term, 42 ALR3d 691.

ARTICLE III.

Law reviews. — For article, "Judicial Supremacy in America; Its Colonial and Constitutional History," see 16 Ga. B.J. 148 (1953). For article advocating judicial restraint of the federal courts, see 17 Ga. B.J. 442 (1955). For article considering the power of the United States House of Representatives to expel a member and the power of the judiciary to review such an expulsion, see 5 Ga. L. Rev. 203 (1971). For article discussing developing principles of state sovereignty limitations on Congress' exercise of its granted powers, see 11 Ga. L. Rev. 35 (1976). For article, "The Role of the Judiciary With Respect to the Other Branches of Government," see 11 Ga. L. Rev. 455 (1977). For article discussing theoretical problems raised by constitutional adjudication and judicial supremacy in the United States, see 11 Ga. L. Rev. 1069 (1977). For article

discussing the evolution of judicial interpretivism, see 14 Ga. L. Rev. 389 (1980). For article, "The Limits of Judicial Supremacy: A Proposal For Checked Activism," see 14 Ga. L. Rev. 471 (1980). For article, "Congress As Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine," 21 Ga. L. Rev. 57 (1986). For article, "The Jurisdictional Nature of the Time to Appeal," see 21 Ga. L. Rev. 399 (1986). For article, "Judicial Review, Foreign Affairs and Legislative Standing," see 25 Ga. L. Rev. 227 (1991). For article, "Missouri v. Jenkins: The Expansion of Federal Judicial Power," see 7 Ga. St. U.L. Rev. 495 (1991). For article, "Spallone v. United States: When Constitutional Principles Collide," see 7 Ga. St. U.L. Rev. 527 (1991). For article, "Individual Rights and the Powers of Government," see 27 Ga. L. Rev. 343 (1993). For article,

"Rights as Trumps," see 27 Ga. L. Rev. 463 (1993). For article, "Article II Courts," see 44 Mercer L. Rev. 825 (1993). For symposium articles on federal judicial independence, see 46 Mercer L. Rev. 637 et seq. (1995).

For note, "Tension Between Judicial and Legislative Powers as Reflected in Confrontations Between Congress and the Courts,"

see 13 Ga. L. Rev. 1513 (1979). For note, "American National Red Cross v. S.G. & A.E.: Bad Blood in the Federal Courts," see 44 Mercer L. Rev. 687 (1993). For note, "Lujan v. Defenders of Wildlife: The Court Maintains Its Proper Role in Environmental Issues," see 44 Mercer L. Rev. 1443 (1993).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
BANKRUPTCY
CASES AND CONTROVERSIES
STANDING AND RIPENESS

General Consideration

There is no presidential privilege to withhold evidence that is demonstrably relevant in criminal trial because of the guarantee of due process of law and the necessity to protect the basic function of the courts. Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Neither doctrine of separation of powers nor need for confidentiality of high level communications, without more, can sustain absolute, unqualified presidential privilege of immunity from judicial process under all circumstances, since the impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the judicial branch to do justice in criminal prosecutions plainly conflicts with the function of the courts under U.S. Const., art. III. Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Unlawful intrusion on lawful powers of court. — Regulation purporting to excuse compliance with a judgment and order of the federal district court which is "subject to review ... by a higher reviewing authority" was invalid insofar as it might conflict with the order in the case or affect the jurisdiction of the court to fashion a remedy in the matter. Charter Medical Corp. v. Heckler, 604 F. Supp. 638 (M.D. Ga. 1985).

Cited in Willis v. Pickrick Restaurant, 231 F. Supp. 396 (N.D. Ga. 1964); **Atlas Roofing**

Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990 (5th Cir. 1975); **Inmates of Henry County Jail v. Parham,** 430 F. Supp. 304 (N.D. Ga. 1976); **International Soc'y for Krishna Consciousness v. Eaves,** 601 F.2d 809 (5th Cir. 1979); **United States v. Elsoffer,** 644 F.2d 357 (5th Cir. 1981); **State Farm Mut. Auto. Ins. Co. v. Bates,** 542 F. Supp. 807 (N.D. Ga. 1982); **Estes v. Crenshaw (In re N & D Properties, Inc.),** 54 Bankr. 590 (N.D. Ga. 1985); **Parker v. Dole,** 668 F. Supp. 1563 (N.D. Ga. 1987); **Duckworth v. Medical Electro-Therapeutics, Inc.,** 768 F. Supp. 822 (S.D. Ga. 1991).

Bankruptcy

Supreme Court empowered to stay decision declaring Bankruptcy Act unconstitutional. — The Supreme Court had the power to stay until October 4, 1982, the effect of its decision in **Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,** 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) declaring certain provisions of the Bankruptcy Act of 1978 unconstitutional. **Anderson v. CBS, Inc.,** 31 Bankr. 161 (Bankr. N.D. Ga. 1982).

Bankruptcy jurisdiction must be exercised by Article III judges. — Bankruptcy jurisdiction is Article III power and must be exercised by Article III judges at every stage of the consideration. **Ellenberg v. Henry,** 38 Bankr. 24 (Bankr. N.D. Ga. 1983).

Federal district courts have subject matter jurisdiction to entertain bankruptcy cases. **Seven Springs Apts. v. Calmark Assets,** 34 Bankr. 987 (N.D. Ga. 1983).

The Supreme Court, in 1982, rendered

unconstitutional only subsection (c) of 28 U.S.C. § 1471, which provided that the bankruptcy court for the district in which a bankruptcy case is commenced shall exercise “all of the jurisdiction” conferred on the district court, and left intact the bankruptcy subject matter jurisdiction of the district courts. *Committee of Unsecured Creditors of FS Communications Corp. v. Hyatt Greenville Corp.*, 760 F.2d 1194 (11th Cir. 1985).

No district or bankruptcy court has any exercisable jurisdiction in bankruptcy cases, matters, or proceedings after December 24, 1982, and district court could not confer jurisdiction on bankruptcy court by adoption of the emergency rule. *Williamson v. General Fin. Co.*, 28 Bankr. 276 (Bankr. M.D. Ga. 1983).

Bankruptcy courts are not Article III courts and therefore may not exercise the judicial power of the United States. *Parklane Hosiery Co. v. Parklane/Atlanta Venture*, 927 F.2d 532 (11th Cir. 1991).

Jurisdiction of bankruptcy court by referral from district court. — Bankruptcy courts obtain jurisdiction over Title 11 cases or proceedings only by referral at the discretion of the district courts, and the district court may withdraw such reference for cause. Nevertheless, the cause prerequisite should not be used to prevent the district court from properly withdrawing reference either to ensure that the judicial power of the United States is exercised by an Article III court or in order to fulfill its supervisory function over the bankruptcy courts. *Parklane Hosiery Co. v. Parklane/Atlanta Venture*, 927 F.2d 532 (11th Cir. 1991).

Bankruptcy court has no authority to issue an unreviewable order, to dismiss, or, alternatively, to abstain from jurisdiction over a bankruptcy case. *Goerg v. Parungao*, 930 F.2d 1563 (11th Cir. 1991).

Bankruptcy court cannot conduct jury trial. — Conducting a jury trial by a bankruptcy court would violate Article III of the Constitution. *Ellenberg v. Bouldin*, 125 Bankr. 851 (N.D. Ga. 1990).

District courts still have jurisdiction over bankruptcy cases and proceedings, and, therefore, may refer these actions to the bankruptcy court. *Pettigrew v. Kutak, Rock & Huie*, 30 Bankr. 989 (N.D. Ga. 1983).

Article III courts have authority to promulgate local rules. — Article III courts have

inherent equitable power to provide themselves with appropriate instruments required for the performance of their duties, such as local rules to administer court business properly brought before the court. *Pettigrew v. Kutak, Rock & Huie*, 30 Bankr. 989 (N.D. Ga. 1983).

Local rule constitutional. — Local rules which provide that in “related proceedings” the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge, “related proceedings” being defined to be those civil proceedings that in the absence of a petition in bankruptcy, could have been brought in a district court or a state court, are constitutional. *Flint ex rel. Flint v. Speir Ins. Agency, Inc.*, 33 Bankr. 814 (N.D. Ga. 1983).

A non-Article III court may perform the functions of presiding over a trial and recommending a disposition, so long as the ultimate decision is made by the district judge. Implicitly then, those sections of the local bankruptcy rule permitting de novo review by the district court are constitutional. *Seven Springs Apts. v. Calmark Assets*, 34 Bankr. 987 (N.D. Ga. 1983).

District court authorized to promulgate Emergency Rule for bankruptcy matters. — The district court has original jurisdiction of bankruptcy matters and had authority to promulgate the Emergency Rule, which refers to the bankruptcy court all cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11. *Ridgefield, Inc. v. Unity Foods, Inc.*, 35 Bankr. 876 (Bankr. N.D. Ga. 1983).

Emergency Local Rule powers must be exercised by Article III judges. — The Emergency Local Rule delegates judicial responsibilities to bankruptcy judges, which may not be exercised constitutionally by non-Article III judges. *Ellenberg v. Henry*, 38 Bankr. 24 (Bankr. N.D. Ga. 1983).

Emergency Local Rule constitutional. — The temporary Emergency Model Local Rule adopted by the district court of the northern district of Georgia, which asserts jurisdiction and judicial power in the district court over Title 11 cases and proceedings

Bankruptcy (Cont'd)

filed in the bankruptcy court, then refers all bankruptcy cases and proceedings, and controversies arising out of or related thereto, to the existing United States bankruptcy judges of the United States bankruptcy court, except for certain judicial actions as prescribed in the rule, is constitutional. Committee of Unsecured Creditors of FS Communications Corp. v. Hyatt Greenville Corp., 760 F.2d 1194 (11th Cir. 1985).

Bankruptcy judges cannot decide peripheral state common-law claims. — Non-Article III bankruptcy judges cannot constitutionally be vested with jurisdictional power to decide state common-law claims brought pursuant to the Bankruptcy Act and related only peripherally to a bankruptcy case adjudicated under federal law. Pettigrew v. Kutak, Rock & Huie, 30 Bankr. 989 (N.D. Ga. 1983).

Bankruptcy judge cannot decide "related" civil proceedings under Bankruptcy Reform Act. — A non-Article III United States bankruptcy court lacks subject matter jurisdiction over proceedings initiated by the debtor alleging violations of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601, 1640. Such proceedings are "related" civil proceedings as described in 28 U.S.C. § 1471(b) and (c), as enacted by § 241(a) of the Bankruptcy Reform Act of 1978, which is an unconstitutional grant of Article III authority, i.e., the "judicial power of the United States," to non-Article III judges. Brown v. Citizens & S. Nat'l Bank, 32 Bankr. 590 (Bankr. N.D. Ga. 1983).

While a bankruptcy court may determine whether the debtor's obligation to provide educational expenses under a separation agreement is dischargeable, it is without jurisdiction to inquire into the interpretation of the agreement in order to establish or to modify the debtor's obligation for child support. Sharp v. Harrell, 33 Bankr. 989 (N.D. Ga. 1983), aff'd, 754 F.2d 902 (11th Cir. 1985).

Bankruptcy judges may not exercise contempt powers. — The statutory grant of contempt powers to bankruptcy judges is unconstitutional. The power of contempt is essentially judicial and may not be constitutionally exercised by a bankruptcy court, a non-Article III court. If the bankruptcy court

feels that a civil contempt sanction is necessary, it should certify the facts to the district court for an appropriate order. Tele-Wire Supply Corp. v. Presidential Fin. Corp., Inc. (In re Indus. Tool Distribs., Inc.), 55 Bankr. 746 (N.D. Ga. 1985) (Decided prior to 1987 amendment of Federal Bankruptcy Rule 9020. See Walton v. Jones (In re Shirley), 184 Bankr. 613 (Bankr. N.D. Ga. 1995)).

Cases and Controversies

District court jurisdiction of probate matters. — It is generally established that probate matters such as the validity of a will and the administration of a decedent's estate are so far proceedings in rem as not to be among the "controversies" of which the district courts may be given jurisdiction under U.S. Const., art. III, and have been given jurisdiction under the statutes. Heath v. Jones, 168 F.2d 460 (5th Cir. 1948).

U.S. Const., art. III limits jurisdiction of federal courts to cases and controversies. Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), modified, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

In actions for declaratory judgments, district court may not render advisory opinion on constitutionality of state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), modified, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

Federal courts established pursuant to U.S. Const., art. III do not render advisory opinions, but are limited to deciding issues in actual cases and controversies. Baxter v. Strickland, 381 F. Supp. 487 (N.D. Ga. 1974).

Controversy, in order to be decided by federal court, must be definite and concrete, touching the legal relations of parties having adverse legal interests, and must be real and substantial, admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Baxter v. Strickland, 381 F. Supp. 487 (N.D. Ga. 1974).

Justiciability is term of art employed to give expression to limitation placed upon the federal courts by the case and controversy doctrine. Where there is no showing

that a state action which forms the basis of a complaint by one affected by the action was predicated on or justified by the challenged statute, there is no actual “case or controversy” concerning the constitutionality of the statute and thus the constitutionality thereof is not justiciable. *Baxter v. Strickland*, 381 F. Supp. 487 (N.D. Ga. 1974).

Personal animosity between parties to lawsuit is not necessary aspect of controversy under U.S. Const., art. III. A controversy need only be definite and concrete, touching the legal relations of parties having adverse legal interests. *Septum, Inc. v. Keller*, 614 F.2d 456 (5th Cir.), cert. denied, 449 U.S. 992, 101 S. Ct. 527, 66 L. Ed. 2d 288 (1980).

Required showing of injury to plaintiff. — In order to meet the hurdle of U.S. Const., art. III’s “case or controversy” justiciability requirement, plaintiff must show that he has suffered some threatened or actual injury resulting from actions of the defendant. *Smith v. Price*, 616 F.2d 1371 (5th Cir. 1980).

In the case of regulations governing speech or conduct, threat of interference with rights of plaintiff beyond that implied by the mere existence of the regulations must be shown to constitute a “case or controversy.” *Smith v. Price*, 616 F.2d 1371 (5th Cir. 1980).

Contesting forfeitures. — In order to contest a forfeiture, a claimant first must demonstrate a sufficient interest in the property to give him Article III standing; otherwise there is no “case or controversy”, in the constitutional sense, capable of adjudication in the federal courts. *United States v. 1419 Mount Alto Rd.*, 830 F. Supp. 1476 (N.D. Ga. 1993).

Standing and Ripeness

Immediate harm or threat of harm to plaintiff prerequisite to exercise of judicial power. — Federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action. *Baxter v. Strickland*, 381 F. Supp. 487 (N.D. Ga. 1974).

Ripeness is constitutional and jurisdictional prerequisite to both injunctive and declaratory relief. *Baxter v. Strickland*, 381 F. Supp. 487 (N.D. Ga. 1974).

One challenging a statute must demonstrate that the person is immediately injured or jeopardized by its operation in order for ripeness to exist. *Baxter v. Strickland*, 381 F. Supp. 487 (N.D. Ga. 1974).

Standing is not confined to those who show economic harm, nor is it necessarily denied because alleged injury is commonly shared. *Hall County Historical Soc’y, Inc. v. Georgia DOT*, 447 F. Supp. 741 (N.D. Ga. 1978).

Threatened harm which is real, not “imaginary,” “speculative,” or “chimerical,” will satisfy standing prerequisites. *High Ol’ Times, Inc. v. Busbee*, 449 F. Supp. 364 (N.D. Ga. 1978), rev’d on other grounds, 621 F.2d 135 (5th Cir. 1980).

In order to avoid rendering advisory opinions, a federal court must evaluate substance of plaintiff’s claimed injury in fact and alleged position within the zone of interests. *High Ol’ Times, Inc. v. Busbee*, 449 F. Supp. 364 (N.D. Ga. 1978), rev’d on other grounds, 621 F.2d 135 (5th Cir. 1980).

Standing requirement existing in federal court requires that challenged action has caused plaintiff injury in fact, economic or otherwise, and the interest sought to be protected is arguably within the zone of interests to be protected or regulated by a statute or constitutional guarantee. *Midway Youth Football Ladies Auxiliary, Inc. v. Strickland*, 449 F. Supp. 418 (N.D. Ga. 1978).

Standing is question of whether plaintiff is sufficiently adversary to defendant to create a case or controversy under U.S. Const., art. III. *Cherry v. AMOCO Oil Co.*, 481 F. Supp. 727 (N.D. Ga. 1979).

Fundamental standing requirement of U.S. Const., art. III, is that a litigant in the federal court must allege a distinct and palpable injury to the litigant. *Maddox v. Southern Dist. Co.*, 34 Bankr. 801 (Bankr. N.D. Ga. 1982).

Individual taxpayers establish standing upon showing of unconstitutional expenditure. — Individual plaintiffs who are taxpayers in the relevant jurisdiction meet the test for taxpayer standing by identifying an allegedly unconstitutional expenditure of funds pursuant to a state spending statute. *Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

Renter “tester.” — A “tester” — an individual who, without an intent to rent an

Standing and Ripeness (Cont'd)

apartment, posed as a renter for the purpose of collecting evidence of discriminatory

practices — had standing under the 1866 Civil Rights Act (42 U.S.C. § 1982). *Watts v. Boyd Properties, Inc.*, 758 F.2d 1482 (11th Cir. 1985).

RESEARCH REFERENCES

ALR. — May Federal court, acquiring jurisdiction because of Federal question but deciding such question adversely to party

invoking jurisdiction, decide non-Federal questions, 12 ALR2d 695.

Section 1.

[Judicial Power, Tenure of Office]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Law reviews. — For article, "In Re: The Supreme Court of the United States, Report and Resolution of the Conference of Chief Justices," see 21 Ga. B.J. 139 (1958). For article examining Justice Cardozo's thought on legal method and the legitimacy of judicial authority, see 15 J. of Pub. L. 122 (1966). For article discussing the philosophy of Professor Philip Kurland on the extension of judicial power by the Warren Court and its entrance into the political realm, see 15 J. of Pub. L. 230 (1966). For article, "The Concept of Judicial Policy-Making: A Critique," see 15 J. of Pub. L. 286 (1966). For article, "The Selection and Tenure of Judges," see 2 Ga. St. B.J. 281 (1966). For article, "Chief Justice Burger and Extra-Case Activism," see 20 J. of Pub. L. 533 (1971). For article discussing the presidential power of judicial appointment, as exercised under Franklin Roosevelt and Richard Nixon, see 8 Ga. St. B.J. 145 (1971). For article "The Role and Impact of the Supreme Court and Judicial Decision-Making in the Evolution of American Federalism," see 8 Ga. St. B.J. 457 (1972). For article, "Judicial Removal of Federal Judges," see 11 Ga. St. B.J. 157 (1975). For article, "Removal and Discipline of Federal Judges," see 31 Mercer L. Rev. 681 (1980). For article discussing the separation of powers implications of implied

rights of actions, see 34 Mercer L. Rev. 973 (1983). For article surveying 1982 Eleventh Circuit cases involving bankruptcy law, see 34 Mercer L. Rev. 1209 (1983). For article, "After ABSCAM: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations," see 36 Emory L.J. 75 (1987). For article, "Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals," see 21 Ga. L. Rev. 653 (1987). For article, "Judicial Privilege," see 22 Ga. L. Rev. 89 (1987). For article, "An Overview of the New Federal Sentencing Guidelines," see 25 Ga. St. B.J. 16 (1988). For article, "The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?," see 37 Emory L.J. 45 (1988). For article, "The Constitution in the Supreme Court: 1946-1953," see 37 Emory L.J. 249 (1988). For article, "Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the 'Blending' of Powers," see 37 Emory L.J. 587 (1988). For article, "Is Disparity a Problem," see 22 Ga. L. Rev. 283 (1988). For article, "More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter," see 38 Emory L.J. 615 (1989).

For note on amenability of dependents of servicemen and nonmilitary employees to

court-martial overseas, see 9 J. of Pub. L. 252 (1960).

For comment, "Pendent Party Jurisdiction

After *Finley v. United States: A Trend Toward Its Abolition*," see 24 Ga. L. Rev. 447

(1990).

JUDICIAL DECISIONS

District court can entertain only such cases as Congress gives it jurisdiction to try. Jurisdiction to try any case or class of cases may be withheld altogether; but once Congress confers jurisdiction to try a case it cannot withhold power to decide the case according to the applicable law. *Payne v. Griffin*, 51 F. Supp. 588 (M.D. Ga. 1943).

Power to limit jurisdiction of district courts. — Congress' power to establish federal district courts includes the discretionary authority to limit and create exceptions to the jurisdiction of those courts. As a result, where Congress grants exclusive jurisdiction over a particular type of claim to a specific

agency or tribunal, or explicitly takes jurisdiction away from federal district courts, the federal district courts are bound by that decision. *United States v. Rockwell Int'l Corp.*, 795 F. Supp. 1131 (N.D. Ga. 1992).

Cited in *Perkins v. Brown*, 53 F. Supp. 176 (S.D. Ga. 1943); *Southern Ry. v. Hogue*, 117 Ga. App. 874, 162 S.E.2d 471 (1968); *Bond v. White*, 508 F.2d 1397 (5th Cir. 1975); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir. 1982); *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528 (11th Cir. 1985); *Walton v. Jones* (In re Shirley), 184 Bankr. 613 (Bankr. N.D. Ga. 1995).

Section 2.

[Jurisdiction]

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Editor's notes. — United States Const., amend. 11 modifies U.S. Const., art. III, sec. II, cl. 1 by restricting the judicial power of

federal courts as to controversies commenced against a state by citizens of another or foreign state. The appellate jurisdiction of

the Supreme Court as to questions of "fact," granted in U.S. Const., art. III, sec. II, cl. 2. has been curtailed by U.S. Const., amend. 7.

Law reviews. — For article, "Georgia Versus the United States Supreme Court," see 4 J. of Pub. L. 285 (1955). For article, "The Law of the Land," focusing on the role of the Supreme Court, see 6 J. of Pub. L. 444 (1957). For article, "Whether the Appellate Power of the Supreme Court Should Be Limited, Or More Expressly Declared," see 21 Ga. B.J. 19 (1958). For article, "In Re: The Supreme Court of the United States, Report and Resolution of the Conference of Chief Justices," see 21 Ga. B.J. 139 (1958). For article, "The Scope of Review of Facts by United States Courts of Appeals," see 21 Ga. B.J. 291 (1959). For article, "Criminal Venue and Related Problems," see 2 Ga. St. B.J. 331 (1966). For article, "Motorboat Collisions and the Family Purpose Doctrine," see 2 Ga. St. B.J. 473 (1966). For article discussing the doctrine of sovereign immunity in light of the eleventh amendment, see 2 Ga. L. Rev. 207 (1968). For article, "Chief Justice Burger and Extra-Case Activism," see 20 J. of Pub. L. 533 (1971). For article, "The Role and Impact of the Supreme Court and Judicial Decision-Making in the Evolution of American Federalism," see 8 Ga. St. B.J. 457 (1972). For article discussing the definition of the "cases" and "controversies" requirement of U.S. Const., Art. III, see 11 Ga. L. Rev. 1069 (1977). For article discussing federal civil litigation, with respect to Article III, first, fourteenth and fifteenth amendment issues, see 30 Mercer L. Rev. 821 (1979). For article, "Constitutional Criminal Litigation," see 32 Mercer L. Rev. 993 (1981). For article discussing congressional legislation which seeks to overturn or frustrate constitutional decisions of the Supreme Court of the United States, see 33 Mercer L. Rev. 707 (1982). For article, "Title VII Class Actions: The End of the Era of the Irrelevant Plaintiff," see 36 Mercer L. Rev. 907 (1985). For article, "The Georgia Bill of Rights: Dead or Alive?," see 34 Emory L.J. 341 (1985). For article, "Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930," see 35 Emory L.J. 59 (1986). For article, "Justice and Juror," see 20 Ga. L. Rev. 257 (1986). For survey of 1984-85 Eleventh Circuit cases on admiralty, see 37 Mercer L. Rev. 1169 (1986). For

article, "Separation of Political Powers: Boundaries or Balance?," 21 Ga. L. Rev. 171 (1986). For article, "Georgia and the Development of Constitutional Principles: An Essay in Honor of the Bicentennial," see 24 Ga. St. B.J. 6 (1987). For survey of 1987 Eleventh Circuit cases on administrative law, see 39 Mercer L. Rev. 1057 (1988). For survey of 1986-1987 Eleventh Circuit cases on admiralty, see 39 Mercer L. Rev. 1107 (1988). For survey of Eleventh Circuit cases on trial practice and procedure, see 39 Mercer L. Rev. 1307 (1988). For article, "Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action over Which the Federal Courts Have Exclusive Jurisdiction," see 37 Emory L.J. 645 (1988). For annual eleventh circuit survey of admiralty law, see 42 Mercer L. Rev. 1209 (1991). For survey of 1995 Eleventh Circuit cases on admiralty law, see 47 Mercer L. Rev. 691 (1996). For article, "The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions," see 53 Emory L.J. 55 (2004). For article, "Appellate Practice and Procedure," see 56 Mercer L. Rev. 1185 (2005).

For note, "Another Milepost in Jury Selection Under the Constitution," see 2 J. of Pub. L. 456 (1953). For note discussing the doctrine of federal preemption in the allocation of powers between the nation and the states, see 22 J. of Pub. L. 391 (1973). For note discussing federal courts' practice of abstention, see 22 J. of Pub. L. 439 (1973). For note, "State Standing in Police Misconduct Cases: Expanding the Boundaries of *Parens Patriae*," see 16 Ga. L. Rev. 865 (1982). For note, "Express Waiver of Eleventh Amendment Immunity," see 17 Ga. L. Rev. 513 (1983). For note on solid waste disposal, flow control ordinances and regulations, see 32 Ga. L. Rev. 1227 (1998).

For comment concerning standing of utility to challenge constitutionality of Tennessee Valley Authority Act, in light of Tennessee Elec. Power Co. v. T.V.A., 306 U.S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1939), see 2 Ga. B.J. 59 (1939). For comment on *Hibdon v. United States*, 204 F.2d 834 (6th Cir. 1953), reversing a felony conviction decided by a majority verdict upon the accused's waiver of a unanimous verdict induced by the trial court, see 16 Ga. B.J. 234 (1953). For com-

ment on *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) and *Kinsella v. Krueger*, 351 U.S. 470, 76 S. Ct. 886, 100 L. Ed. 1342 (1956), as to military authority overseas over dependents of servicemen, see 6 J. of Pub. L. 540 (1957). For comment on *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 291 (1969), as to limits of court-martial's jurisdiction to try serviceman, see 18 J. of Pub. L. 471 (1969). For comment on *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), and *Samuelo v. Mackell*, 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971), concerning a federal court's jurisdiction to grant injunction and declaratory relief in state court proceedings brought pursuant to allegedly unconstitutional state statutes, see 20 J. of Pub. L. 581 (1971). For comment discussing constitutionality of conviction upon

less-than-unanimous jury vote, see 7 Ga. L. Rev. 339 (1973). For comment discussing admiralty jurisdiction over airplane crash, in light of *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972), see 25 Mercer L. Rev. 927 (1974). For comment, "Ancillary Jurisdiction: The Kroger Approach and The Federal Rules," see 28 Emory L.J. 463 (1979). For comment on *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983), see 34 Mercer L. Rev. 1603 (1983). For comment, "Supreme Court Review of State Court Cases: Principled Federalism or Selective Bias?," see 36 Emory L.J. 1277 (1987). For comment, "Pendent Party Jurisdiction After *Finley v. United States*: A Trend Toward Its Abolition," see 24 Ga. L. Rev. 447 (1990).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EXTENT OF JURISDICTION

1. IN GENERAL
2. CASES AND CONTROVERSIES
3. STANDING AND RIPENESS
4. PENDENT JURISDICTION

SUPREME COURT JURISDICTION

TRIAL BY JURY

General Consideration

"Contacts" with forum state not germane to Bankruptcy Act. — As federal district courts have personal jurisdiction in federal bankruptcy actions over any person with minimum contacts with the United States, and as the federal Bankruptcy Act permits nationwide service of process, a federal district court had ancillary personal jurisdiction over a nonresident defendant in a "non-core," related bankruptcy proceeding. This was true even though the defendant lacked minimum contacts with the forum state. *Chemical Bank v. Grigsby's World of Carpet, Inc.* (In re WWG Indus., Inc.), 44 Bankr. 287 (N.D. Ga. 1984).

Congress clearly had the power to confer on the United States District Court subject matter jurisdiction of a suit against a nonresident by an assignee of a debtor in bankruptcy to collect on accounts allegedly owed the debtor. *Chemical Bank v. Grigsby's*

World of Carpet, Inc. (In re WWG Indus., Inc.), 44 Bankr. 287 (N.D. Ga. 1984).

Prosecution for violation of 29 U.S.C. § 461 must occur in the District of Columbia. — Prosecution for failure to file with the Secretary of Labor the trusteeship reports required by 29 U.S.C. §§ 461(a) and (c) (1980) when an international union takes over the operation of a local union can only take place in the District of Columbia. *United States v. DiJames*, 731 F.2d 758 (11th Cir. 1984).

Maritime attachment procedures. — For case discussing the constitutionality of maritime attachment procedures under admiralty rules, see *Schiffahrtsgesellschaft Leonhardt & Co. v. Bottacchi*, 732 F.2d 1543 (11th Cir. 1984).

Composition and placement of United States Sentencing Commission, created by the federal Sentencing Reform Act of 1984 (28 U.S.C. §§ 991-998), was unconstitutional

General Consideration (Cont'd)

because it violated the doctrine of separation of powers. *United States v. Richardson*, 690 F. Supp. 1030 (N.D. Ga. 1988); *United States v. Kane*, 691 F. Supp. 341 (N.D. Ga. 1988).

Statute allowing removal of prosecutions against members of armed forces. — The statute allowing removal of certain state criminal prosecutions against members of the armed forces, 28 U.S.C. § 1442a, is not a statute upon which “arising under” jurisdiction can be based; it requires that a defendant must present a federal defense for removal. *Georgia v. Westlake*, 929 F. Supp. 1516 (M.D. Ga. 1996).

Cited in *Ventimiglia v. Aderhold*, 51 F.2d 308 (N.D. Ga. 1931); *Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938); *Perkins v. Brown*, 53 F. Supp. 176 (S.D. Ga. 1943); *Smith v. UMW*, 180 F. Supp. 796 (M.D. Ga. 1958); *United States v. Raines*, 203 F. Supp. 147 (M.D. Ga. 1961); *Wirtz v. Alapaha Yellow Pine Prods., Inc.*, 217 F. Supp. 465 (M.D. Ga. 1963); *Franklin v. United States*, 384 F.2d 377 (5th Cir. 1967); *Stevens Indus., Inc. v. Maryland Cas. Co.*, 391 F.2d 411 (5th Cir. 1968); *Bond v. Fortson*, 334 F. Supp. 1192 (N.D. Ga. 1971); *United States v. Crow, Pope & Land Enters., Inc.*, 340 F. Supp. 25 (N.D. Ga. 1972); *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974); *Lucas v. Hope*, 515 F.2d 234 (5th Cir. 1975); *Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp.*, 563 F.2d 671 (5th Cir. 1977); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir. 1982); *Athens Lumber Co. v. Federal Election Comm'n*, 689 F.2d 1006 (11th Cir. 1982); *United States v. Brantley*, 733 F.2d 1429 (11th Cir. 1984); *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178 (11th Cir. 1993); *Sammons v. National Comm'n on Certification of Physician Assistants, Inc.*, 104 F. Supp. 2d 1379 (N.D. Ga. 2000).

Extent of Jurisdiction**1. In General**

The language, “shall extend ... to all Cases of admiralty and maritime Jurisdiction,” imports an absolute and exclusive grant of power. *Maryland Cas. Co. v. Grant*, 169 Ga. 325, 150 S.E. 424 (1929), cert.

denied, 281 U.S. 690, 50 S. Ct. 240, 74 L. Ed. 1120 (1930).

Nature of admiralty and maritime jurisdiction. — Jurisdiction is conferred on the federal courts in admiralty because, as the seas are the joint property of the nations, the jurisdiction is essentially national and because of their nature such cases are closely connected with the grant of the commerce power. The jurisdiction is not restricted to admiralty, but includes all maritime jurisdiction. The constitutional provision for federal jurisdiction refers to a system of law operating uniformly in the whole country, and regard must be had to the legal history, Constitution, legislation, customs, and adjudications. The admiralty jurisdiction was not intended to be as limited as it was in England at the time of the adoption of the Constitution, and it was to guard against a narrow construction of the word “admiralty” that “maritime” was added. *Maryland Cas. Co. v. Grant*, 169 Ga. 325, 150 S.E. 424 (1929), cert. denied, 281 U.S. 690, 50 S. Ct. 240, 74 L. Ed. 1120 (1930).

Admiralty and maritime jurisdiction require location and nexus. — Admiralty and general maritime jurisdiction require a showing of both location in navigable waters as well as a nexus to traditional maritime activity. *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533 (11th Cir. 1991), cert. denied, 502 U.S. 1035, 112 S. Ct. 881, 116 L. Ed. 2d 785 (1992).

Only one jurisdiction conferred under “admiralty and maritime jurisdiction.” — Although there is no question but that originally the words “admiralty” and “maritime” were not identical in meaning, there is no question but that there was one jurisdiction given by the phrase “admiralty and maritime jurisdiction.” *Renew v. United States*, 1 F. Supp. 256 (S.D. Ga. 1932).

What constitutes “navigable waters.” — *Strom Thurmond Lake* does not constitute “navigable waters” as that term is used for invoking admiralty jurisdiction. *Seymour v. United States*, 744 F. Supp. 1161 (S.D. Ga. 1990).

Necessarily, the word “affecting” must be given its reasonable and sensible meaning in light of purposes of Constitution. *Farnsworth v. Sanford*, 33 F. Supp. 400 (N.D. Ga.), aff'd, 115 F.2d 375 (5th Cir. 1940), cert. denied, 313 U.S. 586, 61 S. Ct. 1109, 85 L. Ed. 1541 (1941).

Under facts, case not one “affecting” foreign ministers. — Because two Japanese officials named in an indictment were not prosecuted, nor their persons in any manner subjected to threats, arrest, punishment, or any control whatsoever, nor their property in any manner interfered with, or attempted to be interfered with, nor were they called upon to do anything whatsoever, and their prosecution or conviction was in no way necessary to the establishment of the case against petitioner, the case against petitioner was not one “affecting” foreign ministers. *Farnsworth v. Sanford*, 33 F. Supp. 400 (N.D. Ga.), *aff’d*, 115 F.2d 375 (5th Cir. 1940), *cert. denied*, 313 U.S. 586, 61 S. Ct. 1109, 85 L. Ed. 1541 (1941).

Jurisdiction of trial court over case involving foreign official. — U.S. Const., art. III, sec. II, cl. 1 was not intended to deny a trial court jurisdiction, even if it should appear from the evidence that a foreign minister was involved in any manner, whether innocently or criminally and however slightly. It was meant merely to prevent any interference with the person or property of such ministers. *Farnsworth v. Sanford*, 33 F. Supp. 400 (N.D. Ga.), *aff’d*, 115 F.2d 375 (5th Cir. 1940), *cert. denied*, 313 U.S. 586, 61 S. Ct. 1109, 85 L. Ed. 1541 (1941).

Jurisdiction over aliens. — Under U.S. Const., art. III, sec. II, the district court had subject matter jurisdiction over a permanent resident alien residing within the district and his habeas corpus petition which alleged deprivation of liberty without due process based on the prolonged determination of his deportation proceedings. *Grodzki v. Reno*, 950 F. Supp. 339 (N.D. Ga. 1996).

Federal restriction of jurisdiction of state courts. — The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity with U.S. Const., art. III. *Hughes v. District Att’y*, 436 F.2d 568 (5th Cir. 1970), *cert. denied*, 402 U.S. 914, 91 S. Ct. 1397, 28 L. Ed. 2d 656 (1971).

Federal jurisdiction of criminal liability under state law. — The arrest by the federal courts of the processes of criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported

only on a showing of danger of irreparable injury both great and immediate. *Hughes v. District Att’y*, 436 F.2d 568 (5th Cir. 1970), *cert. denied*, 402 U.S. 914, 91 S. Ct. 1397, 28 L. Ed. 2d 656 (1971).

In diversity case, federal court must be sensitive to doctrinal trends of state law, and the policies which inform the prior adjudications by the state courts. *Timms v. Verson Allsteel Press Co.*, 520 F. Supp. 1147 (N.D. Ga. 1981).

Jurisdiction to issue writ of attachment against businesses aboard vessel. — A federal court had the authority, under its inherent power to apply traditional maritime law, to issue a writ of attachment against bankers and stores located aboard a vessel; it did not have to rely on any grant of authority under Rule B(1), Supplemental Admiralty and Maritime Claim Rules, governing attachments. *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528 (11th Cir. 1985).

Preliminary services contract outside admiralty jurisdiction. — If the subject matter of an agency agreement deals with preliminary services, that contract is not a maritime contract and is outside the admiralty jurisdiction. The fact that plaintiff in an *in rem* proceeding claimed a lien on a vessel for performance of those services under the Federal Maritime Lien Act did not change the character of those services or create in the district court the admiralty jurisdiction that was otherwise lacking. *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11th Cir. 1987).

Racial discrimination cases. — In a case against university officials involving a race discrimination claim, the critical inquiry for standing purposes was whether the plaintiff’s application had actually been treated differently at some stage in the admissions process on the basis of race. If so, then the plaintiff had not competed on an equal footing with other applicants outside plaintiff’s racial classification, and standing should have been conferred regardless of whether race was ultimately a factor in the decision to reject the application. Conversely, if the plaintiff’s application was never actually treated differently because of race, then the fact that race may have been a consideration in assessing other applicants at a different stage of the process would not

Extent of Jurisdiction (Cont'd)**1. In General (Cont'd)**

by itself confer standing. *Wooden v. Board of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262 (11th Cir. 2001).

2. Cases and Controversies

Controversy in the constitutional sense means one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character. There must be a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged. *Southern Ry. v. Brotherhood of Locomotive Firemen & Enginemen*, 223 F. Supp. 296 (M.D. Ga. 1962), *aff'd*, 324 F.2d 503 (5th Cir. 1963).

U.S. Const., art. III, sec. II, cl. 1 limits judicial power of federal courts to decision of "cases" and "controversies." The words have an iceberg quality, containing beneath their surface simplicity, submerged complexities which go to the very heart of the constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part, those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process; and in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine. *Mathews v. Massell*, 356 F. Supp. 291 (N.D. Ga. 1973); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976).

Case or controversy requirement in class action. — To satisfy the case or controversy requirement, there must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed and at the time the class action is certified by the district court, but there must also be a live controversy at the time the Supreme

Court reviews the case. The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976).

Article III courts have jurisdiction over actual controversies; they are not permitted luxury of issuing advisory opinions. *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976).

Actual controversy must exist at stages of appellate or certiorari review, and not simply on date action is initiated. *McRae v. Hogan*, 576 F.2d 615 (5th Cir. 1978).

Authority to decide moot or abstract issues. — Because the judicial power conferred by Art. III depends upon the existence of cases or controversies, federal courts lack authority to decide moot questions or abstract propositions or issues that cannot affect the rights of litigants in the case before them. *McRae v. Hogan*, 576 F.2d 615 (5th Cir. 1978).

Mootness doctrine does not apply when challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and there is a reasonable expectation that some complaining party would be subjected to the same action again. Although the power of federal courts is limited to justiciable or live controversies, a judicially carved exception to the mootness doctrine applies when a claim is capable of repetition yet evades review. *Penthouse Int'l, Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978).

Existence of controversy demonstrated by showing of threats of criminal prosecution. — While the availability of declaratory relief in a federal challenge to a state criminal statute is not precluded merely because a plaintiff has not made the required showing for injunctive relief, so long as threats of prosecution are not imaginary, speculative, or chimerical, the plaintiff has demonstrated the existence of an Art. III controversy. *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135 (5th Cir. 1980), *rev'd* on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Basic test for determining whether litigant alleges case or controversy is whether conflicting contentions of parties present real and substantial controversy between persons having adverse legal interests, a dispute that

is definite and concrete. *Western Bus. Sys. v. Slaton*, 502 F. Supp. 746 (N.D. Ga. 1980).

There can be no case or controversy where parties seek adjudication of only political question, or merely seek advisory opinion, or where the litigation presents merely an abstract, academic, or hypothetical question, or where the question sought to be adjudicated has been mooted by subsequent developments, or where the plaintiff has no standing to maintain the action. *Western Bus. Sys. v. Slaton*, 502 F. Supp. 746 (N.D. Ga. 1980).

Controversy must be definite and concrete, touching legal relations of parties having adverse legal interests; it must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts. *Federal Election Comm'n v. Lance*, 635 F.2d 1132 (5th Cir.), appeal dismissed and cert. denied, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981).

Federal courts do not decide abstract, hypothetical, or contingent questions. This is but another way of stating the requirement for a justiciable case or controversy under U.S. Const., art. III, sec. II, cl. 1. *Halder v. Standard Oil Co.*, 642 F.2d 107 (5th Cir. 1981).

Justiciable controversy is distinguished from dispute merely hypothetical or abstract in nature; it must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, not an opinion advising what the law would be upon a hypothetical statement of facts. *Halder v. Standard Oil Co.*, 642 F.2d 107 (5th Cir. 1981).

District courts lack jurisdiction to express legal opinions based upon hypothetical or academic facts. It is not the function of a United States District Court to sit in judgment on questions which today may readily be imagined, but may never in fact come to pass. Mere predictions of what may or may not occur cannot confer jurisdiction on a court to render an advisory opinion relating to those predictions. *Halder v. Standard Oil Co.*, 642 F.2d 107 (5th Cir. 1981).

Establishing existence of case or controversy. — The existence of a case or controversy is established if there is "sufficient immediacy and reality" to warrant the issu-

ance of a declaratory judgment. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

Rights of parties before court must be at issue. — Article III of the Constitution conditions the exercise of federal judicial power upon the existence of a case or controversy. As a result of Article III's proscription, federal courts are without authority to decide questions which cannot affect the rights of the parties before the court. *Afro-American Patrolmen's League v. City of Atlanta*, 817 F.2d 719 (11th Cir. 1987).

Nature of mootness doctrine. — An action that has become moot does not present a justiciable case or controversy within the meaning of U.S. Const., art. III. A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome of the litigation, such as where there is no reasonable expectation that the violation will occur again or where interim relief or events have eradicated the effects of the alleged violation. *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987).

Matters that are resolved or that have come to an end during litigation in a United States court, cease to be part of the "case" or "controversy" and become moot — unless such matters are "capable of repetition, yet evading review." *Saladin v. City of Milledgeville*, 630 F. Supp. 344 (M.D. Ga. 1986), rev'd on other grounds, 812 F.2d 687 (11th Cir. 1987), appeal dismissed after remand, 804 F. Supp. 1547 (M.D. Ga. 1992).

Capable of repetition, yet evading review exception to mootness doctrine. — Because the duration of a preliminary order reinstating an employee under § 405 of the Surface Transportation Act of 1982, 42 U.S.C. App. § 2305, was too short for the employer's challenge to be fully litigated, yet it could reasonably be expected that the employer would be subjected to similar preliminary orders in the future, the controversy between the employer and the Secretary of Labor as to the constitutional adequacy of the secretary's procedures prior to the issuance of the preliminary reinstatement order fell within the "capable of repetition, yet evading review" exception to the mootness doctrine. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987).

Extent of Jurisdiction (Cont'd)**2. Cases and Controversies (Cont'd)**

The federal court may exercise jurisdiction in cases if the conduct complained of is capable of repetition, yet evading review. *Chris C. v. Gwinnett County Sch. Dist.*, 780 F. Supp. 804 (N.D. Ga. 1991), *aff'd*, 968 F.2d 25 (11th Cir. 1992).

Demonstration of direct injury. — A plaintiff's request for injunctive relief fails to satisfy this section's "case or controversy" requirement if the plaintiff does not demonstrate that the plaintiff has sustained or is immediately in danger of sustaining some direct injury. *McQuirter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Unconstitutional statute interfering with plaintiff's normal conduct. — An anticipatory attack is appropriate if the allegedly unconstitutional statute interferes with the way the plaintiff would normally conduct one's affairs. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

Suit brought by juror in state court murder trial against the presiding judge, claiming that the judge violated constitutional rights by singling the juror out in open court, after the verdict, as the only juror to vote against the death penalty and by commenting about the juror in a published interview, and seeking declaratory relief, failed to satisfy the threshold "case or controversy" requirement, no allegation being made that such conduct by the judge would be continued. *Emory v. Peeler*, 756 F.2d 1547 (11th Cir. 1985).

Temporary restraining order where obscenity statute not in issue. — Because there was no state obscenity enforcement action concerning a particular issue of a magazine, and because the complaint of the magazine's publisher sought no ultimate relief, by way of either injunction or declaration, but only a temporary restraining order, there was no "case or controversy" to authorize federal court jurisdiction. *Penthouse Int'l, Ltd. v. Webb*, 594 F. Supp. 1186 (N.D. Ga. 1984).

Plaintiffs demonstrated existence of requisite "case or controversy". — See *American Booksellers Ass'n v. Webb*, 590 F. Supp. 677 (N.D. Ga. 1984).

Dispute over ownership and possession of documents which the FBI had provided to a

city satisfied the requirement of a case or controversy, even though plaintiff federal government and city defendants had both previously sought to prevent dissemination of the documents. *United States v. Napper*, 694 F. Supp. 897 (N.D. Ga. 1988), *aff'd*, 887 F.2d 1528 (11th Cir. 1989).

Claims for reinstatement and front pay were moot because claimant had already had former job reinstated and reinstatement and front pay are alternative, rather than cumulative, remedies. *Morris v. Roche*, 182 F. Supp. 2d 1260 (M.D. Ga. 2002).

3. Standing and Ripeness

Essence of standing questions. — As part of the case or controversy requirement, a litigant must have "standing" before he may bring a lawsuit in federal court. The essence of a standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions. *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987).

Ripeness doctrine involves both jurisdictional limitations imposed by U.S. Const., art. III's requirement of a case of controversy and prudential considerations arising from problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of the court's jurisdiction, even though jurisdiction is technically present. *Johnson v. Sikes*, 730 F.2d 644 (11th Cir. 1984).

Standing to attack tax statute. — A taxpayer who is not affected and thus not harmed by an alleged deficiency in a tax statute is not in a position to attack its constitutionality on the ground that such effect is unconstitutional. *Lott Inv. Corp. v. Gerbing*, 242 Ga. 90, 249 S.E.2d 561 (1978).

One to whom application of a statute is constitutional will not be heard to attack statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. *Lott Inv. Corp. v. Gerbing*, 242 Ga. 90, 249 S.E.2d 561 (1978).

One who would strike down state statute as violative of federal Constitution must show that the person is within class of per-

sons with respect to whom the Act is unconstitutional and that the alleged unconstitutional feature injures the person. *Lott Inv. Corp. v. Gerbing*, 242 Ga. 90, 249 S.E.2d 561 (1978).

Plaintiff who challenges a state practice must demonstrate realistic danger of sustaining direct injury from its application. *Western Bus. Sys. v. Slaton*, 502 F. Supp. 746 (N.D. Ga. 1980).

Important factor in considering ripeness is whether the tendered issue involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all. *Federal Election Comm'n v. Lance*, 635 F.2d 1132 (5th Cir.), appeal dismissed and cert. denied, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981).

Standing under establishment clause. — As to scope of the establishment clause of the first amendment and ability to demonstrate Article III standing thereunder, see *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

Standing to attack campaign finance system. — Individual citizens eligible to vote in Georgia elections, former and future candidates for state office, and organizations whose members are citizens eligible to vote in Georgia elections lacked standing to seek a declaratory judgment stating that the state campaign finance system violates their rights under the United States and Georgia Constitutions. *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1263 (11th Cir. 1999).

Standing to seek injunctive relief against city and police. — The plaintiff in a federal civil rights action had no standing to seek injunctive relief against a city and its police officers respecting certain allegedly unconstitutional practices, because the plaintiff failed to show that the plaintiff would have another encounter with the police and would again be subjected to unconstitutional treatment. *Lambert v. McFarland*, 612 F. Supp. 1252 (N.D. Ga. 1984).

Standing to challenge government-sponsored religious statements. — City residents and taxpayers had standing to challenge the display of a city seal used both on city stationery and to emboss official documents, since a non-economic injury which results

from a party's being subjected to unwelcome religious statements can support a standing claim. *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987).

Standing to contest forfeiture. — In order to contest a forfeiture, a claimant must first demonstrate a sufficient interest in the property to give the claimant Article III standing; otherwise, there is no "case or controversy," in the constitutional sense, capable of adjudication in the federal courts. *United States v. \$38,000.00 in United States Currency*, 816 F.2d 1538 (11th Cir. 1987).

Standing to challenge government's timber cutting policy. — In order for timber purchasers to have standing to bring an action challenging the government's timber cutting policy, they were required to meet the minimal Article III requirement of personally suffering an actual or threatened injury due to the government's allegedly illegal conduct. Their injury must have been fairly traceable to the government's actions and redressable by order of the court. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 736 F. Supp. 267 (N.D. Ga. 1990), *aff'd in part and vacated in part on other grounds*, 993 F.2d 800 (11th Cir. 1993), cert. denied, 510 U.S. 1040, 114 S. Ct. 683, 126 L. Ed. 2d 651 (1994).

Standing to contest constitutionality of statutory penalty. — Defendant who was sentenced to less than the maximum penalty provided by the sodomy statute lacked standing to contest whether such maximum penalty constitutes cruel and unusual punishment. *King v. State*, 265 Ga. 440, 458 S.E.2d 98 (1995).

Internal Revenue Service regulations. — Institute that certifies those who offer tax service to the public failed in its attempt to enjoin the Internal Revenue Service from enforcement of a directive prohibiting the use of the term "certified" by an individual who practices as an "enrolled agent" for the Internal Revenue Service; the institute failed to establish that the directive placed an unconstitutional burden on its first amendment rights in that it did not show any instance of threatened enforcement action by the Internal Revenue Service and did not show a concrete factual situation sufficient to establish a case in controversy. *Institute of Certified Practitioners, Inc. v. Bentsen*, 874 F. Supp. 1370 (N.D. Ga. 1994).

Extent of Jurisdiction (Cont'd)**3. Standing and Ripeness (Cont'd)**

Standing to challenge prison policy. — An inmate does not have standing to assert the first amendment rights of prison guards relative to a prison policy prohibiting its employees from communicating directly with the parole board on behalf of prisoners. *Harris v. Evans*, 20 F.3d 1118 (11th Cir.), cert. denied, 513 U.S. 1045, 115 S. Ct. 641, 130 L. Ed. 2d 546 (1994).

Teacher had standing to challenge Moment of Quiet Reflection Act. — Plaintiff's status as a teacher, the plaintiff's objection to implementing the moment of silence in the classroom, and the plaintiff's subsequent suspension and termination were sufficient to afford standing to challenge the Moment of Quiet Reflection in Schools Act. *Bown v. Gwinnett County Sch. Dist.*, 895 F. Supp. 1564 (N.D. Ga. 1995), aff'd, 112 F.3d 1464 (11th Cir. 1997).

Bailee of currency may challenge forfeiture. — The bailee of an amount of currency, who was in constructive possession of the currency when it was seized, had Article III standing to contest forfeiture of the currency. *United States v. \$38,000.00 in United States Currency*, 816 F.2d 1538 (11th Cir. 1987).

Uninjured plaintiff lacks standing in antitrust action. — Plaintiff, a generator of electricity, had no standing to sue under the Clayton Act, 15 U.S.C. § 15, for alleged antitrust violations resulting from wholesale power sales contract requiring members of wholesaler to purchase all power therefrom, because plaintiff suffered no injuries. *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986), aff'd, 844 F.2d 1538 (11th Cir. 1988).

Conversion of bankruptcy proceeding. — There was no case or controversy, and thus no federal jurisdiction, because debtor rendered moot Chapter 7 discharge by converting the bankruptcy proceeding to Chapter 13, and because the possibility of debtor's reconversion to Chapter 7 was not ripe for adjudication. *Mann v. Hahn*, 167 Bankr. 693 (Bankr. N.D. Ga. 1994).

Summary judgment. — Once it is determined that some of the plaintiffs have standing, standing exists for purposes of determining that a case or controversy is before

the court under Article Three of the Constitution, but if it is clear that a plaintiff is without standing to maintain the action, summary judgment in favor of defendant on this ground is appropriate. *International Ass'n of Firefighters, Local 349 v. City of Rome*, 682 F. Supp. 522 (N.D. Ga. 1988).

Standing in bankruptcy proceeding. — Though corporation holding second security deed on debtor's property lacked standing to recover under Bankruptcy Code, 11 U.S.C. § 362(h), corporation did have standing to seek other relief, including actions to initiate contempt proceedings or to seek declaration that defendant's foreclosure was void, in action against defendant, who held first priority security deed and whose advertising of property for foreclosure violated automatic stay. *Barnett Bank v. Trust Co. Bank (In re Ring)*, 178 Bankr. 570 (Bankr. S.D. Ga. 1995).

Standing to assert violation of "one person, one vote" rule. — In an action against the state, its state legislative bodies, the Fulton County House and Senate delegations, other unspecified local legislative delegations, the Governor, the Lieutenant Governor, the Speaker of the House, and other state government officials alleging that the method by which the Georgia General Assembly enacted "local legislation" violated the principle of "one person, one vote," the plaintiffs, who were residents of and registered voters in unincorporated Fulton County, had standing on the basis of their entitlement to full and equal representation without invidious discrimination. *DeJulio v. Georgia*, 127 F. Supp. 2d 1274 (N.D. Ga. 2001).

State flag. — African-American citizen's argument that the state flag, incorporating the stars and bars of the Confederate flag, compelled the citizen to be the courier of an ideological message that the citizen found morally objectionable failed because the flag on its face did not promulgate a sufficiently clear message of discrimination and because the record contained no evidence that the citizen was forced to acknowledge the flag in any way. *Coleman v. Miller*, 885 F. Supp. 1561 (N.D. Ga. 1995), aff'd, 117 F.3d 527 (11th Cir. 1997), cert. denied, 523 U.S. 1011, 118 S. Ct. 1199, 140 L. Ed. 2d 328 (1998).

Standing not found. — In order to satisfy Article III's case or controversy requirement,

a party must have standing to bring a case. Since the injury that plaintiffs allege, namely the monies lost as a result of the failure to perfect the security interest, is too hypothetical to constitute injury in fact, the plaintiffs lacked standing to bring a motion for class certification in their suit against the U.S. Bank. U.S. Bank's suit against other banking institutions may have the effect of recouping all funds lost as a result of the failure to perfect, thereby nullifying any injury that U.S. Bank's actions would have had on the bondholders. As the outcome of an existing suit could effectively eliminate any injury suffered by the bondholders, plaintiffs have failed to adequately demonstrate that they suffered actual, as opposed to conjectural or hypothetical, injury in fact. *In re S. Fulton Hosp. Certificate Holder Litig.*, F. Supp. 2d , 2003 U.S. Dist. LEXIS 25567 (N.D. Ga. Mar. 28, 2003).

4. Pendent Jurisdiction

Federal district courts may decline jurisdiction of state claim if goals of judicial economy and convenience and fairness to litigants would not be furthered. *Davis v. Griffin-Spalding County Bd. of Educ.*, 445 F. Supp. 1048 (N.D. Ga. 1975).

Requirements for pendent jurisdiction. — If a federal claim has substance sufficient to confer subject matter jurisdiction on the court, and both the state and federal claims derive from a common nucleus of operative fact, but where, if considered without regard to their federal or state character, a plaintiff's claims are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. *Davis v. Griffin-Spalding County Bd. of Educ.*, 445 F. Supp. 1048 (N.D. Ga. 1975).

Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case. *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241 (1977), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979).

Pendent jurisdiction relates to issues of which federal court would not have jurisdiction if raised independently of federal claim. *Bailey v. Wilkes*, 162 Ga. App. 410, 291 S.E.2d 418 (1982).

If federal court would have refrained from or been precluded from exercising pendent jurisdiction over state claims, then subsequent suit in state court would not be barred by res judicata. *Bailey v. Wilkes*, 162 Ga. App. 410, 291 S.E.2d 418 (1982).

Limitations on federal court jurisdiction. — Because federal courts are courts of limited jurisdiction, due regard for the constitutional allocation of powers between the state and federal systems requires a federal court scrupulously to confine itself to the jurisdiction conferred on it by Congress and permitted by the Constitution. *In re Carter*, 618 F.2d 1093 (5th Cir. 1980), cert. denied, 450 U.S. 949, 101 S. Ct. 1410, 67 L. Ed. 2d 378 (1981).

Federal court has pendent jurisdiction over state claim not otherwise cognizable in that tribunal if and only if it has jurisdiction over the federal claim. *Bailey v. Wilkes*, 162 Ga. App. 410, 291 S.E.2d 418 (1982).

Lack of subject matter jurisdiction over state case. — Even after entry of final judgment, the constitutional balance of policies that underlies the Art. III grant of judicial power impels the vacation of that judgment and remand to the state court having jurisdiction when it is determined that the federal court was without power to act because of a lack of subject matter jurisdiction over a removed case. *In re Carter*, 618 F.2d 1093 (5th Cir. 1980), cert. denied, 450 U.S. 949, 101 S. Ct. 1410, 67 L. Ed. 2d 378 (1981).

There are three factors for a federal district court to consider in deciding whether or not to abstain: (1) whether the disposition of a question of state law involved in the case can eliminate or narrow the scope of the federal constitutional issue; (2) whether the state law question presents difficult, obscure, or unclear issues of state law; and (3) whether a federal decision could later conflict with subsequent state court resolutions concerning the same regulatory program or scheme, thus engendering more confusion. *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135 (5th Cir. 1980).

Effect of dismissal of federal claim. — Because the federal court dismissed appel-

Extent of Jurisdiction (Cont'd)
4. Pendent Jurisdiction (Cont'd)

lant's federal claim, there was nothing from which it could be urged that appellant's state claim would have been pendent. There otherwise being no federal jurisdiction, the federal court would not have been a competent tribunal to hear appellant's state claims. *Bailey v. Wilkes*, 162 Ga. App. 410, 291 S.E.2d 418 (1982).

Supreme Court Jurisdiction

Jurisdiction of Supreme Court over cases involving ambassadors, other public ministers, and consuls is not exclusive. The words of the Constitution do not make the original jurisdiction of the Supreme Court exclusive, and they leave Congress free, not to infringe upon the jurisdiction of the Supreme Court, but to give concurrent jurisdiction to the lower courts. *Farnsworth v. Sanford*, 115 F.2d 375 (5th Cir. 1940), cert. denied, 313 U.S. 586, 61 S. Ct. 1109, 85 L. Ed. 1541 (1941).

Validity of concurrent jurisdiction of district court. — In a case in which a former attache to an embassy was tried and convicted for conspiracy under the Espionage Act, 50 U.S.C. § 31 et seq. (repealed by 62 Stat. 862, effective Sept. 1, 1948), there was no unconstitutional intrusion on the original jurisdiction of the Supreme Court, and exercise of jurisdiction by a district court, which had concurrent jurisdiction by the terms of an Act of Congress, was valid. *Farnsworth v. Sanford*, 115 F.2d 375 (5th Cir. 1940), cert. denied, 313 U.S. 586, 61 S. Ct. 1109, 85 L. Ed. 1541 (1941).

Judicial status of former attache. — An attache to an embassy is a public minister, but only so long as the attache is attached to the embassy. When the attache ceases to be attached and returns to the attache's own country, the attache is no longer entitled to diplomatic immunity and a case against the attache afterwards instituted does not affect an ambassador or minister within the meaning of the Constitution. *Farnsworth v. Sanford*, 115 F.2d 375 (5th Cir. 1940), cert. denied, 313 U.S. 586, 61 S. Ct. 1109, 85 L. Ed. 1541 (1941).

Original habeas petitions. — The federal Antiterrorism and Effective Death Penalty Act of 1996 does not deprive the Supreme Court of jurisdiction to entertain original

habeas petitions. *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996).

Trial by Jury

There is nothing in Constitution of United States requiring states to provide jury of 12 in trial of criminal cases, though the Constitution does require the federal courts to have that number. Trial by jury in a federal court means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and in England when the Constitution was adopted. Among those elements was a jury composed of 12 persons, neither more nor less. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), aff'd, 131 F.2d 110 (5th Cir. 1942), cert. denied, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

No freedoms, including freedoms of speech and press, are absolute, and liberty of press is subordinate to independence of judiciary and the proper administration of justice. The latter is necessarily true, for only in the courts can freedom of the press and other constitutional rights be preserved. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

Press should be given widest latitude possible in exercise of its freedom that is consonant with orderly administration of justice, trial by a fair and impartial jury, and the freedom and independence of the courts in the exercise of their constitutional rights and duties. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

Press interference with trial of criminal case by impartial jury. — A responsible press, appreciating as it must the great power of the press in a democratic society, should refrain from publishing and distributing news articles which, in the normal course of events would, or which it could reasonably anticipate would, interfere with the trial of a criminal case by an impartial jury; and to do so may subject it to punishment for contempt of court. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

Defendant newspaper corporation would not be required to have reasonably anticipated that publication and distribution of articles regarding defendant would have come to the attention of the jurors or have interfered with the trial of the case by an

impartial jury; for they had a right to expect that the jury would have been kept together until the conclusion of the trial or otherwise properly instructed upon being permitted to disperse. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

RESEARCH REFERENCES

ALR. — Right to jury trial in case of seizure of property alleged to be illegally used, 17 ALR 568; 50 ALR 97.

Power of the state to create and enforce liens on ships for a nonmaritime tort, 20 ALR 1095.

Workmen's Compensation Act: applicability of state compensation Act to injury within admiralty jurisdiction, 25 ALR 1029; 31 ALR 518; 56 ALR 352.

Alienage of party as affecting right of removal of suit on ground of diverse citizenship, 49 ALR 1226.

Right to jury trial in will contest, 62 ALR 82.

Jurisdiction of state courts of actions in relation to interstate shipments, 64 ALR 333.

Nature and extent of review upon appeal of causes in admiralty, 103 ALR 775.

Waiver of right to jury trial as operative after expiration of term during which it was made, or as regards subsequent trial, 106 ALR 203.

Right of user of gasoline or other commodity to question validity of a statute or ordinance imposing a tax upon dealer, 125 ALR 734.

Citizenship of executor or administrator as test of diversity of citizenship for purposes of jurisdiction of federal court, 136 ALR 938.

Right of defendant to waive right of trial by jury where he is not represented by counsel, 143 ALR 445.

What actions arise under Constitution, laws, and treaties of United States; general principles, 12 ALR2d 5.

May federal court, acquiring jurisdiction because of federal question but deciding

such question adversely to party invoking jurisdiction, decide non-federal questions, 12 ALR2d 695.

Federal diversity of citizenship jurisdiction where one of the states in which multistate corporation party litigant is alleged to be incorporated is also state of citizenship of opponent, 27 ALR2d 745.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 ALR2d 780.

Withdrawal of waiver of right to jury trial in criminal case, 46 ALR2d 919.

Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 ALR3d 301.

Modern status of the rules as to immunity of foreign sovereign from suit in federal or state courts, 25 ALR3d 322.

Choice of law in actions arising from airplane crash in territorial waters of state, 39 ALR3d 196.

Validity and efficacy of accused's waiver of unanimous verdict, 97 ALR3d 1253.

Waiver after not guilty plea, of trial in felony cases, 9 ALR4th 695.

Paternity proceedings: right to jury trial, 51 ALR4th 565.

What is "a separate and independent claim or cause of action" within 28 USCS § 1441(c) which permits nonresident codefendant to remove case from state to federal court, 58 ALR Fed. 458.

Methods other than arrest of vessel for obtaining an rem jurisdiction in admiralty, 95 ALR Fed. 225.

Admiralty jurisdiction over contracts for services in connection with off-shore drilling operations, 114 ALR Fed. 623.

Section 3.

[Treason, Proof and Punishment]

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No

Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

Cross references. — Georgia law against treason, Ga. Const. 1983, Art. I, Sec. I, Para. XIX and § 16-11-1. Georgia law proscribing the corruption of blood or forfeiture of estate by virtue of a conviction, Ga. Const. 1983, Art. I, Sec. I, Para. XX.

Law reviews. — For article, "Problems in

Search of Principles: The First Amendment in the Supreme Court from 1791-1930," see 35 Emory L.J. 59 (1986).

For comment, "Private Citizens in Foreign Affairs: A Constitutional Analysis," see 36 Emory L.J. 285 (1987).

RESEARCH REFERENCES

ALR. — Civil effects of sentence to life imprisonment, 139 ALR 1308.

ARTICLE IV.

Section 1.

[Faith and Credit among States]

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Cross references. — Full faith and credit given to acts and proceedings of another state generally, § 1-3-9. Qualified credit given where alimony is in issue, §§ 19-6-26, 19-6-27. Full faith and credit to orders of other states pursuant to Uniform Child Custody Jurisdiction and Enforcement Act, § 19-9-93. Manner of proving Acts and proceedings of another state, § 24-7-24.

Law reviews. — For article, "Some Constitutional Problems and the Conflict of Laws and Statutes of Limitation," see 7 J. of Pub. L. 120 (1958). For article discussing convergence of standards governing limits of state's personal jurisdiction and applicability of state substantive law, see 9 J. of Pub. L. 282 (1960). For article, "The Length of the Long Arm," see 9 J. of Pub. L. 293 (1960). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article discussing full faith and credit and federalism

in choice of law questions, see 34 Mercer L. Rev. 709 (1983). For article proposing an issue-by-issue analysis for resolution of choice of law questions, see 34 Mercer L. Rev. 731 (1983). For article, "Enforcing the Full Faith and Credit Clause: Congress Legislates Finality for Child Custody Decrees," see 1 Ga. St. U.L. Rev. 157 (1985). For article, "Child Custody — Jurisdiction and Procedure," see 35 Emory L.J. 291 (1986). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For article, "Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860," see 39 Emory L.J. 65 (1990). For annual eleventh circuit survey of constitutional law — civil, see 43 Mercer L. Rev. 1075 (1992). For article, "Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question," see 28 Ga. L. Rev. 365 (1994).

For note, "Interstitial Lawmaking: Uniformity or Conformity?," see 32 Mercer L. Rev. 1235 (1981).

For comment on *Cooledge v. Casey*, 58 Ga. App. 134, 198 S.E. 96 (1938), see 1 Ga. B.J. 47 (1939). For comment discussing impact of full faith and credit clause upon divorce decrees, in light of *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 ALR 1273 (1942), see 5 Ga. B.J. 42 (1943). For comment regarding impact of full faith and credit clause upon divorce decrees, in light of *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942), see 8 Ga. B.J. 228 (1945). For comment on *United Commercial Travelers v. Wolfe*, 331 U.S. 586, 67 S. Ct. 1355, 91 L. Ed. 1687 (1947), holding full faith and credit clause requires forum state to give effect to statute of limitations provision of fraternal benefit society, see 10 Ga. B.J. 378 (1948). For comment on *Azar v. Thomas*, 206 Ga. 588, 57 S.E.2d 821 (1950), holding foreign decree of divorce may be collaterally attacked on grounds of fraud in its procurement and lack of jurisdiction, see 13 Ga. B.J. 334 (1951). For comment on *Grandville-Smith v. Grandville-Smith*, 349 U.S. 1, 75 S. Ct. 553, 99 L. Ed. 773 (1955), analyzing due process aspects of divorce jurisdiction statutes and full faith and credit problems with divorce decrees, see 4 J. of Pub. L. 206 (1955). For comment on *Watson v. Employer's Liab. Assurance Corp.*, 348 U.S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1954),

holding that statute allowing direct action by policy holder against insurer contrary to terms of the contract and requiring consent of the insurer to such action as a prerequisite of doing business in the state was not violative of the Constitution, see 17 Ga. B.J. 529 (1955). For comment on *Tobin v. Tobin*, 93 Ga. App. 568, 92 S.E.2d 304 (1956), holding that it is no defense to an alimony judgment in a divisible divorce that one party obtained the divorce subsequent to the judgment, see 20 Ga. B.J. 118 (1957). For comment on *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), holding that for a state to assert jurisdiction over a foreign insurance company it is sufficient for due process purposes if the contract has a substantial connection with that state, see 21 Ga. B.J. 113 (1958). For comment concerning full faith and credit ramifications of alimony decrees, in light of *Connell v. Connell*, 119 Ga. App. 485, 167 S.E.2d 686 (1969), see 18 J. of Pub. L. 517 (1969). For comment on *Connell v. Connell*, 119 Ga. App. 485, 167 S.E.2d 686 (1969), as to enforcement of a foreign modification of a Georgia child support decree, see 21 Mercer L. Rev. 675 (1970). For comment on *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976), see 11 Ga. L. Rev. 683 (1977). For comment discussing extension of the minimum contacts concept to personal jurisdiction in divorce litigation in light of *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976), see 29 Mercer L. Rev. 341 (1977).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JUDICIAL PROCEEDINGS

1. JURISDICTION
2. CHOICE OF LAW
3. JUDGMENTS GENERALLY
4. DIVORCE AND ALIMONY
5. CUSTODY AND SUPPORT OF CHILDREN

General Consideration

Full faith and credit provision is a rule of evidence rather than of jurisdiction. FTC v. American Legal Distribs., Inc., 739 F. Supp. 1535 (N.D. Ga. 1990); *United States Fid. &*

Guar. Co. v. Lawson, 15 F. Supp. 116 (S.D. Ga. 1936).

Full faith and credit provision is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its

General Consideration (Cont'd)

own. There are limits to the extent to which the laws and policy of one state may be subordinated to those of another. *Pink v. A.A.A. Hwy. Express, Inc.*, 314 U.S. 201, 62 S. Ct. 241, 86 L. Ed. 152 (1941).

United States courts must give full faith and credit to judgments of state courts. *Nicolson v. Citizens & S. Nat'l Bank*, 50 F. Supp. 92 (S.D. Ga. 1943).

Full faith and credit clause is not binding on federal courts. *FTC v. American Legal Distribs., Inc.*, 739 F. Supp. 1535 (N.D. Ga. 1990).

Full faith and credit clause applies only to state records and proceedings. *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946).

State courts are bound to follow decisions of Supreme Court regarding what limitations upon full faith and credit clause of the United States Constitution are permissible. *Woody v. Woody*, 91 Ga. App. 806, 87 S.E.2d 222 (1955).

Power of Congress to prescribe state rules of evidence. — Aside from the full faith and credit clause of the Constitution, Congress would have no power to prescribe rules of evidence for state courts. *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946).

Full faith and credit clause does not apply to judgments of foreign countries. *Cocke v. Truslow*, 91 Ga. App. 645, 86 S.E.2d 686 (1955).

Application only to judgments obtained within courts of the United States. — Comity alone could authorize recognition of a Mexican divorce. The general comity rule is that in a proper case the laws and judicial proceedings of one state will be enforced in another state, provided they do not involve anything immoral, contrary to public policy, or violative of the conscience of the state called upon to give them effect. It is fundamental that comity will not be applied where a divorce is obtained in a foreign state under circumstances which offend the public policy of this state as found in its Constitution and statutes and the decisions of its courts. *Christopher v. Christopher*, 198 Ga. 361, 31 S.E.2d 818 (1944).

English court decree accorded conclusive effect. — A decree of an English court of chancery, rendered when both parties were citizens of that realm, which adjudges that

the defendant therein is liable to the plaintiff in a given sum of money, no question being raised as to the court having jurisdiction of the subject matter or of the parties, and there being no suggestion of fraud in its rendition, will be given conclusive effect by the courts of this state. *Coulborn v. Joseph*, 195 Ga. 723, 25 S.E.2d 576 (1943).

Full faith and credit will be accorded a foreign decree only when properly proved. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Manner of proving foreign judgments limited by federal statute. — A state cannot by merely failing or refusing to amend its code place greater restrictions upon a party seeking to rely on a foreign judgment than are imposed by the procedure enacted by Congress pursuant to the full faith and credit clause of the United States Constitution. *Peebles v. Peebles*, 103 Ga. App. 462, 119 S.E.2d 710 (1961).

Copy of foreign judgment only required in action based thereon. — To maintain an action based on judgment from another state, it is not necessary to show an authenticated copy of the record of the entire divorce and alimony proceedings; but a prima facie case is made by pleading and proving a properly authenticated copy of the judgment itself. *Creaden v. Krogh*, 75 Ga. App. 675, 44 S.E.2d 136 (1947).

Certification of copy of foreign judgment by associate judge sufficient. — A copy of the judgment of a court of a sister state attested by the clerk of such court with a certificate by one of the judges of the court that such attestation is in due form is sufficient to authorize its admission in evidence even though the judge signing the certificate was not the chief or presiding judge of such court. *Peebles v. Peebles*, 103 Ga. App. 462, 119 S.E.2d 710 (1961).

Full faith and credit clause does not compel state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state. *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 85 S. Ct. 769, 13 L. Ed. 2d 641 (1965).

Mandatory judicial recognition of laws and legal proceedings of sister states. — The courts of this state must judicially recognize the laws of the several states, as published by

authority, without proof, and properly authenticated judicial proceedings of a sister state are entitled to the same full faith and credit as they have by law or usage in the courts of the state from which they are taken. *Kelly v. Kelly*, 115 Ga. App. 700, 155 S.E.2d 732 (1967).

Foreign judgment entitled to same effect as foreign jurisdiction gives it. — Lawfully obtained judgments of the court of one state, when sued on or pleaded or introduced in evidence in another state are entitled to receive the same full faith, credit, and respect that they are accorded in the state where rendered. *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983).

Foreign judgment subject to attack for lack of jurisdiction or fraud only. — Under the full faith and credit clause of the United States Constitution a judgment of a foreign court will be enforced by the courts of this state unless it is shown that the foreign court lacked jurisdiction of the person or subject matter or that the judgment was procured by fraud. *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983).

Ex parte application for letters of administration. — Georgia court was not required to give full faith and credit to any findings or presumptions made by a New Jersey court on the issue of domicile in a proceeding which amounted to no more than an ex parte application for letters of administration of an estate. *Wilson v. Willard*, 183 Ga. App. 204, 358 S.E.2d 859 (1987).

Contractual provision that is not valid where made does not become part of the contract between the parties. *GECC v. Home Indem. Co.*, 168 Ga. App. 344, 309 S.E.2d 152 (1983).

Conviction not precluded based on notice. — While out of state convictions must be given the same faith and credit to which they are entitled in the state where they are rendered, the full faith and credit clause does not prevent Georgia from according felony status in Georgia to out-of-state misdemeanor criminal convictions in those instances where the Georgia statute provides sufficient notice to persons of ordinary intelligence than any out-of-state misdemeanor convictions that meet the specified statutory requirements will be deemed the equivalent of a felony conviction in Georgia. Thus,

since the defendant was charged with being a convicted felon in possession of a firearm, contrary to O.C.G.A. § 16-11-131, based on a misdemeanor involuntary manslaughter conviction in another state, for which the maximum penalty was five years imprisonment, if the statute had provided defendant adequate notice that the defendant's misdemeanor conviction could be used as a predicate for this charge, the full faith and credit clause would not have precluded the defendant's conviction. *State v. Langlands*, 276 Ga. 721, 583 S.E.2d 18 (2003).

Cited in *Potter v. Potter*, 40 Ga. App. 324, 149 S.E. 579 (1929); *O'Malley v. Wilson*, 182 Ga. 97, 185 S.E. 109 (1936); *John Hancock Mut. Life Ins. Co. v. Yates*, 184 Ga. 42, 190 S.E. 560 (1937); *Fidelity-Phenix Fire Ins. Co. v. Cortez Cigar Co.*, 92 F.2d 882 (5th Cir. 1937); *Foremost Dairy Prod., Inc. v. Sawyer*, 185 Ga. 702, 196 S.E. 436 (1938); *Drake v. Drake*, 187 Ga. 423, 1 S.E.2d 573 (1939); *Smith v. Globe Indem. Co.*, 65 Ga. App. 838, 16 S.E.2d 601 (1941); *McAlhany v. Allen*, 195 Ga. 150, 23 S.E.2d 676 (1942); *Coulborn v. Joseph*, 195 Ga. 723, 25 S.E.2d 576 (1943); *Sanders v. Sanford*, 138 F.2d 415 (5th Cir. 1943); *Tademy v. Scott*, 68 F. Supp. 556 (N.D. Ga. 1945); *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F.2d 960 (5th Cir. 1947); *Graves v. Carter*, 207 Ga. 308, 61 S.E.2d 282 (1950); *Richards v. Richards*, 85 Ga. App. 605, 69 S.E.2d 911 (1952); *Hedquist v. Gottke*, 209 Ga. 681, 75 S.E.2d 18 (1953); *Blood v. Earnest*, 217 Ga. 642, 123 S.E.2d 913 (1962); *Watkins v. Conway*, 221 Ga. 374, 144 S.E.2d 721 (1965); *Funderburg v. Wold*, 117 Ga. App. 638, 161 S.E.2d 376 (1968); *Richardson v. Strickland*, 225 Ga. 319, 168 S.E.2d 146 (1969); *Connell v. Connell*, 119 Ga. App. 485, 167 S.E.2d 686 (1969); *Leathers v. Klebold*, 227 Ga. 683, 182 S.E.2d 423 (1971); *Showalter v. Sandlin*, 229 Ga. 405, 191 S.E.2d 828 (1972); *Mahler v. Paquin*, 142 Ga. App. 582, 236 S.E.2d 512 (1977); *Kronitz v. Fifth Ave. Dance Studio, Inc.*, 242 Ga. 398, 249 S.E.2d 80 (1978); *Bailey v. London Marina, Inc.*, 151 Ga. App. 73, 258 S.E.2d 738 (1979); *FDIC v. Windland Co.*, 245 Ga. 194, 264 S.E.2d 11 (1980); *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981); *City of Alma v. Benham*, 170 Ga. App. 143, 316 S.E.2d 477 (1984); *Wilson v. Mills*, 172 Ga. App. 328, 323 S.E.2d 251 (1984).

Judicial Proceedings

1. Jurisdiction

Jurisdiction over members of class required for recognition of foreign judgment affecting them. — As a condition precedent for the application of the full faith and credit provision of the United States Constitution to the members of a class who may be affected by the judicial proceedings of another state, it must appear that such court had jurisdiction to bind the members of the class wherever located. *Eminent Household of Columbian Woodmen v. Bryant*, 62 Ga. App. 167, 8 S.E.2d 438 (1940).

Judgment of foreign court having jurisdiction controlling in other states. — This section compels that controversies be stilled so that if a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered. *Riley v. New York Trust Co.*, 315 U.S. 343, 62 S. Ct. 608, 86 L. Ed. 885 (1942).

Presumption favoring jurisdiction conclusive absent adverse evidence in record. — According to the common-law rule, adhered to at the present time in most states, the presumption in favor of the jurisdiction of a court of general jurisdiction is conclusive, and its judgment cannot be collaterally attacked if no want of jurisdiction is apparent of record. *Creaden v. Krogh*, 75 Ga. App. 675, 44 S.E.2d 136 (1947).

Decree partially invalid for want of jurisdiction. — A consent decree of a court of another state, which, in part, seeks to transfer title to realty in this state that had previously been set aside to a widowed spouse and minor children as a year's support, shows upon its face that, insofar as transferring title to realty, the court was without jurisdiction of the subject matter; and, accordingly, that part of the decree is not such a judgment as comes within the full faith and credit clause of the Constitution. *King v. King*, 203 Ga. 811, 48 S.E.2d 465 (1948).

For purpose of acquiring in personam jurisdiction in Georgia, the term "doing business" means engaging for profit in some practice either repeatedly or possibly with the intention that the practice be repeated and does not include the making of one contract with a nonresident. *Allied Fin. Co.*

v. Prosser, 103 Ga. App. 538, 119 S.E.2d 813 (1961).

U.S. Const. art. IV, sec. 1 has no application if the foreign judgment shows on its face that there was no jurisdiction of the person of the defendant, and thus shows a violation of due process. *Greenfield v. Chronicle Printing Co.*, 107 Ga. App. 442, 130 S.E.2d 526 (1963).

Collateral attack on decree if foreign court record purports to show jurisdiction. — A decree might be collaterally attacked by proof that the court which rendered it has no jurisdiction of the parties or cause of action, even though the record of the proceedings in the foreign court purports to show jurisdiction. *Logan v. Nunnally*, 128 Ga. App. 43, 195 S.E.2d 659 (1973).

Burden of proof on party asserting lack of jurisdiction. — The burden is upon the party asserting the invalidity of an out-of-state decree to show that it is not binding, and the jurisdiction of the out-of-state court is to be presumed until it is proved by evidence or the record itself. *Logan v. Nunnally*, 128 Ga. App. 43, 195 S.E.2d 659 (1973).

Litigation of issue of jurisdiction of foreign court binding on other court. — In collateral attack on a judgment of another court respecting jurisdiction over the defendant, once it is shown that such issue was fully litigated in the original court, the judgment is binding under the full faith and credit clause. *Fidelity Std. Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 382 F. Supp. 956 (S.D. Ga. 1974), *aff'd*, 510 F.2d 272 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 125, 46 L. Ed. 2d 94 (1975).

Collateral attacks on foreign judgments for want of jurisdiction. — The broad and general statement that a collateral attack upon a foreign judgment for want of jurisdiction is not barred by the full faith and credit clause of the Constitution is subject to exceptions. *Green Acres Dist., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

If a party is personally served that party is subject to in personam jurisdiction of courts of a foreign state and cannot collaterally attack a judgment of such court. *Green Acres Dist., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

If the question of jurisdiction is raised in foreign court and decided adversely to a

party, that party may not collaterally attack this determination. If the record reveals that the personal jurisdiction issue was raised by a defendant and decided adversely to the defendant by a court of otherwise competent jurisdiction, the judgment of that court is conclusive, is *res judicata*, and may not be collaterally attacked. *Green Acres Dist., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

A judgment of a foreign court will be enforced by the courts of this state. However, that judgment may be collaterally attacked where the foreign court lacked jurisdiction of the person or subject matter. Yet, if the defendant fails to appear at trial but makes a post-judgment appearance and moves to set aside the judgment, the issues raised and decided adversely to the defendant in the post-judgment hearing by a foreign court of otherwise competent jurisdiction are conclusive, *res judicata*, and may not be collaterally attacked in the Georgia court. *International Sys. v. Bladen County*, 168 Ga. App. 316, 308 S.E.2d 679 (1983).

Presumption of jurisdiction where merely dependent on existence of facts. — If the question as to the jurisdiction of the court depends merely upon the existence or non-existence of a fact, and the judgment is otherwise regular, and the court otherwise a court of competent jurisdiction, it is to be presumed that the court found facts to exist such as warranted its assuming jurisdiction, and such finding of fact cannot be collaterally attacked. *Green Acres Dist., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

On facts, jurisdictional issue not subject to collateral attack. — Because a defendant made a special appearance to contest personal jurisdiction, was fully heard, was overruled as to this objection and took no further part in the case or sought review of the adverse ruling, the judgment entered against the party on the merits was *res judicata* with regard to the jurisdictional issue and not subject to collateral attack on that ground when sued upon in another state. *Green Acres Dist., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

Effect of foreign statute conferring continuing jurisdiction over minor upon court granting divorce on nonresident. — The

Indiana statute that confers continuing jurisdiction over the minor child upon the court that granted the divorce decree cannot confer jurisdiction on a trial court in Indiana over an out-of-state resident who does not consent to or become subject in some way to the jurisdiction of the Indiana court. *Schowe v. Amster*, 236 Ga. 720, 225 S.E.2d 289 (1976).

Foreign adjudications of jurisdictional issues *res judicata* in other courts. — The doctrine of *res judicata* must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack. *Kingdon v. Foster*, 238 Ga. 37, 230 S.E.2d 855 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2179, 53 L. Ed. 2d 226 (1977).

Personal jurisdiction of foreign court is necessary before judgment from foreign jurisdiction will be given full faith and credit. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Effect of section on attacking jurisdiction of foreign courts. — Neither the full faith and credit clause of the United States Constitution nor any Act of Congress passed in pursuance thereof, forbids or prevents an inquiry into the jurisdiction of the court by which the judgment offered in evidence in another state was rendered. *Masters v. ESR Corp.*, 150 Ga. App. 658, 258 S.E.2d 224 (1979).

Judgment of foreign court lacking personal jurisdiction is not entitled to full faith and credit in the State of Georgia, inasmuch as a judgment of any court that lacks jurisdiction is void. *Capital Bank v. Levy*, 151 Ga. App. 819, 261 S.E.2d 722 (1979).

The Mississippi rule that a surety is bound to a judgment against its principal is entitled to no extraterritorial effect in a suit against the surety in Georgia, where the surety was not a party or privy to the Mississippi litigation involving the principal. *Rouse Constr., Inc. v. Transamerica Ins. Co.*, 750 F.2d 1492 (11th Cir. 1985).

Sole basis for precluding collateral attack on jurisdiction of foreign court. — A collateral attack upon a petition to domesticate a foreign (sister state) judgment that it was based on lack of personal jurisdiction is

Judicial Proceedings (Cont'd)**1. Jurisdiction (Cont'd)**

precluded in this state only if the defendant has appeared in the foreign court and has thus had an opportunity to litigate the issue. *Maxwell v. Columbia Realty Venture*, 155 Ga. App. 289, 270 S.E.2d 704 (1980).

In a suit brought to domesticate a Pennsylvania judgment for back taxes where the record showed that the defendant appeared, by and through counsel, and contested the Pennsylvania suit on its merits, an attack on the jurisdiction of the Pennsylvania court was without merit. *Hopkins v. City of Philadelphia*, 155 Ga. App. 534, 271 S.E.2d 672 (1980).

Personal jurisdiction in revival action. — Because a defendant had the requisite minimum contacts with the forum state for that state to exercise personal jurisdiction over the defendant during the original litigation, those same contacts were sufficient to provide personal jurisdiction to the trial court for any revival action concerning the judgment entered in the course of the original litigation. *Kaylor v. Turner*, 210 Ga. App. 2, 435 S.E.2d 233 (1993).

2. Choice of Law

In general. — A class of cases in which recognition of the law of the situs of the contract has been required comprises cases in which a right validly acquired under the law of the other state is set up by way of defense to an action in the forum, the law of which is opposed or contrary to the defensive matter. In such cases the requirement of the full faith and credit provisions is aided by the due process and contract provisions of the Constitution, to bring about recognition of foreign law, since enforcing the contract or other right stripped of the defensive provision valid under the applicable law would be making a new and different contract or creating a new right, and this would amount to a taking of property without due process of law, or in violation of the contract. *Terry v. Mays*, 161 Ga. App. 328, 291 S.E.2d 44 (1982).

Validity, form, and effect of contracts are to be determined generally by law of place where made. *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S. Ct. 129, 81 L. Ed. 106 (1936).

Effect on section of prosecution for possession of whiskey bearing revenue stamps from sister state only. — The offense of possessing whiskey in Georgia not bearing the required revenue stamps is not mitigated, nor is the prosecution defeated, by the fact that the whiskey bears the revenue stamps of another state; such prosecution is not a violation of the interstate commerce clause of the Constitution of the United States or of U.S. Const., art. IV, sec. I. *Herbert v. State*, 60 Ga. App. 633, 4 S.E.2d 843 (1939).

Rights of contractual parties governed by statutes and decisions of state where contract made. — The rights of the parties to a contract made and to be performed in another state are controlled not only by that state's pertinent statutes but by the decisions of its appellate courts construing and applying those statutes. *Motz v. Alropa Corp.*, 192 Ga. 176, 15 S.E.2d 237 (1941).

Nonresident policyholder subject to liabilities imposed by laws of insurance corporation's domicile. — If a resident of this state accepts a policy of insurance issued by a mutual insurance corporation of another state, by the terms of which the insured becomes a member of the corporation, the insured thereby is subject to the liabilities imposed upon its members by the laws of the domiciliary state. *Gaston v. Keehn*, 69 Ga. App. 500, 26 S.E.2d 107 (1943).

Giving effect to foreign statute absent compliance by plaintiff with domestic statute. — Because plaintiff knew at time of sale of automobiles to Georgia dealer that they were to be brought into Georgia, and failed to have executed either a title retention contract or a bill of sale to secure debt and to record such an instrument, either of which, under Georgia law, would have been an appropriate step to protect his interest in the automobiles, the full faith and credit clause of the United States Constitution did not require, under the circumstances, that Georgia courts give extraterritorial effect to the Florida automobile title registration law. *Cook Motor Co. v. Richardson*, 103 Ga. App. 129, 118 S.E.2d 502 (1961).

Extraterritorial effect of state's exclusive statutory remedy for injuries to its residents outside state. — A state can fix one exclusive remedy for personal injuries involving its residents wherever the accident happens

and the full faith and credit clause requires the other states to refuse to enforce any inconsistent remedy. *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 85 S. Ct. 769, 13 L. Ed. 2d 641 (1965).

Burden of showing superiority of foreign state's interest over that of forum on party so asserting. — Every state is *prima facie* entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause or for any other reason, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. *Security Ins. Group v. Plank*, 133 Ga. App. 815, 212 S.E.2d 471 (1975).

Application of forum's statute absent proof of foreign statute. — In a case in which the plaintiffs sought to domesticate action in Maryland for debt against a partnership in which a Georgia resident was served by allegedly mailing to the Georgia resident a copy of the pleadings in the State of Georgia, the law of Georgia as to validity of service would apply in the absence of any proof of the Maryland statute. *Maxwell v. Columbia Realty Venture*, 155 Ga. App. 289, 270 S.E.2d 704 (1980).

3. Judgments Generally

Effect given to judgments of sister state to same extent as given in sister state. — Action on a foreign judgment, being properly authenticated and rendered by a court of a sister state, is to be given the same full faith and credit in the courts of this state as it would have in the courts of the state where it was rendered. *Albert v. Albert*, 86 Ga. App. 560, 71 S.E.2d 904 (1952).

Full faith and credit clause requires that judgment in one state must be given such full effect in another state as it is given by the law and usage of the state of its origin. *Peebles v. Peebles*, 103 Ga. App. 462, 119 S.E.2d 710 (1961).

Foreign judgments given such effect as accorded in rendering state. — It is fundamental that under the full faith and credit clause the courts of this state are required to give only such effect to a judgment of a sister state as it would have in that state. *Jackson v. Jackson*, 231 Ga. 751, 204 S.E.2d 297 (1974).

Judgments of courts of one state must be given the same faith and credit in another state as they have by law or usage in the courts of the state rendering them. *Fidelity Std. Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 382 F. Supp. 956 (S.D. Ga. 1974), *aff'd*, 510 F.2d 272 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 125, 46 L. Ed. 2d 94 (1975).

Full faith and credit accorded judgments based on constitutional laws of sister states. — Full faith and credit will be accorded by Georgia to judgments rendered in sister states based upon the constitutional laws of those states. *Allied Fin. Co. v. Prosser*, 103 Ga. App. 538, 119 S.E.2d 813 (1961).

Recognition of foreign judgment under review by supreme court of state rendering judgment. — This section requires courts of Georgia to give full faith and credit to a judgment of another state's court even where it is shown that the supreme court of that state has such judgment under review. *Ferster v. Ferster*, 220 Ga. 319, 138 S.E.2d 674 (1964).

Under U.S. Const., art. IV, sec. I, judgment of foreign court will be enforced by courts of this state. That judgment, however, may be collaterally attacked where the foreign court lacked jurisdiction of the person or subject matter or where the judgment was procured by fraud. *Gordon v. Gordon*, 237 Ga. 171, 227 S.E.2d 53 (1976).

Foreign judgments entitled to full faith and credit. — Under the full faith and credit clause, a judgment of a foreign court will be enforced by the courts of this state unless it is shown that the foreign court lacked jurisdiction of the person or subject matter or that the judgment was procured by fraud. *Dropkin v. Dropkin*, 237 Ga. 768, 229 S.E.2d 621 (1976); *Veazey v. Veazey*, 246 Ga. 376, 271 S.E.2d 449 (1980); *Paris v. Cooper*, 158 Ga. App. 212, 279 S.E.2d 507 (1981).

Courts of Georgia are required by U.S. Const., art. IV, sec. I to give full faith and credit to judgments of sister states. A judgment in one state is conclusive upon the merits in every other state, but only if the court of the first state had jurisdiction. *Haire v. Eide*, 150 Ga. App. 52, 256 S.E.2d 658 (1979).

Proper foreign judgments entitled to full faith and credit. — The judgment of a court of one state, when sued on, pleaded, or

Judicial Proceedings (Cont'd)**3. Judgments Generally (Cont'd)**

introduced in evidence in another state, is entitled to receive the same full faith, credit, and respect that is accorded to it in the state where rendered. If it is valid and conclusive there, it is so in all other states. *Masters v. ESR Corp.*, 150 Ga. App. 658, 258 S.E.2d 224 (1979).

Foreign judgment properly proved entitled to full faith and credit. — The full faith and credit clause of the United States Constitution requires the courts of this state to give effect to a judgment granted in a sister state when the same is properly proved in a proceeding in which it may be relevant. *Melnick v. Bank of Highwood*, 151 Ga. App. 261, 259 S.E.2d 667 (1979).

Judgment rendered by competent court of another state is conclusive on merits in courts of this state when made the basis of an action or defense, and the merits cannot be reinvestigated. A foreign judgment is conclusive as to all matters which were decided or could have been heard at the time of the obtaining of the foreign judgment. *Melnick v. Bank of Highwood*, 151 Ga. App. 261, 259 S.E.2d 667 (1979).

Foreign judgments given same effect as accorded in rendering state. — Under the full faith and credit clause, the Georgia courts are required to give only such effect to a foreign judgment as it would have in the foreign state. *Capital Bank v. Levy*, 151 Ga. App. 819, 261 S.E.2d 722 (1979).

Foreign judgments entitled to full faith and credit conclusive on merits in forum. — Lawfully obtained judgments of the court of one state, when sued on or pleaded or introduced in evidence in another state, are entitled to receive the same full faith, credit, and respect that they are accorded in the state where rendered, and the foreign judgment is conclusive as to all matters which were decided or could have been heard at the time of the obtaining of the foreign judgment. *Trammell v. Burke*, 154 Ga. App. 366, 268 S.E.2d 417 (1980).

Prerequisites of foreign judgments entitled to full faith and credit. — If a judgment sued on is complete and regular upon its face and contains recitals as to the jurisdictional facts, it is entitled to full faith and credit. *Lowther v. Mathers*, 147 Ga. App. 82, 248 S.E.2d 161 (1978).

U.S. Const., art. IV, sec. I makes the valid in personam judgment of one state enforceable in all other states. *Williamson v. Williamson*, 247 Ga. 260, 275 S.E.2d 42, cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Recognition of judgment based on fraud. — There is no obligation on the part of one state to recognize a judgment rendered in another that originated in a fraudulent intention maintained and carried out on the same basis. *Cochran v. Cochran*, 173 Ga. 856, 162 S.E. 99 (1931).

Decree in court of domicile of corporation is evidence in every other state that corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly in obedience to the full faith and credit provision of the United States Constitution; but it is for the court to which an application for appointment of a receiver is made to decide whether the proper administration of the assets requires the appointment of a receiver. Ordinarily, in comity to the proceeding of another court of coordinate jurisdiction, it will appoint an ancillary receiver and assume administration in aid of the primary receiver. *Isaac Silver & Bros. Co. v. Kalmon*, 175 Ga. 244, 165 S.E. 434 (1932).

Satisfied judgment against garnishee recognized as payment of original debt in action by original creditor. — A judgment against a garnishee, properly obtained according to the law of the state and paid, must, under the full faith and credit clause of the federal Constitution, be recognized as a payment of the original debt by the courts of another state in an action brought against the garnishee by the original creditor. *H.J. Heinz Co. v. Fortson*, 61 Ga. App. 52, 6 S.E.2d 594 (1939).

Foreign judgment having effect of former adjudication in matters pending in forum state. — Under the full faith and credit clause of the Constitution, a judgment of a court of competent jurisdiction in Tennessee, if properly proved, may have the effect of former adjudication in matters pending in the courts of this state. *Roadway Express, Inc. v. McBroom*, 61 Ga. App. 223, 6 S.E.2d 460 (1939).

Proper foreign judgments regarding contracts of fraternal societies binding on non-

resident members. — Decisions of the United States Supreme Court affecting fraternal benefit societies have universally held that a decision by a court having jurisdiction in the state where the society or company is incorporated respecting matters of interpretation of its charter or contracts is binding on members similarly situated in other states. *Eminent Household of Columbian Woodmen v. Bryant*, 62 Ga. App. 167, 8 S.E.2d 438 (1940).

Effect of judgment assessing corporation members on nonresident policyholder. — If a court of the domiciliary state of an insolvent mutual corporation having jurisdiction thereof proceeds according to the applicable statutes to determine the necessity for and the amount of an assessment against its members, such proceedings are conclusive as to the necessity for and the amount of the assessment, when asserted against a nonresident policyholder who by the express terms of his policy became a member of the corporation, although he was not made a party to said proceedings. An assessment levied by court order upon members of such a corporation, in conformity with the statutes of the state of its organization, against a nonresident member who is not a party to the proceedings, involves no want of due process and is entitled to full faith and credit so far as the necessity and amount of the assessment are concerned. *Gaston v. Keehn*, 69 Ga. App. 500, 26 S.E.2d 107 (1943).

Validity of a judgment when collaterally attacked must be tried by an inspection of the judgment roll alone, and no other or further evidence on the subject is admissible, not even evidence that no notice had been given. *Creaden v. Krogh*, 75 Ga. App. 675, 44 S.E.2d 136 (1947).

Validity of foreign judgment by confession of attorney in court. — Full faith and credit is given by Georgia courts to valid judgments from other states, where such judgments do not contravene Georgia laws. A valid judgment by confession of an attorney in a court is not such a judgment as would contravene Code 1933, Ch. 110-6. *Cocke v. Truslow*, 91 Ga. App. 645, 86 S.E.2d 686 (1955).

Recitation in final order that service was perfected imports absolute verity until properly controverted in the Georgia court by pleadings raising the issue that such service was not legal service and that the judgment

rendered on such service would not be entitled to credit according to the law or usage of Florida. *Peeples v. Peeples*, 103 Ga. App. 462, 119 S.E.2d 710 (1961).

Effect of foreign decree on one not party to original proceeding where evidence shows it to be nullity. — If the evidence of one relying upon a foreign decree conclusively shows that such decree is a nullity, the courts of this state are not required to give it full faith and credit and a person not a party to such divorce proceeding whose rights are materially and adversely affected by it may collaterally attack its validity in the courts of this state. *Cole v. Cole*, 221 Ga. 171, 143 S.E.2d 637 (1965).

Proper foreign judgment conclusive on its merits in forum. — A litigant in the courts of this state relying on the judgment of a sister state in support of or in defense to an action is in general entitled to have such a judgment accorded the same full faith and credit, and no more, as it would receive in the state where rendered, and such a judgment by a court of competent jurisdiction of another state is to this extent conclusive on its merits in the courts of this state. *Kelly v. Kelly*, 115 Ga. App. 700, 155 S.E.2d 732 (1967).

Collateral attack of judgment of foreign court having jurisdiction on ground of fraud. — A judgment of a court of a foreign state having jurisdiction of the subject matter and the parties cannot be collaterally attacked in the courts of this state on the ground of fraud. *Johnson v. Johnson*, 115 Ga. App. 749, 156 S.E.2d 186 (1967).

Valid judgment cannot be attacked collaterally until set aside or reversed. *Costello v. Costello*, 230 Ga. 40, 195 S.E.2d 408 (1973).

Proper foreign judgment offered as evidence in forum court unimpeachable for fraud. — A judgment rendered by a court having jurisdiction of the subject matter, and apparently legal on its face, when offered as evidence in a cause pending in this state, cannot be collaterally impeached for fraud. *Logan v. Nunnally*, 128 Ga. App. 43, 195 S.E.2d 659 (1973).

Nonfinal foreign judgments not entitled to full faith and credit. — If an action is based upon a foreign judgment which is not final in the state where rendered, such judgment is not entitled to recognition under the full faith and credit doctrine. *Ryle v.*

Judicial Proceedings (Cont'd)**3. Judgments Generally (Cont'd)**

Ryle, 130 Ga. App. 680, 204 S.E.2d 339 (1974).

Only final judgments accorded full faith and credit. — A judgment of a state court, in order to be given full faith and credit in another jurisdiction, must be a final judgment adjudicating the litigation in a conclusive manner. *Fidelity Std. Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 382 F. Supp. 956 (S.D. Ga. 1974), *aff'd*, 510 F.2d 272 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 125, 46 L. Ed. 2d 94 (1975).

Recognition of foreign judgments subject to appeal. — The fact that a foreign judgment is subject to an appeal does not render it interlocutory within the meaning of the rule denying full faith and credit to interlocutory judgments; the full faith and credit clause of the United States Constitution applies as soon as a judgment is enforceable, and not merely after the time to appeal has elapsed. *Fidelity Std. Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 382 F. Supp. 956 (S.D. Ga. 1974), *aff'd*, 510 F.2d 272 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 125, 46 L. Ed. 2d 94 (1975).

Judgment from which appeal has been taken without supersedeas is final judgment entitled to be accorded full faith and credit, even though the appeal is still pending in the court of the original jurisdiction. *Fidelity Std. Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 382 F. Supp. 956 (S.D. Ga. 1974), *aff'd*, 510 F.2d 272 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 125, 46 L. Ed. 2d 94 (1975).

Effect of collateral attack for fraud on recognition of foreign judgment. — Full faith and credit does not have to be accorded a judgment where the collateral attack is based on its procurement through fraud. *Fidelity Std. Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 382 F. Supp. 956 (S.D. Ga. 1974), *aff'd*, 510 F.2d 272 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 125, 46 L. Ed. 2d 94 (1975).

Impeachment of a foreign judgment is limited to existence of fraud that is extrinsic in its nature, that is, fraud preventing one from having a real contest of the action based on conduct or activities outside of the court proceedings themselves. *Fraudulent*

acts that pertain to an issue involved in the original action which was litigated or could have been litigated therein may not be relitigated in another state's courts. *Fidelity Std. Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 382 F. Supp. 956 (S.D. Ga. 1974), *aff'd*, 510 F.2d 272 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 125, 46 L. Ed. 2d 94 (1975).

Foreign judgment entitled to full faith and credit where issues fully and fairly litigated in original court. — A judgment is entitled to full faith and credit, even as to questions of jurisdiction, when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. *Fidelity Std. Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 382 F. Supp. 956 (S.D. Ga. 1974), *aff'd*, 510 F.2d 272 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S. Ct. 125, 46 L. Ed. 2d 94 (1975); *Green Acres Disct., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

When party appears and defends, judgment of court, regular upon its face, may not be attacked in the courts of this state. *Green Acres Disct., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

Effect of conflict of laws on according full faith and credit to foreign judgment. — Even if the statutory law of this state is different from that of the sister state, and even if this would prevent recovery (conceding *arguendo* that there is such a difference), the forum state (Georgia) must give full faith and credit to that judgment rendered by the sister state. *Colodny v. Krause*, 136 Ga. App. 379, 221 S.E.2d 239 (1975).

Judgment in corporate liquidation proceedings. — Because the Delaware Chancery Court, pursuant to applicable statute, had power to wind up the affairs of a corporation that is a creature of the laws of that state, and, as part of that winding up, state court disposed of property of such company although majority stockholder was not named as party in the liquidation proceeding but was merely notified, the United States District Court properly gave full faith and credit to the state court proceeding by granting summary judgment in favor of the state court's holding, thus, effectively causing such proceeding to be enforceable against the majority stockholder. *CMS Indus., Inc. v.*

L.P.S. Int'l, Ltd., 643 F.2d 289 (5th Cir. 1981).

Judgment rendered by court of another state is conclusive on merits in courts of this state when made the basis of an action and the merits cannot be reinvestigated. *Flagship Bldrs., Inc. v. Sentinel Star Co.*, 143 Ga. App. 624, 239 S.E.2d 235 (1977).

Foreign judgment conclusive on merits only if rendering court had jurisdiction. — A judgment in one state is conclusive upon the merits in every other state, but only if the court of the first state had power to pass on the merits — had jurisdiction, that is, to render the judgment. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Enforcement of foreign judgments subject to collateral attack. — A judgment of a foreign court will be enforced by the courts of Georgia. That judgment, however, may be collaterally attacked where the foreign court lacked jurisdiction of the person or subject matter. *Collins v. Peacock*, 147 Ga. App. 424, 249 S.E.2d 142 (1978).

Proper foreign judgment not subject to collateral attack. — A judgment rendered by a court of competent jurisdiction of a sister state, properly authenticated, is conclusive on the merits in the courts of this state when made the basis of action and the merits cannot be reinvestigated, i.e., such a judgment is not subject to collateral attack. *Sun First Nat'l Bank v. Gainesville 75, Ltd.*, 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Georgia is not required by the full faith and credit clause to recognize nonfinal decrees. *Blue v. Blue*, 243 Ga. 22, 252 S.E.2d 452 (1979).

Only final foreign judgments entitled to full faith and credit. — To entitle the judgment of the court of a sister state to full faith and credit and to endow it with conclusive effect, the judgment must be final. *Sun First Nat'l Bank v. Gainesville 75, Ltd.*, 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Law of state of rendition determines whether judgment is final and, if not, what issues remain subject to further determination. *Sun First Nat'l Bank v. Gainesville 75, Ltd.*, 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Nature of final judgments. — Final judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. *Sun First Nat'l Bank*

v. Gainesville 75, Ltd., 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Allowing actions based on unsatisfied final foreign judgments. — Under the full faith and credit clause, Georgia must recognize the final and unmodifiable judgments of sister states, and permit actions for amounts due and unpaid thereunder up until the time of action. *Williamson v. Williamson*, 247 Ga. 260, 275 S.E.2d 42, cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Modification of foreign decree modifiable by rendering state. — Modification of a sister state decree does not offend the full faith and credit clause so long as the decree is modifiable by the rendering state, because the forum state has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered. *Blue v. Blue*, 243 Ga. 22, 252 S.E.2d 452 (1979).

Foreign judgment void as against public policy of forum entitled to full faith and credit. — That the North Carolina consent judgment contains a clause making it void as against the public policy of this state does not change the rule that local policy considerations must give way to this constitutional provision. *Cannon v. Cannon*, 244 Ga. 299, 260 S.E.2d 19 (1979).

Foreign order void as violating Georgia public policy. — Michigan order, by facially prohibiting consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the full faith and credit clause did not require the federal district court in Georgia to give full effect to the Michigan court order. *Williams v. GMC*, 147 F.R.D. 270 (S.D. Ga. 1993).

Interpretation of foreign decree by forum enforcing it. — While a foreign decree may not be altered or modified by the courts of this state, it may be interpreted and effect given to its legal intentment by a court of this state in which an action is brought to enforce such decree. *Sun First Nat'l Bank v. Gainesville 75, Ltd.*, 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Domestication of foreign judgment separate issue from enforcement of judgment. — Domestication in this state of a foreign judgment is a separate issue from the extent to which enforcement of that domesticable

Judicial Proceedings (Cont'd)**3. Judgments Generally (Cont'd)**

judgment will be authorized. *Sun First Nat'l Bank v. Gainesville 75, Ltd.*, 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Foreign judgments must be domesticated.

— Because a foreign judgment cannot be enforced until it is domesticated, a Georgia judgment had priority over an earlier obtained, but later domesticated, foreign judgment against the same debtor. *NationsBank v. Gibbons*, 226 Ga. App. 610, 487 S.E.2d 417 (1997).

Payment is complete defense to enforcement of foreign judgment entitled to full faith and credit and domestication in this state, and the defendant may plead partial satisfaction or any other affirmative defense to the enforcement sought in an action on the domesticable judgment. *Sun First Nat'l Bank v. Gainesville 75, Ltd.*, 155 Ga. App. 70, 270 S.E.2d 293 (1980).

Workers' compensation award decision.

— The full faith and credit clause does not require that the decision in another state that a person is no longer entitled to benefits is a bar to an award under Georgia law when jurisdiction is invoked under O.C.G.A. § 34-9-242. *Roadway Express, Inc. v. Warren*, 163 Ga. App. 759, 295 S.E.2d 743 (1982), cert. dismissed as improvidently granted, 464 U.S. 988, 104 S. Ct. 476, 78 L. Ed. 2d 675 (1983).

Discharge or payment of judgment is defense to execution of a foreign judgment. *Armstrong v. Strand*, 167 Ga. App. 723, 307 S.E.2d 528 (1983).

4. Divorce and Alimony**Foreign divorce decree unentitled to recognition absent personal service on wife.**

— A Nevada decree, rendered without personal service of process on a spouse and therefore without personal jurisdiction over the spouse, was not entitled to enforcement in this state by virtue of the full faith and credit clause of the federal Constitution. *Cochran v. Cochran*, 173 Ga. 856, 162 S.E. 99 (1931).

Foreign alimony decree enforceable as to unpaid payments. — A decree for alimony from a sister state, providing for future monthly payments, is such a decree as is enforceable in this state under the full faith and credit clause of the Constitution of the

United States as to such payments as have become due and remain unpaid at the time of the rendition of the judgment in this state, although the foreign court retains jurisdiction for the purpose of modifying the judgment. *Roberts v. Roberts*, 174 Ga. 645, 163 S.E. 735 (1932); *Lawrence v. Lawrence*, 196 Ga. 204, 26 S.E.2d 283 (1943); *McLendon v. McLendon*, 66 Ga. App. 156, 17 S.E.2d 252 (1941), later appeal, 70 Ga. App. 664, 29 S.E.2d 97 (1944); *Johnson v. Johnson*, 115 Ga. App. 749, 156 S.E.2d 186 (1967).

On facts, foreign divorce decree collaterally attackable for fraud. — A decree of divorce rendered in the State of Alabama on a bill of complaint by the husband alleging himself to be a bona fide resident of that state and the respondent to be a nonresident of the state, which was based upon appearance and pleading alone by the respondent as waiver of service and submission to the jurisdiction, may be collaterally attacked for fraud in its procurement. *Durden v. Durden*, 184 Ga. 421, 191 S.E. 455 (1937).

Foreign decree obtained on service by publication not entitled to full faith and credit. — Where a decree of divorce is obtained in another state on service by publication and there is no appearance or response by the defendant, such decree is not binding on the courts of this state under the full faith and credit clause of the United States Constitution. *Barnett v. Barnett*, 191 Ga. 501, 13 S.E.2d 19 (1941).

On facts, foreign decree obtained on service by publication collaterally attackable for want of jurisdiction. — Because only service upon the wife in the husband's suit for divorce in foreign state was by publication, and the wife made no appearance and contested none of the allegations of that suit, the wife had a right to collaterally attack the foreign decree upon the grounds that the court was without jurisdiction because the husband had not been a bona fide resident of the foreign state for a period of one year as required by the laws of that state to give the court jurisdiction and that the husband's representation to the court that the husband had been such a bona fide resident was false and fraudulent. *Marchman v. Marchman*, 198 Ga. 739, 32 S.E.2d 790 (1945).

Foreign decree obtained without personal service on nonresident subject to collateral

attack. — The full faith and credit clause of the Constitution of the United States has no application to a decree of divorce where the defendant in the divorce action was a non-resident, made no appearance, and the only service had was by publication; such a divorce decree is subject to a collateral attack showing that the court rendering the same was without jurisdiction or that the decree was procured by the perpetration of a fraud upon the court. *Marchman v. Marchman*, 198 Ga. 739, 32 S.E.2d 790 (1945).

Procedure for enforcement of foreign alimony decree. — An order and decree for alimony from another state, providing for future weekly payments, is such a decree as is enforceable in Georgia under the full faith and credit clause of the Constitution of the United States as to such payments as have become due and remain unpaid, when an action is brought in a court of competent jurisdiction in Georgia on a judgment entered in another state for the total of the unpaid payments which have accrued to the date of the judgment rendered in such other state. *Creaden v. Krogh*, 75 Ga. App. 675, 44 S.E.2d 136 (1947).

Jurisdiction of foreign court rendering decree prima facie presumed valid. — Because the record of the proceedings and decree in the Nevada court, which the defendant offered in evidence, shows on its face that the court had jurisdiction of the plaintiff and the defendant had his residence in Nevada, under the full faith and credit clause of the federal Constitution, the trial court was under a duty to accord prima facie validity to the Nevada decree; and, upon the admission of the judgment and record in that case, the burden was upon the plaintiff, if the plaintiff would escape the operation of the decree, to show that it was not binding upon the plaintiff, and such jurisdiction of the Nevada court over the cause of action and the parties is to be presumed until disproved by evidence or by the record itself. *Patterson v. Patterson*, 208 Ga. 7, 64 S.E.2d 441 (1951).

Presumption rebuttable by evidence showing domicile outside foreign decree forum. — The presumption of validity of a foreign divorce decree is rebuttable by evidence of the attacking party showing a lack of domicile of the plaintiff in the foreign divorce forum; and, if the evidence shows that the

plaintiff was not a bona fide resident of the foreign state at the time the divorce action was instituted, the court may decline to give full faith and credit to the decree, notwithstanding the finding of the foreign decree that he was such a resident. *Patterson v. Patterson*, 208 Ga. 7, 64 S.E.2d 441 (1951).

Foreign divorce decree showing jurisdiction entitled to recognition in in-state divorce action. — An amendment to the husband's answer, in an in-state divorce action by the wife, setting up a final divorce decree from a court of foreign state, which decree showed on its face that such court had jurisdiction over the parties and the cause of action for a divorce, is prima facie entitled to respect by the courts of this state under the full faith and credit clause of the federal Constitution. *Cherry v. Cherry*, 208 Ga. 213, 65 S.E.2d 805 (1951).

Full faith and credit clause places Georgia courts under duty to accord prima facie validity to Texas divorce decree. *Meeks v. Meeks*, 209 Ga. 588, 74 S.E.2d 861 (1953).

Effect of foreign divorce decree on temporary alimony order. — Full faith and credit under the Constitution of the United States does not demand that support and maintenance due the wife under a temporary alimony order of the courts of Georgia cease when a valid divorce is granted between the parties in another state. *Meeks v. Meeks*, 209 Ga. 588, 74 S.E.2d 861 (1953).

Effect of pending divorce action on divorce decree procured in sister state. — The mere fact that spouse had a divorce action pending in a court in Georgia at the time he procured a Texas divorce is not sufficient to rebut the prima facie validity of the Texas decree, since whether or not there was an action pending in Georgia for the same cause was not a jurisdictional fact in the cause in Texas. *Meeks v. Meeks*, 209 Ga. 588, 74 S.E.2d 861 (1953).

Mere production of copy of foreign divorce decree without more insufficient to invalidate it. — Although it is true that a Texas divorce decree may be collaterally attacked in the courts of Georgia on the grounds of lack of jurisdiction in the Texas court or fraud in the procurement of the decree, and that the Georgia courts may determine those questions for themselves, where the only evidence produced in proceeding by wife to have husband adjudged in

Judicial Proceedings (Cont'd)**4. Divorce and Alimony (Cont'd)**

contempt for failure to pay temporary alimony was a copy of the husband's Texas divorce decree, and no question regarding the jurisdiction of the Texas court or of fraud in the procurement of the decree is presented, the Constitution of the United States demands that the Texas decree be given full faith and credit. *Meeks v. Meeks*, 209 Ga. 588, 74 S.E.2d 861 (1953).

Foreign decree obtained on personal service or by appearance of both parties valid.

— If there has been personal service or if the parties both actually appear and participate in the trial by pleading and personal appearance, this court holds that a divorce decree rendered by the courts of another state, under these circumstances, is not subject to collateral attack. *Smith v. Smith*, 211 Ga. 615, 87 S.E.2d 320 (1955).

Full faith and credit not accorded foreign decree subject to collateral attack. — If the only service obtained in a divorce action is by publication, when the defendant is a nonresident and does not appear and defend the action and has no actual notice of the pendency of the action, the decree is subject to attack on the ground that the court rendering the decree had no jurisdiction of the parties, or that the decree was obtained by the perpetration of a fraud upon the court rendering the decree, and the full faith and credit clause of the Constitution of the United States and the Act of Congress enacted pursuant thereto, 28 U.S.C. § 1738, have no application under these circumstances. *Smith v. Smith*, 211 Ga. 615, 87 S.E.2d 320 (1955).

Decree unattackable in rendering state is unattackable in any state. — If a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or by strangers in the rendering state, the full faith and credit clause forbids an attack by them anywhere in the United States. A state by virtue of U.S. Const., art. IV, sec. I must give full faith and credit to a foreign divorce decree by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree, where the decree is not susceptible to such collateral attack in the courts of the state which rendered it.

Woody v. Woody, 91 Ga. App. 806, 87 S.E.2d 222 (1955).

Elements essential to foreign divorce decree for full faith and credit. — The decisions of this court up to this time have uniformly held that the full faith and credit clause of the Constitution of the United States and the Act of Congress enacted in pursuance thereof, 28 U.S.C. § 1738, have no application to a decree of divorce if the defendant in the divorce action was a nonresident, made no appearance, and the only service had was by publication, and that such a divorce decree is subject to a collateral attack showing that the court rendering the same was without jurisdiction or that the petitioner therein procured the decree by the perpetration of a fraud upon the court rendering the same. But if there has been personal service or the defendant appears and defends, a decree of divorce rendered by a court of another state and regular upon its face is not subject to attack in the courts of this state. *Wade v. Wade*, 213 Ga. 886, 102 S.E.2d 557 (1958).

Foreign alimony decree subject to revocation or modification unenforceable. — A decree for alimony of a sister state, providing for future monthly payments, which by its own terms is subject to be revoked or modified as to the amount to be paid thereunder by the court rendering such decree, is not enforceable in this state under U.S. Const., art. IV, sec. I or upon principles of comity. *Ferster v. Ferster*, 219 Ga. 543, 134 S.E.2d 600 (1964).

Effect of foreign divorce on support and maintenance order. — Full faith and credit under the Constitution of the United States does not demand that support and maintenance due the spouse under an order of the courts of Georgia cease when a valid divorce is granted between the parties in another state. *Spadea v. Spadea*, 225 Ga. 80, 165 S.E.2d 836 (1969).

Foreign divorce properly proved entitled to full faith and credit. — U.S. Const., art. IV, sec. I requires the courts of this state to give effect to a divorce granted in a sister state when the same is properly proved in a proceeding in which it may be relevant in this state. *Spadea v. Spadea*, 225 Ga. 80, 165 S.E.2d 836 (1969).

Foreign divorce decree properly rendered not subject to collateral attack. — Under

U.S. Const., art. IV, sec. I, a divorce decree of a sister state rendered after personal service on the defendant and after the defendant has appeared in person or by attorney and defended the same on the merits, which decree is regular upon its face, is not subject to collateral attack in the courts of this state but must be given full force and effect as if rendered by a court of this state. *Joyner v. Joyner*, 227 Ga. 545, 181 S.E.2d 842 (1971).

Foreign divorce decree attacked for fraud as bar to alimony action. — The rule prevailing in this state is that a decree of divorce, obtained by a husband in another state, wherein service is perfected on the wife, a resident of this state, by publication, and in which the plaintiff in such foreign judgment is not in fact a bona fide resident of the state in which the judgment is rendered, can be attacked collaterally for fraud when offered in the courts of this state, as a bar to the wife's action for alimony. *Logan v. Nunnally*, 128 Ga. App. 43, 195 S.E.2d 659 (1973).

Ex parte divorce decree valid in other states if one spouse domiciled in forum. — An ex parte judgment that only grants a divorce is entitled to full faith and credit in other states if one of the spouses was domiciled in the forum that granted the divorce judgment. *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976).

Foreign divorce decree unimpeachable in rendering state is unimpeachable in any state. — If a decree of divorce cannot be attacked on jurisdictional grounds by parties who were actually before the court, or by their privies, or by strangers, in the courts of the state in which the decree was rendered, the full faith and credit clause precludes their attacking it in the courts of a sister state. *Kingdon v. Foster*, 238 Ga. 37, 230 S.E.2d 855 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2179, 53 L. Ed. 2d 226 (1977).

U.S. Const., art. IV, sec. I requires courts of this state to give effect to divorce decree of sister state when properly proved. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Foreign divorce decree obtained by domiciliary of rendering state by constructive service valid. — A divorce decree granted by a state to one of its domiciliaries is entitled to full faith and credit in another state even though the other spouse is given notice only through constructive service.

Benefield v. Harris, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Foreign divorce decree invalid as to non-resident on issue of alimony absent personal service. — Even though a divorce decree is entitled to full faith and credit insofar as it affects marital status, it is ineffective as to a nonresident on the issue of alimony (an in personam judgment) unless there was personal service. *Benefield v. Harris*, 143 Ga. App. 709, 240 S.E.2d 119 (1977).

Actions on unsatisfied and unmodifiable foreign alimony decrees permitted. — If a decree for installment payments of alimony or child support is given in a sister state, and the decree constitutes a final and unmodifiable judgment as to amounts due and unpaid under it, the full faith and credit clause requires that Georgia permit actions for the amount due and unpaid up until the time the action is brought. *Blue v. Blue*, 243 Ga. 22, 252 S.E.2d 452 (1979).

Foreign modified alimony order rendered without personal service unenforceable. — As a personal judgment for alimony cannot be rendered against a nonresident defendant upon service by publication, and accordingly, an action for modification of alimony cannot be maintained against a nonresident defendant who has not been personally served or has not waived personal service, nor can Mississippi statute which purports to grant court rendering divorce continuing jurisdiction to modify alimony award confer personal jurisdiction over a nonresident defendant who has not consented or subjected herself to the jurisdiction of the Mississippi courts, Mississippi modification order against resident of Georgia who was served by publication and who did not waive personal service was not entitled to full faith and credit in the courts of this state. *Veazey v. Veazey*, 246 Ga. 376, 271 S.E.2d 449 (1980).

Vested right to due alimony installments entitled to full faith and credit. — Generally speaking, if a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming due and is protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments. Alimony decreed to a spouse in a divorce is as much a debt of record, until

Judicial Proceedings (Cont'd)**4. Divorce and Alimony (Cont'd)**

the decree has been recalled, as any other judgment for money is. *Williamson v. Williamson*, 247 Ga. 260, 275 S.E.2d 42, cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Modifiable alimony decree unenforceable. — If the law of the state in which a judgment for future alimony is rendered makes the right to demand and receive such alimony discretionary with the court that rendered the decree, to the extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even though no application to annul or modify the decree in respect of alimony has been made prior to installments falling due, the decree is not protected by the full faith and credit clause. *Williamson v. Williamson*, 247 Ga. 260, 275 S.E.2d 42, cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Decrees subject to further order of court. — Georgia law distinguishes between an action to enforce an award for support rendered in connection with a divorce decree, although such award is subject to modification, and an action to enforce such award if it is not rendered in connection with a divorce decree and is made subject to "further order of the court," and will not enforce the latter judgment of a sister state. *Jagiella v. Jagiella*, 647 F.2d 561 (5th Cir. 1981).

Foreign modification of Georgia child support award requires in personam jurisdiction. — A Kentucky court would be required to have in personam jurisdiction over defendant in order to modify a Georgia award of child support. *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983).

When foreign divorce decree given effect. — U.S. Const., art. IV, sec. I requires the courts of this state to give effect to a divorce decree of a sister state when properly proved. *Tallman v. Tallman*, 161 Ga. App. 447, 287 S.E.2d 703 (1982).

Nature of action to enforce alimony decree. — The action to enforce a decree for alimony of a sister state does not make such action an alimony case; rather it is an action on a debt of record. *Tallman v. Tallman*, 161 Ga. App. 447, 287 S.E.2d 703 (1982).

Judgments subject to retroactive modification lack requisite finality. — Final divorce decrees of other states are recognized under the full faith and credit clause. Even those which may be prospectively modified are properly domesticated and enforced in Georgia under principles of comity. Nevertheless, judgments of other states which may be modified retroactively lack the requisite finality to be entitled to full faith and credit. *Apple v. Apple*, 186 Ga. App. 325, 367 S.E.2d 109 (1988).

Contempt action held unenforceable. — Although it was not error to domesticate 1975 and 1978 New York divorce and alimony decrees, there was no basis to enforce an action for contempt based on unpaid sums allegedly owed under those decrees, because a reduction of the sums owed to judgment, they were not enforceable in New York. *Apple v. Apple*, 186 Ga. App. 325, 367 S.E.2d 109 (1988).

5. Custody and Support of Children

Foreign decree awarding custody void for lack of jurisdiction. — A father's leaving his wife and minor child in Georgia to obtain employment for himself in Michigan, and failing to provide for them, except sending them about \$12.00 in two years, held to authorize a finding that the father had voluntarily relinquished parental authority over the child to the mother, thereby rendering the domicile of the child that of its mother, so that a Michigan divorce decree awarding custody of the child to the father was void for lack of jurisdiction, even though the mother filed an answer in the divorce proceeding, asking to be awarded the child; and the court was authorized to determine the habeas corpus case filed by father to regain custody without regard to the foreign judgment, and solely in view of the welfare of the child as an original proposition. *Elliott v. Elliott*, 181 Ga. 545, 182 S.E. 845 (1935).

Custody decree void for lack of jurisdiction of child. — On habeas corpus by a father to recover the custody of a minor child living with the mother in Georgia, predicated upon a decree of a Michigan court dissolving the marriage and awarding the child to the father, the full faith and credit clause of the federal Constitution did not preclude the Georgia court from declaring the Michigan decree void for lack of

jurisdiction of the child. *Elliott v. Elliott*, 181 Ga. 545, 182 S.E. 845 (1935).

Foreign custody decree subject to modification in other state for welfare of child. —

A decree of divorce awarding the custody of the children of the parties, rendered by the court of another state having jurisdiction of the subject matter and of the parties, shall be given full effect in this state; but such decree cannot anticipate changes which may occur in the condition of the parents, or in their character and fitness for the care of their children. Accordingly, if, in a proceeding in this state involving the custody of a child, a change is shown in the circumstances of the parties materially affecting the welfare of the child since the foreign decree, the court in the exercise of a sound discretion may protect such welfare accordingly, the same as if there has been such a change since a decree rendered in this state. If the mother and child now reside in this state, and if the father filed his petition in a superior court of this state for injunction against the mother, the court would be authorized, if there was competent evidence of a change in the condition of the parties since the decree materially affecting the child's welfare, to make a new award of custody. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941).

Custody decree rendered without jurisdiction of mother collaterally attackable. —

Although a decree in another state awarding the custody of a child to the father is conclusive as between the parties to the decree and as to the right and fitness for such custody at that time, such a judgment rendered without jurisdiction of the mother may be collaterally attacked without offending the full faith and credit clause of the Constitution of the United States. *Carter v. Carter*, 201 Ga. 850, 41 S.E.2d 532 (1947).

Divorce decree awarding custody and properly rendered entitled to full faith and credit. —

If the defendant appears and defends, a decree of divorce rendered by a court of another state and regular upon its face is not subject to attack in the courts of this state, and such a decree awarding custody of the children of the parties, rendered by the court of another state having jurisdiction of the subject matter and of the parties, shall be given full effect in this state. *Beggs v. Beggs*, 208 Ga. 415, 67 S.E.2d 135 (1951).

Valid jurisdiction over parents confers same over minors' custody and support. — A

divorce suit embraces within its scope the care and disposition of minor children, and jurisdiction over the parents confers *eo ipso* jurisdiction over the minors' custody and support; and if in a foreign court jurisdiction is not claimed by virtue of service by publication on a nonresident, but rests upon an answer and cross-bill filed therein by the nonresident, wherein the custody of the children and alimony for their support is put in issue, such court acquires complete jurisdiction of the marriage status and the custody of the children. *Beggs v. Beggs*, 208 Ga. 415, 67 S.E.2d 135 (1951).

Foreign custody decree properly obtained entitled to full faith and credit. —

A judgment of a court of competent jurisdiction in another state, awarding the custody of a child to a named person, which judgment is regular on its face and unimpeached for fraud, is conclusive of the status at the time of its rendition, and will be accorded full faith and credit if introduced in proceedings in Georgia for the custody of the child. *Peeples v. Newman*, 209 Ga. 53, 70 S.E.2d 749 (1952).

Any custody decree subject to modification if welfare of child at issue. —

A judgment awarding the custody of a child, whether rendered by the courts of a sister state or by the courts of Georgia, may be modified upon application if it is shown that there is such a change of conditions since the rendition of the decree as will affect the welfare of the child. *Peeples v. Newman*, 209 Ga. 53, 70 S.E.2d 749 (1952).

Foreign custody decree unimpeached for fraud entitled to full faith and credit. —

The judgment of a court of competent jurisdiction of a sister state, awarding the custody of a minor child, which is regular on its face and unimpeached for fraud, is entitled to full faith and credit in proceedings for the custody of the child in this state. *Belden v. Strickland*, 218 Ga. 105, 126 S.E.2d 670 (1962).

Original foreign custody award not res judicata in proceeding for custody where child's welfare at issue. —

An original custody award in a foreign court, under U.S. Const., art. IV, sec. 1, is not res judicata as to a subsequent claim of custody based on changes of conditions affecting the child's welfare. *Oliver v. Oliver*, 225 Ga. 61, 165 S.E.2d 863 (1969).

Judicial Proceedings (Cont'd)**5. Custody and Support of Children (Cont'd)**

Duty of courts to modify foreign custody decree if change in conditions adversely affect child. — Although a decree of a court of a sister state granting custody of a child temporarily for a period of one year must be given effect by the courts of this state under the full faith and credit clause of the United States Constitution, it is nevertheless the duty of the trial courts of this state, if the issues are presented to it, to determine whether there has been a change in conditions subsequent to the entry of the previous decree which adversely affects the welfare of the child, and to determine, based on the present conditions as shown by the evidence, whether the best interests of the child dictate a change in custody. *Glover v. Sink*, 230 Ga. 81, 195 S.E.2d 443 (1973).

Allowance of evidence of effect of foreign custody decree in rendering state. — In order to determine the effect of a Maryland decree in regard to child support and custody sought to be enforced by the husband in a divorce action, evidence of the effect of such decree in Maryland should be allowed and the refusal to permit the wife to introduce such evidence is error. *Jackson v. Jackson*, 231 Ga. 751, 204 S.E.2d 297 (1974).

Foreign custody judgment not incident to divorce decree and without jurisdiction invalid. — If a foreign court changes or fixes

custody of a child, not incident to a divorce decree, without personal jurisdiction over the parties to the action, the judgment so issued need not be recognized under the full faith and credit clause of the Constitution. *Schowe v. Amster*, 236 Ga. 720, 225 S.E.2d 289 (1976).

Child custody judgment may be entitled to recognition under former Code 1933, Ch. 5, T. 74 (see O.C.G.A. Ch. 9, T. 19) even though such judgment would not be entitled to full faith and credit. *Youmans v. Youmans*, 247 Ga. 529, 276 S.E.2d 837 (1981).

Prosecution for abandonment. — Because a North Carolina divorce decree making the divorced wife responsible for the total maintenance of the children would not have barred a North Carolina prosecution of the father for abandonment, the full faith and credit clause did not have the effect of barring a criminal prosecution for abandonment in Georgia. *Chapman v. State*, 177 Ga. App. 580, 340 S.E.2d 237 (1986).

Supreme Court without jurisdiction where full faith issue not raised in state court. — Because petitioner failed, in the state proceedings, to raise question of whether the United States Constitution demanded that Georgia give full faith and credit to a Florida custody decree and, the Georgia Supreme Court failed to rule on a federal issue, the United States Supreme Court was without jurisdiction on the petition for certiorari. *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

RESEARCH REFERENCES

ALR. — Refusal to entertain an action upon a judgment rendered in another state upon a cause of action which it would have been contrary to statute or public policy of the forum to have entertained, 4 ALR 968; 10 ALR 719; 24 ALR 1437.

Pendency of appeal from judgment as affecting right to enforce it in another state, 5 ALR 1269.

Full-faith and credit provision as applying to decree of another state admitting a will to probate, 13 ALR 498.

Refusal to entertain an action upon a judgment rendered in another state on a cause of action which it would have been contrary to public policy of the forum to have entertained, 24 ALR 1437.

Conflict of laws as to contributory negligence, 32 ALR 796.

Inhibition by decree of divorce, or statute of state or country in which it is granted, against remarriage, as affecting a marriage celebrated in another state or country, 32 ALR 1116; 51 ALR 325.

Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 ALR 740.

Foreign judgment based upon, or which fails to give effect to, a judgment previously rendered at the forum, or in a third jurisdiction, 53 ALR 1146.

Conclusiveness of officer's return of service of process on which judgment in sister state was rendered, 59 ALR 1398.

Limitation applicable to cause of action created by statute of another state which allows a longer period than the statute of the forum, 68 ALR 217; 146 ALR 1356.

Duty of courts to follow decisions of other states, on questions of common law or unwritten law, in which the cause of action had its situs, 73 ALR 897.

Federal Constitution and conflict of laws as to rights not based on judgments, 74 ALR 710; 100 ALR 1143; 134 ALR 1472.

Duty of court of one state, under the full faith and credit clause of federal Constitution, to recognize and enforce a judgment rendered in another state upon a claim which such court has no jurisdiction to enforce, 76 ALR 1364.

Conflict of laws as to construction and effect of will devising real property, 79 ALR 91.

Extraterritorial recognition and effect on marital status of decree of divorce rendered upon constructive or substituted service, 86 ALR 1329; 143 ALR 1294; 157 ALR 1399; 163 ALR 368.

Conflict of laws as regards survival of cause of action and revival of pending action upon death of party, 87 ALR 852; 42 ALR2d 1170. Reciprocity as affecting comity, 87 ALR 973.

Conflict of laws as to conditional sale of chattels, 87 ALR 1308; 13 ALR2d 1312.

Assumption of or refusal to assume jurisdiction by court of one state or country, of action on contract involving foreign elements, 87 ALR 1425; 90 ALR2d 1109.

Right to enjoin an action in another state in respect of matters adjudicated in local action or proceeding, 91 ALR 570.

Judgment or order upholding prior judgment in the same state against direct attack upon ground of lack of jurisdiction, as conclusive in another state under the full faith and credit provision or doctrine of res judicata, 104 ALR 1187.

Conflict of laws as to period of limitation to enforce stockholders' statutory liability, 113 ALR 510; 143 ALR 1442.

Full faith and credit provisions as affecting insurance contracts, 114 ALR 250; 119 ALR 483; 173 ALR 1138.

Recognition of foreign marriage as affected by policy in respect of incestuous marriages, 117 ALR 186.

Decree of court of domicil respecting va-

lidity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will, 131 ALR 1023.

Conflict of laws regarding deficiency in respect of debt secured by mortgage or deed of trust, 136 ALR 1057.

Duty of courts of one state to recognize and give effect to decrees of divorce rendered in other states, as affected by constructive service of process or lack of domicil at divorce forum, 143 ALR 1294.

Revival of judgment by constructive service of process upon nonresident, as affected by due process and full faith and credit clauses, 144 ALR 403.

Domestic decree of divorce based upon a finding of invalidity of a previous divorce in another state, as estopping party to the domestic suit to assert, in a subsequent litigation, the validity of the divorce decree in the other state, 150 ALR 465.

Recognition of status created by foreign adoption or legitimation for purposes of testate or intestate distribution of decedent's estate in a jurisdiction in which such status could not have been created even in the case of one domiciled there, 153 ALR 199.

Decree for alimony in installments as within full faith and credit provision, 157 ALR 170.

Duty to recognize and give effect to decrees of divorce rendered in other states, or in foreign country, as affected by constructive service of process or lack of domicil at divorce forum, 157 ALR 1399.

Extraterritorial effect of provision in decree of divorce as to custody of child, 160 ALR 400.

Judgment for defendant based on the statute of limitations as bar to maintenance of action in another state, 164 ALR 693.

Right to maintain action or proceeding in one state or country to collect or enforce tax due to another state or country or political subdivision thereof, 165 ALR 796.

Estoppel to assert invalidity of decree of divorce for lack of domicil at the divorce forum or failure to obtain jurisdiction of person, 175 ALR 538.

Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicil, since Williams decision, 1 ALR2d 1385; 28 ALR2d 1303.

Consent decree as affecting title to real estate in another state, 2 ALR2d 1188.

Denial of divorce in sister state or foreign country as *res judicata* in another suit for divorce between the same parties, 4 ALR2d 107.

Inclusion in domestic judgment or record, in action upon a judgment of a sister state, of findings respecting the cause of action on which the judgment in the sister state was rendered, 10 ALR2d 435.

Foreign divorce decree as subject to attack by spouse in state of which neither spouse is resident, 12 ALR2d 382.

Standing of strangers to divorce proceeding to attack validity of divorce decree, 12 ALR2d 717.

Foreign filiation or support order in bastardy proceedings, requiring periodic payments, as extraterritorially enforceable, 16 ALR2d 1098.

Validity and enforceability of judgment entered in sister state under a warrant of attorney to confess judgment, 39 ALR2d 1232.

Enforceability in another jurisdiction of personal liability of stockholders for debts of corporation whose organization is incomplete or defective, 42 ALR2d 659.

Enforceability of provision in agreement for attorney's fees, valid in state of its execution or performance, but invalid under law of forum, 54 ALR2d 1053.

Injunction against suit in another state or country for divorce or separation, 54 ALR2d 1240.

Fraud as defense to action on judgment of sister state, 55 ALR2d 673.

Conflict of laws as to attorneys' liens, 59 ALR2d 564.

Conflict of laws as to interest recoverable as part of the damages in a tort action, 68 ALR2d 1337.

What law governs effect of release of one

tort-feasor upon liability of another tort-feasor, 69 ALR2d 1034.

Doctrine of *forum non conveniens*: assumption or denial of jurisdiction of contract action involving foreign elements, 90 ALR2d 1109.

Conflict of laws as to right of action between husband and wife or parent and child, 96 ALR2d 973.

Law governing assignment of wages or salary, 1 ALR3d 927.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

Power of divorce court to deal with real property located in other state, 34 ALR3d 962.

Conflict of laws as to presumptions and burden of proof concerning facts of civil case, 35 ALR3d 289.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 ALR3d 520.

Requirement of full faith and credit to foreign judgment for punitive damages, 44 ALR3d 960.

Conflict of laws as to right of action for loss of consortium, 46 ALR3d 880.

Disbarment or suspension of attorney in one state as affecting right to continue practice in another state, 81 ALR3d 1281.

Extraterritorial application of statute permitting injured person to maintain direct action against tort-feasor's automobile liability insurer, 83 ALR3d 338.

Choice of law as to application of comparative negligence doctrine, 86 ALR3d 1206.

Full faith and credit "last-in-time" rule as applicable to sister state divorce or custody judgment which is inconsistent with the forum state's earlier judgment, 36 ALR5th 527.

Section 2.

[Privileges and Immunities, Fugitives]

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Cross references. — Criminal extradition, Ch. 13, T. 17.

Editor's notes. — U.S. Const., art. IV, sec. II, cl. 3 concerned slaves and indentured servants and has been rendered obsolete by U.S. Const., amend. 13.

Law reviews. — For article discussing fishing rights along maritime belt of the United States, in light of *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1157, 92 L. Ed. 1460 (1948), see 11 Ga. B.J. 191 (1948). For article, "Interstate Extradition and State Sovereignty," see 1 Mercer L. Rev. 147 (1950). For article, "Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930," see 35 Emory L.J. 59 (1986). For article, "Georgia and the Development of Constitutional Principles: An Essay in Honor of the Bicentennial," see 24 Ga. St. B.J. 6 (1987). For article, "Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860," see 39 Emory L.J. 65 (1990). For article, "Slavery and Race: New

Ideas and Enduring Shibboleths in the Interpretation of the American Constitutional System," see 44 Mercer L. Rev. 637 (1993).

For note, "Interstate Extradition," see 1 J. Pub. L. 463 (1952). For note discussing the constitutional implications of higher nonresident tuition fees charged by state universities, see 8 Ga. St. B.J. 86 (1971).

For comment on *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1157, 92 L. Ed. 1460 (1948), holding unconstitutional discriminatory license tax on foreign shrimp boats within three-mile limit, see 11 Ga. B.J. 83 (1948). For comment discussing cruel and unusual punishment and scope of review of proceedings through writ of habeas corpus of convict escaped from chain gang, in light of *Dye v. Johnson*, 338 U.S. 864, 70 S. Ct. 146, 94 L. Ed. 530 (1949), see 12 Ga. B.J. 356 (1950). For comment on *Watson v. Grimes*; *Harper v. Grimes*, 218 Ga. 631, 129 S.E.2d 795 (1963), see 26 Ga. B.J. 92 (1963).

JUDICIAL DECISIONS

ANALYSIS

CITIZENS' PRIVILEGES AND IMMUNITIES EXTRADITION

1. IN GENERAL
2. PROCEDURE

Citizens' Privileges and Immunities

Former Code 1933, § 57-117 (see O.C.G.A. § 7-4-18) was not violative of United States Constitution on ground that it was in deprivation of defendant's rights. *Atterberry v. State*, 212 Ga. 778, 95 S.E.2d 787 (1956).

Prohibition of application of doctrine of forum non conveniens to nonresidents in FELA actions. — The privileges and immunities clause of the United States Constitution prohibits Georgia courts from applying the doctrine of forum non conveniens to citizens of other states who are nonresidents of Georgia in Federal Employers' Liability Act cases and declining to exercise jurisdic-

tion of such actions brought by them. *Brown v. Seaboard Coast Line R.R.*, 229 Ga. 481, 192 S.E.2d 382, answer conformed to, 127 Ga. App. 342, 193 S.E.2d 192 (1972).

Validity of statute denying medical care to nonresidents. — Absent some relationship to the availability of post-procedure medical care for an aborted patient, the constitutionality of a residence requirement could not be upheld. The privileges and immunities clause protects persons who enter Georgia seeking the medical services that are available there. *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

Cited in *Jollie v. Hughes*, 184 Ga. 860, 193 S.E. 769 (1937); *Southern Ry. v. Parker*, 194

Citizens' Privileges and Immunities (Cont'd)

Ga. 94, 21 S.E.2d 94 (1942); *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942); *Mainer v. Plunkett*, 216 Ga. 820, 120 S.E.2d 175 (1961); *Pahno v. Mathews*, 226 Ga. 216, 173 S.E.2d 704 (1970); *Johnstone v. Deyton*, 233 Ga. 146, 210 S.E.2d 692 (1974); *High Oil Times, Inc. v. Busbee*, 449 F. Supp. 364 (N.D. Ga. 1978).

Extradition

1. In General

Duty to honor demand of sister state for extradition of fugitive. — The Constitution imposes a duty upon the executive authority of each state of this Union to honor the demand of another state for the extradition of a fugitive from the demanding state. *Hart v. Mount*, 196 Ga. 452, 26 S.E.2d 453 (1943).

It is not by virtue of mere comity that extradition warrant is issued, but in obedience to constitutional mandate. *Hart v. Mount*, 196 Ga. 452, 26 S.E.2d 453 (1943).

Extradition based on constitutional mandate, not merely comity. — The matter of rendering one from an asylum state to another state by extradition proceedings is not founded merely on comity between the states, but is in response to a requirement under U.S. Const., art. IV, sec. II, cl. 2. *House v. Grimes*, 214 Ga. 572, 105 S.E.2d 745 (1958).

Law governing extradition proceedings. — The primary law governing extradition proceedings is found in the Constitution of the United States, and the acts of Congress in pursuance thereof. *McFarlin v. Shirley*, 209 Ga. 794, 76 S.E.2d 1 (1953).

Elements necessary to authorize extradition. — If a request for extradition is premised on the constitutional provision, one arrested and held on the governor's warrant issued in response to the request is entitled to habeas corpus relief upon establishing that he is not a fugitive from justice. *Jenkins v. Garrison*, 265 Ga. 42, 453 S.E.2d 698 (1995).

In order to authorize an extradition under the Constitution and laws of the United States, the alleged criminal act must have been committed by an individual who was at the time of its commission personally within

the state which demands the individual's surrender, and that such person must have fled from the demanding state to the state where the individual is found, either directly or indirectly. Such a person is defined as a fugitive from justice. *Jackson v. Pittard*, 211 Ga. 427, 86 S.E.2d 295 (1955).

Convicted felon leaving state before serving full term is fugitive from justice. — Where a person is convicted of felony committed by the person in one state, and that person goes into another state, whether voluntarily or involuntarily, before serving the full term for which that person was sentenced, that person thereby becomes a fugitive from justice. *Brown v. Lowry*, 185 Ga. 539, 195 S.E. 759 (1937); *King v. Mount*, 196 Ga. 461, 26 S.E.2d 419 (1943); *Broyles v. Mount*, 197 Ga. 659, 30 S.E.2d 48 (1944); *Taylor v. Foster*, 205 Ga. 36, 52 S.E.2d 314 (1949); *House v. Grimes*, 214 Ga. 572, 105 S.E.2d 745 (1958); *Frazier v. Grimes*, 221 Ga. 375, 145 S.E.2d 39 (1965); *Ingram v. Dodd*, 243 Ga. 788, 256 S.E.2d 778 (1979).

Parole violator subject to extradition. — A person who has been convicted of a felony in another state and released on parole by the authorities of that state with permission to go into this state, upon the violation of the terms of parole by the commission of a felony in this state, becomes a fugitive from justice within the meaning of U.S. Const., art. IV, sec. II, cl. 2 and the Act of Congress enacted pursuant thereto, 18 U.S.C. § 662, and subject to extradition by the state where the person was convicted, although that person has committed no crime in that state subsequent to parole. *Beavers v. Lowry*, 186 Ga. 557, 198 S.E. 692 (1938).

A paroled convict who violates the terms of parole may be extradited from one state to another on the ground that the person is a convict whose term has not expired, and therefore is charged with crime under the provision of United States Constitution relating to interstate extradition. *Broyles v. Mount*, 197 Ga. 659, 30 S.E.2d 48 (1944); *Mathews v. Foster*, 209 Ga. 699, 75 S.E.2d 427 (1953); *Soviero v. State*, 220 Ga. 119, 137 S.E.2d 471 (1964); *Frazier v. Grimes*, 221 Ga. 375, 145 S.E.2d 39 (1965).

Parole violator committing another felony is fugitive from justice. — If a person who has been convicted of a felony or other crime in another state, and released on

parole by the authorities of that state with permission to go into another state, violates the terms of his parole by the commission of another felony, or a federal offense amounting to a felony, that person becomes a fugitive from justice within the meaning of U.S. Const., art. IV, sec. II, cl. 2. *Mathews v. Foster*, 209 Ga. 699, 75 S.E.2d 427 (1953).

Convicted felon involuntarily brought into state from convicting jurisdiction to serve sentence fugitive from justice. — Petitioner, brought into Georgia after conviction in the state of Massachusetts for the purpose of serving the sentence imposed by the federal court, and consequently not coming into Georgia from Massachusetts voluntarily, was nevertheless a fugitive from justice. *Scheinfaïn v. Aldredge*, 191 Ga. 479, 12 S.E.2d 868 (1940).

Violator of conditional pardon still charged with crime. — A person who is out on a conditional pardon which has been revoked, is nevertheless still a person who is charged with crime within the meaning of U.S. Const., art. IV, sec. II, cl. 2. *Deering v. Mount*, 194 Ga. 833, 22 S.E.2d 828 (1942).

Felon serving only part of sentence subject to later extradition. — Where an individual who had been convicted and sentenced for the offense of embezzlement in the state of Louisiana was taken into custody by federal authorities and convicted and sentenced for a federal offense, was then returned to the authorities of Louisiana, and after serving a part of the sentence imposed upon the individual by the court of that state, was reprieved to the United States authorities to permit the individual to serve a federal sentence and after said sentence was served, was then arrested on a warrant issued by the Governor of Georgia on a requisition from the Governor of Louisiana, in order that the individual might be extradited and required to serve out an incomplete sentence in that state, in the circumstances the individual was a fugitive from the justice of Louisiana within the purview of the Constitution and laws of the United States, and was subject to extradition to that state. *King v. Mount*, 196 Ga. 461, 26 S.E.2d 419 (1943).

Extradition not violative of right to fair trial. — One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is al-

leged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial, and he may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. *House v. Grimes*, 214 Ga. 572, 105 S.E.2d 745 (1958).

On facts, conditional pardon violator subject to extradition. — Petitioner, who was granted a conditional pardon on 10-year sentence imposed in Florida, provided that the petitioner leave the state of Florida immediately, and thereafter remain outside the state and lead a sober, peaceable, and law-abiding life, and was later arrested and tried in the federal courts and sentenced to serve ten years, was a fugitive from justice subject to extradition to Florida, when that state revoked the conditional pardon and placed a detainer with the federal authorities. *House v. Grimes*, 214 Ga. 572, 105 S.E.2d 745 (1958).

2. Procedure

Precedence of extradition warrant over bill of exceptions in habeas corpus. — The filing of a bill of exceptions to the decision of the judge in the hearing of a habeas corpus case, if the petitioner is being detained under an extradition warrant, does not operate as a supersedeas, and, pending the decision on appeal, the petitioner must remain in the condition in which the petitioner is placed by the judgment; in such a case there is no provision in the law of this state for bail. *Hames v. Sturdivant*, 181 Ga. 472, 182 S.E. 601 (1935).

Laws of demanding state control as to sufficiency of indictment. — The question as to whether or not the alleged fugitive from the justice of another state is charged with a crime is one of law, and is always open upon the face of the papers to judicial inquiry, but if the indictment which forms the basis of the extradition proceedings substantially charges a crime in conformity to the laws of the demanding state, the prisoner should not be released, however defective such indictment might be either at common law or under the well-known rules of criminal pro-

Extradition (Cont'd)**2. Procedure** (Cont'd)

cedure. *Scheinfain v. Aldredge*, 191 Ga. 479, 12 S.E.2d 868 (1940).

When requisition papers make a case under the Constitution, the Governor without more should honor demand and issue the warrant for extradition. *Hart v. Mount*, 196 Ga. 452, 26 S.E.2d 453 (1943).

Evidence insufficient to show petitioner not person named in extradition proceeding. — In habeas corpus proceedings against sheriff who was holding petitioner in custody under warrant of Governor, evidence that at a hearing held by a secretary of the Governor proof was offered showing that the petitioner was not the person named in the extradition proceeding, afforded no ground for discharging the petitioner from custody; and there being no evidence on the habeas corpus trial showing that the petitioner was not in fact the person described in the extradition proceeding, and there being an identity of names, it was not error to remand the petitioner to the custody of the sheriff. *Hart v. Mount*, 196 Ga. 452, 26 S.E.2d 453 (1943).

Authority of state to postpone service of remainder of term pending service of federal sentence. — After convict had served a part of the sentence imposed by the court of Louisiana, the authorities of the state could waive immediate service of the remainder and postpone such service until after service of a federal sentence, and in so doing they did not waive or release jurisdiction of Louisiana to demand the extradition of such convict. *King v. Mount*, 196 Ga. 461, 26 S.E.2d 419 (1943).

Burden on petitioner to show insufficiency of executive extradition warrant. — If, in the trial of a habeas corpus case, it appears that the respondent holds the petitioner in custody under an executive warrant based upon an extradition proceeding and the warrant is regular on its face, the burden is cast upon the petitioner to show some valid and sufficient reason why the warrant should not be executed. The presumption is that the Governor has complied with the Constitution and the law, and this presumption continues until the contrary appears. *King v. Mount*, 196 Ga. 461, 26 S.E.2d 419 (1943); *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d

921 (1944); *Mathews v. Foster*, 209 Ga. 699, 75 S.E.2d 427 (1953); *McFarlin v. Shirley*, 209 Ga. 794, 76 S.E.2d 1 (1953); *Baldwin v. Grimes*, 216 Ga. 390, 116 S.E.2d 207 (1960).

Refusal to discharge alleged parole violator not error. — Refusal on the hearing of a writ of habeas corpus to discharge applicant, held under an extradition warrant as a fugitive from justice for allegedly violating parole, was not error. *Broyles v. Mount*, 197 Ga. 659, 30 S.E.2d 48 (1944).

Question of law as to substantiality of crime charged against person goes to indictment. — In cases involving extradition, it is a question of law open to judicial inquiry on habeas corpus as to whether the person demanded is substantially charged with a crime against the laws of the demanding state; but this rule applies to the sufficiency of the indictment or affidavit as a pleading, and not to extraneous evidence as to actual guilt. *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944).

Courts of asylum state cannot, upon writ of habeas corpus, inquire into guilt or innocence of accused. *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944).

Evidence insufficient to show applicant not in state at time of offense. — Although in a habeas proceeding the applicant, being held under an executive warrant based on an extradition proceeding, could urge, as a ground for release, that as a matter of fact the applicant was not within the state in question at the time of the commission of the alleged offense, the evidence authorized, even if it did not demand, the finding against the applicant upon such issue. *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944).

Question of law as to sufficiency of indictment or affidavit charging crime. — Whether or not alleged fugitive from the justice of another state is charged with a crime, is a question of law, which is always open upon the face of the papers to judicial inquiry; but as to this question, the law requires only that the crime be substantially charged in an indictment found or in an affidavit made before a magistrate, as a matter of pleading. *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944).

Closer scrutiny of sufficiency of charge of crime by affidavit rather than indictment. — Although in passing upon the legal question as to whether a crime against the laws of the

demanding state is sufficiently charged, there may be need for closer scrutiny if the requisition is based upon an affidavit instead of an indictment, yet if the charge as pleaded is in law sufficient for the purpose of extradition, the same presumptions and incidents will follow, upon grant by the Governor of the extradition, as if the demand had been based upon an indictment. *Ellis v. Grimes*, 198 Ga. 51, 30 S.E.2d 921 (1944).

Courts of asylum state cannot, upon writ of habeas corpus, inquire into guilt or innocence of accused. No such jurisdiction is given them by law, and it would be a manifestly unwise provision if authority to investigate such a question was conferred on a tribunal that had no power to compel the attendance of witnesses who resided in another state, and whose testimony would be necessary to throw light on the issue. *Mathews v. Foster*, 209 Ga. 699, 75 S.E.2d 427 (1953).

Petitioner illegally restrained if extradition warrant not based on valid requisition. — In habeas corpus proceedings, although the evidence offered by the petitioner could not be held, as a matter of law, to be sufficient to overcome the presumption that the Governor had complied with the Constitution and the laws, because the respondent tendered in evidence, over proper objections of the petitioner, the requisition of the Governor of the state of South Carolina without a copy of an indictment found or an affidavit made before a magistrate pursuant to 18 U.S.C. § 3182 the respondent in effect contradicted the prima facie showing made by the warrant alone and thus showed that the petitioner was being illegally restrained, in that the warrant was not based on a valid requisition, and the trial court erred in remanding the petitioner to the respondent. *McFarlin v. Shirley*, 209 Ga. 794, 76 S.E.2d 1 (1953).

Probation violator subject to extradition without proof of commission of additional

crime. — A probationer whose probation has been revoked because of a violation of its conditions may be extradited from one state to another on the ground that the probationer is a convict whose sentence has not expired, and who is charged with crime within the meaning of the United States Constitution; there is no constitutional requirement that a fugitive be shown to have committed an additional crime while a fugitive; a showing of the probationer's status as a fugitive is sufficient to support extradition proceedings. *Ingram v. Dodd*, 243 Ga. 788, 256 S.E.2d 778 (1979).

Extradition proceedings are of summary nature only. — Once a habeas corpus court has found the extradition papers to be legally sufficient, a further inquiry into a petitioner's statutory and constitutional defenses violates the clear intention that an extradition proceeding be of a summary nature. Defenses that the statute of limitations has run on the offense for which the petitioner is being extradited, that the petitioner has been denied a speedy trial, and all other due process questions are issues to be properly decided by courts in the demanding state, not by courts in any asylum state. *Hutson v. Stoner*, 244 Ga. 52, 257 S.E.2d 539, cert. denied, 444 U.S. 967, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979).

Lack of presence in demanding state at time of commission of alleged crime is no longer a defense that is cognizable in an extradition proceeding. Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide (1) whether the extradition documents on their face are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive. *Hutson v. Stoner*, 244 Ga. 52, 257 S.E.2d 539, cert. denied, 444 U.S. 967, 100 S. Ct. 455, 62 L. Ed. 2d 379 (1979).

RESEARCH REFERENCES

ALR. — Constitutionality of discrimination as regards degree of penalty or punishment for violation of Sunday law, 8 ALR 566.

Permitting prisoner under sentence in

federal court to be taken for trial before state court, 22 ALR 886; 62 ALR 279.

One charged with desertion or failure to support wife or child as fugitive from justice,

subject to extradition, 32 ALR 1167; 54 ALR 281.

Validity of license statute or ordinance which discriminates against nonresidents, 61 ALR 337; 112 ALR 63.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 ALR 419.

Sufficiency of recitals in rendition warrant in extradition as regards copy of indictment or affidavit, 89 ALR 595.

Constitutionality, construction, and application of statute authorizing extradition of one who commits an act within the state or a third state resulting in a crime in the demanding state, 151 ALR 239.

Validity of municipal ordinance imposing income tax or license upon nonresident in taxing jurisdiction (commuter tax), 48 ALR3d 343.

Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings, 90 ALR3d 1085.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 ALR4th 157.

Court-authorized permanent or temporary removal of child by parent to foreign country, 30 ALR4th 548.

"Guilty but mentally ill" statutes: validity and construction, 71 ALR4th 702.

Right of extraditee to bail after issuance of governor's warrant and pending final disposition of habeas corpus claim. 13 ALR5th 118.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities, 36 ALR5th 161.

Jurisdiction of federal court to try criminal defendant who alleges that he was brought within United States jurisdiction illegally or as result of fraud or mistake, 28 ALR Fed. 685.

Section 3.

[Admission of New States, Territory and Other Property]

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Law reviews. — For article, "Georgia Water Law: Use and Control Factors," see 19 Ga. B.J. 119 (1956). For article, "The Fed-

eral Loyalty Security Program — A Constitutional Dilemma," see 20 Ga. B.J. 473 (1958).

Section 4.

[Guarantee of Republican Government]

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Law reviews. — For article “Free Speech and the Interest in Local Law and Order,” see 1 J. of Pub. L. 41 (1952). For article, “The Law of the Land,” focusing on the role of the Supreme Court, see 6 J. of Pub. L. 444 (1957). For article arguing against constitutional justification for the sending of federal troops to Little Rock, Arkansas and the federalization of Arkansas troops, see 20 Ga. B.J. 325 (1957). For article, “Whether the Appellate Power of the Supreme Court Should Be Limited, Or More Expressly De-

clared,” see 21 Ga. B.J. 19 (1958). For article, “Reapportionment Recapitulated: 1960-1970,” see 7 Ga. St. B.J. 191 (1970). For article, “Constitutional Issues In Federal No-Fault,” see 27 Mercer L. Rev. 273 (1975). For article, “Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930,” see 35 Emory L.J. 59 (1986). For article, “Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860,” see 39 Emory L.J. 65 (1990).

JUDICIAL DECISIONS

United States is a democratic country with a republican form of government. Leoles v. Landers, 184 Ga. 580, 192 S.E. 218, appeal dismissed, 302 U.S. 656, 58 S. Ct. 364, 87 L. Ed. 507 (1937).

Cited in Carr v. State, 176 Ga. 747, 169 S.E.

201 (1933); South v. Peters, 89 F. Supp. 672 (N.D. Ga. 1950); Cox v. Georgia Educ. Auth., 225 Ga. 542, 170 S.E.2d 240 (1969); Revels v. Tift County, 235 Ga. 333, 219 S.E.2d 445 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Effect of section on state constitutional provision. — United States Const., art. II, sec. III, means that the laws must be executed as required by other constitutional provisions, such as the one that demands a request from the Legislature or the Governor of the state before federal troops are used to put down domestic violence (U.S. Const., art. IV, sec. IV). 1957 Op. Att’y Gen. p. 8.

Circumstances necessary for implementation of section. — The Constitution only

authorizes the United States to take protective action against domestic violence in any state on application of the Legislature or of the executive; U.S. Const., art. IV, sec. IV has been construed in a number of cases, and there are several Supreme Court decisions that call attention to the fact that the United States can only intervene to suppress violence in a state on application of the Legislature or of the executive of that state. 1957 Op. Att’y Gen. p. 8.

ARTICLE V.

[Amendment of the Constitution]

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first

Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Editor's notes. — House Resolution 105 of the 1991 Session of the General Assembly (Ga. L. 1991, p. 2041) petitions the U.S. Congress to call a constitutional convention for the purpose of amending the U.S. Constitution relative to disrespectful acts toward the United States and state flags.

Ga. L. 2004, p. 1081, not codified by the General Assembly, provides that: "the General Assembly does hereby rescind, repeal, cancel, void, nullify, and supersede, to the same effect as if they had never been passed, any and all prior applications by the General Assembly to the Congress of the United States of America to call a convention to propose amendments to the Constitution of the United States of America, pursuant to the terms of Article V thereof, regardless of when and regardless of whether such applications were for a more limited convention to propose one or more amendments regarding one or more specific subjects and purposes or for a general convention to propose an unlimited number of amendments upon an unlimited number of subjects.

"Be it further resolved that the General Assembly hereby specifically repeals Resolution Act No. 53 (Ga. L. 1952, p. 472), passed during the 1952 Regular Session of the Georgia General Assembly; Resolution Act No. 61 (Ga. L. 1952, p. 480), passed during the 1952 Regular Session of the Georgia General Assembly; Resolution Act No. 2 (Ga. L. 1955, p. 4), passed during the 1955 Regular Session of the Georgia General Assembly; Resolution Act No. 45 (Ga. L. 1959, p. 383), passed during the 1959 Regular Session of the Georgia General Assembly; Senate Resolution No. 39, passed during the 1961 Regular Session of the Georgia General Assembly; Resolution Act No. 89 (Ga. L.

1965, p. 559), passed during the 1965 Regular Session of the Georgia General Assembly; Resolution Act No. 96 (Ga. L. 1967, p. 894), passed during the 1967 Regular Session of the Georgia General Assembly; Resolution Act No. 93 (Ga. L. 1976, p. 184), passed during the 1976 Regular Session of the Georgia General Assembly; and House Resolution No. 105 (Ga. L. 1991, p. 2041), passed during the 1991 Regular Session of the Georgia General Assembly.

"Be it further resolved that the General Assembly urges the legislatures of each and every state that has applied to Congress to call a convention for either a general or limited constitutional convention to repeal and withdraw such applications.

"Be it further resolved that the Clerk of the House of Representatives is authorized and directed to transmit an appropriate copy of this resolution to the presiding officers of both houses of the legislatures of each state in the Union, the President of the United States Senate, the Speaker of the United States House of Representatives, each member of the Georgia Congressional delegation, and the Administrator of General Services."

Law reviews. — For article discussing Article V and the constitutional convention as a method of amending the Constitution, see 20 J. of Pub. L. 543 (1971). For article, "The Convention Method of Amending the United States Constitution," see 14 Ga. L. Rev. 1 (1979).

For note, "ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979). For note, "Informed Voter Initiatives and Uninformed Judicial Review Under Article V," see 34 Ga. L. Rev. 1701 (2000).

JUDICIAL DECISIONS

Cited in *South v. Peters*, 89 F. Supp. 672 (N.D. Ga. 1950); *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964).

RESEARCH REFERENCES

ALR. — Judicial decisions relating to adoption or repeal of amendments to federal Constitution, 87 ALR 1321; 122 ALR 717.

Removal or suspension of constitutional limitation as affecting statute previously enacted, 171 ALR 1070.

ARTICLE VI.

[Debts, Supremacy, Oath]

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Cross references. — Taking of oath to support the Constitution of the United States and the Constitution of Georgia, Ga. Const. 1983, Art. III, Sec. IV, Para. II (members of General Assembly); Art. V, Sec. I, Para. VI and § 45-12-4 (Governor); §§ 15-2-3, 15-3-5, 15-6-6 (judges); Ch. 3, T. 45 (public officers generally).

Editor's notes. — U.S. Const., amend. 14, sec. III, disqualifies from office those persons who fail to honor the oath required by Clause 3 of this article.

Law reviews. — For article, "Interposition, Nullification and the Delicate Division of Power in a Federal System," see 5 J. of Pub. L. 2 (1956). For article, "The Law of the Land," focusing on the role of the Supreme Court, see 6 J. of Pub. L. 444 (1957). For article criticizing statutory interpretation of Federal Power Act extending federal authority through the commerce clause, and proposing a balancing of interests test to protect state jurisdiction over production and gathering of natural gas and electricity when they are local activities, see

10 Mercer L. Rev. 226 (1959). For article, "The Subject-Matter Limitation Upon the Treaty-Making Power," see 11 J. of Pub. L. 122 (1962). For article, "Consolidation by Compact: A Remedy for Preemption of State Food and Drug Laws," see 14 J. of Pub. L. 276 (1965). For article, "The Treaty Power and Family Law," see 7 Ga. L. Rev. 55 (1972). For article, "The Role and Impact of the Supreme Court and Judicial Decision-Making in the Evolution of American Federalism," see 8 Ga. St. B.J. 457 (1972). For article discussing the "void from inception" doctrine as applied to statutory law in Georgia, see 8 Ga. L. Rev. 101 (1973). For article discussing the constitutional parameters of state efforts to stimulate international trade, see 27 Mercer L. Rev. 391 (1976). For article suggesting federal preemption implications of state attempts to regulate foreign investment in domestic corporations, see 27 Mercer L. Rev. 615 (1976). For article discussing the interrelationship between state and federal authority in regulating scientific and technological expansion

sion, see 11 Ga. L. Rev. 785 (1977). For article discussing theoretical problems raised by constitutional adjudication and judicial supremacy in the United States, see 11 Ga. L. Rev. 1069 (1977). For article, "The Georgia Bill of Rights: Dead or Alive?," see 34 Emory L.J. 341 (1985). For article, "Separation of Political Powers: Boundaries or Balance?," 21 Ga. L. Rev. 171 (1986). For article, "State Taxation of Interstate Banking," see 21 Ga. L. Rev. 283 (1986). For article, "Georgia and the Development of Constitutional Principles: An Essay in Honor of the Bicentennial," see 24 Ga. St. B.J. 6 (1987). For article, "Georgia's Current Anti-takeover Law: A Look at Management's New Shield," see 24 Ga. St. B.J. 176 (1988). For article, "Exclusion of Evidence in Federal Prosecutions on the Basis of State Law," see 22 Ga. L. Rev. 667 (1988). For article, "Children, Poverty and State Constitutions," see 38 Emory L.J. 577 (1989).

For note discussing habeas corpus as a means of exerting control by the central government in protecting the constitutional rights of criminal defendants and the ramifications for federalism, see 16 Mercer L. Rev. 281 (1964). For note, "The State Action Doctrine and State Antitrust Laws — Thirty-five Years of Struggle," see 30 Mercer L. Rev. 1039 (1969). For note discussing the doctrine of federal preemption in the allocation of powers between the nation and the states, see 22 J. of Pub. L. 391 (1973). For note, "Oil Spills — State Prevention and the Possibility of Pre-emption," see 30 Mercer L. Rev. 559 (1973). For note, "Overcoming Tobacco Company Immunity: Cipollone Clears an Uncertain Path," see 27 Ga. L. Rev. 253 (1992). For note, "Federal Preemption of State Products Liability Claims: Adding Clarity and Respect for State Sovereignty to

the Analysis of Federal Preemption Defenses," see 36 Ga. L. Rev. 797 (2002).

For comment criticizing *Sei Fujii v. State*, 217 P.2d 481 (Cal. 1950), holding suspending California Alien Land Law as discriminatory in violation of United States Treaty, see 2 Mercer L. Rev. 276 (1950). For comment on *Commonwealth of Pa. v. Nelson*, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), holding that the Federal Alien Registration Act (Smith Act), 54 Statute 670, as amended, 18 U.S.C. § 2385, superseded the enforceability of Pennsylvania Sedition Act, see 19 Ga. B.J. 100 (1956). For comment concerning state taxation of federal property in light of *Offutt Hous. Co. v. County of Sarpy*, 351 U.S. 253, 76 S. Ct. 814, 100 L. Ed. 1151 (1956), see 19 Ga. B.J. 247 (1956). For comment on *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), and *Kinsella v. Krueger*, 351 U.S. 470, 76 S. Ct. 886, 100 L. Ed. 1342 (1956), as to military authority overseas over dependents of servicemen, see 6 J. of Pub. L. 540 (1957). For comment on *United States v. Barash*, 428 F.2d 328 (2d Cir. 1970), as to the constitutionality under the principle of double jeopardy, of increasing severity of punishment on retrial following successful appeal, see 5 Ga. L. Rev. 194 (1971). For comment on *Anderson v. Laird*, 316 F. Supp. 1081 (D.D.C. 1970), as to religious regulations at military academies, see 5 Ga. L. Rev. 400 (1971). For comment discussing federal immunity from state taxation, in light of *United States v. County of Fresno*, 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977), see 26 Emory L.J. 709 (1977). For comment, "*Verizon Maryland, Inc. v. Public Service Commission of Maryland: Reaffirming Ex Parte Young and the Necessity of Finding Regulatory Hand-Back Schemes to a Gift or Gratuity*," see 52 Emory L.J. 1519 (2003).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SUPREME LAW OF LAND

OATH OF OFFICE

General Consideration

Hague Conventions are binding in Georgia (as in all states) under the supremacy clause of the United States Constitution. *Edwards v. Edwards*, 254 Ga. App. 849, 563 S.E.2d 888 (2002).

Cited in *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930); *In re Moore*, 42 F.2d 475 (N.D. Ga. 1930); *Carr v. State*, 176 Ga. 747, 169 S.E. 201 (1933); *United States v. One Chevrolet Truck*, 79 F.2d 651 (5th Cir. 1935); *Morris Plan Bank v. Simmons*, 201

Ga. 157, 39 S.E.2d 166 (1946); *Regents of Univ. Sys. v. Carroll*, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363 (1950); *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 75 S.E.2d 161 (1953); *Georgia v. Rachel*, 384 U.S. 780, 86 S. Ct. 1783, 16 L. Ed. 2d 925 (1966); *Bond v. Floyd*, 251 F. Supp. 333 (N.D. Ga. 1966); *McDaniel v. Gangarosa*, 126 Ga. App. 666, 191 S.E.2d 578 (1972); *Granese v. State*, 232 Ga. 193, 206 S.E.2d 26 (1974); *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980); *Zimmerman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ga. App. 429, 283 S.E.2d 639 (1981); *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225 (11th Cir. 1982); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985); *Mayor of City of Forsyth v. Monroe County*, 260 Ga. 296, 392 S.E.2d 865 (1990); *Ragsdale v. Blaw Knox Corp.* (In re Hydro-Chem Processing, Inc.), 190 Bankr. 129 (Bankr. N.D. Ga. 1995).

Supreme Law of Land

Inconsistent state law. — The supremacy clause of the United States Constitution dictates that federal law preempts inconsistent state law. *Poloney v. Tambrands, Inc.*, 260 Ga. 850, 412 S.E.2d 526 (1991).

Direct conflict between state law and federal constitutional provisions raises question under supremacy clause of broader scope than where the alleged conflict is only between a state statute and a federal statute that might be resolved by the construction given either the state or the federal law. *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 83 S. Ct. 397, 9 L. Ed. 2d 317 (1963).

State policy opposed to federal policy must give way. A state is without power to provide the conditions on which the federal government will effectuate its policies. *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 83 S. Ct. 397, 9 L. Ed. 2d 317 (1963).

Regulations promulgated by federal agencies under a statutory authorization have the force of federal law and can preempt conflicting state law. *Crowe v. Fleming*, 749 F. Supp. 1135 (S.D. Ga. 1990).

Motorist's tort claim, alleging that a tractor-trailer was defective because it did not have adequate reflective materials along

its side, was preempted by federal regulations promulgated under the National Traffic and Motor Vehicle Safety Act. *Crowe v. Fleming*, 749 F. Supp. 1135 (S.D. Ga. 1990).

Supreme Court ruling on a constitutional issue is a constitutional rule binding upon the states. *Sims v. Georgia*, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593 (1967).

Application of supremacy clause requires determination of, and balancing of, state and local action against federal policy. *DeKalb County v. Henry C. Beck Co.*, 382 F.2d 992 (5th Cir. 1967).

United States Supreme Court decisions construing federal statute binding on state supreme court. — The Bankruptcy Act being a federal statute, decisions of the United States Supreme Court construing and applying it are binding upon the state Supreme Court as precedents. *Branch v. Human*, 215 Ga. 209, 109 S.E.2d 732 (1959).

Limitation on state power of direct taxation. — In the field of direct taxation, the power of the sovereign state is supreme, except when the exercise of that supreme right brings it into collision with the operation of a government instrumentality necessary to the existence of the federal government and to the exercise of its powers upon a subject as to which exclusive jurisdiction was delegated to Congress in the Constitution of 1789. *City of Atlanta v. Stokes*, 175 Ga. 201, 165 S.E. 270 (1932).

State courts cannot award federal tax exemption. — Georgia state courts do not have the authority to award the federal income tax dependency exemption to a noncustodial parent. *Blanchard v. Blanchard*, 261 Ga. 11, 401 S.E.2d 714 (1991).

Federal power to wage war superior to state power to tax. — Even though the power of a state to tax generally is supreme, that power may not be used to hamper, hinder, annoy, harass, and impede the federal government in the exercise of its unlimited power to carry on war. *City of Atlanta v. Stokes*, 175 Ga. 201, 165 S.E. 270 (1932).

Nothing in Constitution requires State of Georgia to make conviction of federal offense grounds for disqualification to serve as juror. *Brady v. State*, 199 Ga. 566, 34 S.E.2d 849 (1945).

Strict local rules of pleading cannot be used to impose unnecessary burdens upon

Supreme Law of Land (Cont'd)

rights of recovery authorized by federal laws. *Brown v. Western Ry.*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949).

Federal bankruptcy law preempts state law, owing to the supremacy clause. As one of Congress' enumerated powers, the power to enact bankruptcy laws is limited only by the substantive guarantees contained in the federal Constitution. *Goerg v. Parungao*, 844 F.2d 1562 (11th Cir. 1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 850, 102 L. Ed. 2d 981 (1989).

The Constitution of the United States empowered Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States," and laws enacted by Congress pursuant to this grant of authority are supreme to those of the states. Bankruptcy provisions allowing the opportunity to cure and reinstate accelerated debts and bankruptcy provisions governing the payment of secured creditors' attorney's fees are no exception to the supremacy clause. *In re Centre Court Apts., Ltd.*, 85 Bankr. 651 (Bankr. N.D. Ga. 1988).

The federal Bankruptcy Code, rules, and official forms, rather than Georgia law, apply and control in prescribing the procedure whereby exemptions are to be claimed in a bankruptcy case and, as a result, debtors in bankruptcy are not required to comply with O.C.G.A. § 44-13-101. *Caruthers v. Fleet Fin., Inc.*, 87 Bankr. 723 (Bankr. N.D. Ga. 1988).

Federal law preempted plaintiff's state law claims against defendants for actions they took in violation of plaintiff's bankruptcy stay. *Smith v. Mitchell Constr. Co.*, 225 Ga. App. 383, 481 S.E.2d 558 (1997).

State statute affecting area not addressed by federal law. — The enactment of a state statute affecting an area of the law that is not addressed by the federal statute concerning child pornography law (18 U.S.C. § 2251) does not violate the supremacy clause of the United States Constitution. *Aman v. State*, 261 Ga. 669, 409 S.E.2d 645 (1991).

Treaty as to service of process on foreign corporation. — In action involving sufficiency of service of process on foreign corporation, judicial notice had to be taken of a treaty concerning service abroad, and it predominates over any statutory provision of

the State of Georgia. *Camp v. Sellers & Co.*, 158 Ga. App. 646, 281 S.E.2d 621 (1981).

Deliberate violations of state law for federal purposes. — Investigators and prosecutors must be as aware as are the courts of the delicate interface between state and federal law enforcement. Deliberate violations of state law for federal purposes must be the rare exception, and be clearly seen to be reasonable, necessary, and proper. Otherwise, federal officers will have to be abandoned by federal courts as the supremacy clause will not save them. *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982).

That a deliberate violation of state law may render federal law enforcement more convenient is insufficient to shield the agent from state prosecution. More is required lest the issue, at least initially, be left to state court resolution. *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982).

Child support guidelines. — O.C.G.A. § 19-6-15 is not unconstitutional under the supremacy clause. *Ward v. McFall*, 277 Ga. 649, 593 S.E.2d 340, cert. denied, 543 U.S. 818, 125 S. Ct. 57, 160 L. Ed. 2d 26 (2004).

State defenses to civil rights claims. — Supremacy clause of federal Constitution prevents state court from construing federal rule to permit state immunity defense to claim made under 42 U.S.C. § 1983, the Civil Rights Act of 1871. *Davis v. City of Roswell*, 250 Ga. 8, 295 S.E.2d 317 (1982), cert. denied, 475 U.S. 1122, 106 S. Ct. 1640, 90 L. Ed. 2d 185 (1986).

Using state law to interpret federal act. — Applicability of the general provisions of state contract law to the determination of the "making of an arbitration agreement" did not violate the Federal Arbitration Act and, thus, the supremacy clause. *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985).

Under the supremacy clause, § 2 of the Federal Arbitration Act preempts O.C.G.A. § 34-4-6 and thus employee employed under contract requiring arbitration of any claims or disputes cannot bring action under O.C.G.A. § 34-4-6 for unpaid wages. *Haluska v. RAF Fin. Corp.*, 875 F. Supp. 825 (N.D. Ga. 1994).

State is prohibited from implementing employment reclassification proposal that was flawed and likely to have an adverse racial impact. *Williams v. Ledbetter*, 685 F. Supp. 247 (M.D. Ga. 1988).

Georgia "anti-takeover" statute enjoyed a presumption of validity under the supremacy and interstate commerce clauses, because it could not be established with the required degree of legal certainty that the statute denied hostile tender offers for Georgia corporations a meaningful opportunity to succeed. *West Point-Pepperell, Inc. v. Farley, Inc.*, 711 F. Supp. 1096 (N.D. Ga. 1989).

Treaty duly entered into is the supreme law of the land. *Butler's Shoe Corp. v. Pan Am. World Airways, Inc.*, 514 F.2d 1283 (5th Cir. 1975).

Treaty lawfully entered into stands on same footing of supremacy as do the Constitution and laws of the United States. — A treaty must be regarded as a part of the law of the state as much as are the state's own statutes and it may override the power of the state even with respect to the great body of private relations which usually fall within the control of the state. *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801 (N.D. Ga. 1964), *aff'd*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905, 88 S. Ct. 2053, 20 L. Ed. 2d 1363 (1968).

Warsaw Convention, as a treaty, constitutes part of the law of this land, overriding state law and policies. — One is not bound to seek redress in the courts of this country. One may submit to the jurisdiction of the foreign state and, presumably, have one's rights determined in accordance with the law of that place; but if one institutes action here, the law which the court will apply is that set forth by the convention, even though it be inconsistent with the law of the forum. *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801 (N.D. Ga. 1964), *aff'd*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905, 88 S. Ct. 2053, 20 L. Ed. 2d 1363 (1968).

Use of the words "Anything in this Act to the contrary notwithstanding" means that the statute in which the phrase is used takes precedence over, and is intended to exclude and not include, the operation of other statutes which may not be in harmony therewith. *Dinkler v. Jenkins*, 118 Ga. App. 239, 163 S.E.2d 443, *rev'd on other grounds*, 224 Ga. 785, 164 S.E.2d 799 (1968).

Legislation conflicting with a court order drawing its authority from U.S. Const., amend. 14 is unconstitutional. *Stell v. Board*

of Pub. Educ., 334 F. Supp. 909 (S.D. Ga. 1971).

Laws or regulations promoting racial discrimination unconstitutional. — Any law or regulation of a state, county, or municipality requiring or furthering racial discrimination in the public schools violates the federal Constitution. *Stell v. Board of Pub. Educ.*, 334 F. Supp. 909 (S.D. Ga. 1971).

Federal court decisions other than Supreme Court's not binding on Georgia appellate courts. — While the decisions of the United States Supreme Court are binding upon the Georgia appellate courts, those of other federal courts are not binding upon the Georgia appellate courts. *Security Mgt. Co. v. King*, 132 Ga. App. 618, 208 S.E.2d 576 (1974).

Constitutionally obtained evidence in violation of state law admissible in federal courts. — Wiretap or other evidence obtained without violating the federal Constitution or federal law is admissible in a federal criminal trial even though obtained in violation of state law. *United States v. Hayes*, 445 F. Supp. 455 (M.D. Ga. 1977).

Supremacy clause denies state legislatures control over jurisdiction or procedure in courts of the United States. *United States v. Hayes*, 445 F. Supp. 455 (M.D. Ga. 1977).

Applicability of preemption doctrine. — The preemption doctrine may apply: (1) if there is direct conflict between state and federal regulation; (2) if state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; or (3) if Congress has "occupied the field" in a given area so as to oust all state regulation, whether friendly or hostile. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd sub nom. Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981), 644 F.2d 1030 (5th Cir.), *cert. denied*, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

With statutory conflicts, preemption largely a matter of construction. — If preemption is deemed to occur by virtue of conflict with a federal statute, the extent of preemption is largely a question of statutory construction. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd sub nom. Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981), 644 F.2d 1030 (5th Cir.), *cert. denied*, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

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Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *Poloney v. Tambrands, Inc.*, 260 Ga. 850, 412 S.E.2d 526 (1991).

States may not statutorily burden access to federal courts with requirements federal courts are prohibited from imposing. *Ehlers v. City of Decatur*, 614 F.2d 54 (5th Cir. 1980).

Allegations concerning federal rights insufficient to confer jurisdiction. — Because the federal rights of which plaintiff was allegedly deprived were those arising under the Social Security Act and the supremacy clause of the Constitution, such allegations were insufficient to confer subject matter jurisdiction under 28 U.S.C. § 1343. *Seagraves v. Harris*, 629 F.2d 385 (5th Cir. 1980).

Federal FDA tampon warning label requirements expressly preempted state tampon warning label requirements for toxic shock syndrome, including those that emanated from state tort law. *Poloney v. Tambrands, Inc.*, 260 Ga. 850, 412 S.E.2d 526 (1991).

Supremacy clause does not apply to the regulatory scheme promulgated under the Medicare and Medicaid Acts. See *Brogdon v. National Healthcare Corp.*, 103 F. Supp. 2d 1322 (N.D. Ga. 2000).

Train speed limits are part of federal statutory scheme that explicitly preempts state regulations covering the same subject matter. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991), *aff'd*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

In a wrongful death action that alleged negligence under Georgia law, federal regulations pre-empted the negligence action only insofar as it asserted that the train was traveling at an excessive speed. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993), superseded by statute as stated in *Armijo v. Atchison, T. & S.F. Ry.*, 87 F.3d 1188 (10th Cir. 1996) (decided under prior law). But see *CSX Transp., Inc. v. Trism Specialized Carriers, Inc.*, 9 F. Supp. 2d 1374 (N.D. Ga. 1998), *aff'd*, 182 F.3d 788 (11th Cir. 1999).

Federal Survivor Benefit Plan (10 U.S.C. § 1447 et seq.) preempted the authority of state law regarding the payment of annuity benefits. *King v. King*, 225 Ga. App. 298, 483 S.E.2d 379 (1997).

Federal Aviation Safety Noise Abatement Act of 1979 preempts state law with regard to suits seeking redress for airport noise. *City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896 (1996).

Common-law railroad grade crossing liability not affected. — In the absence of a decision by a federally designated policymaker, state common-law liabilities relating to the adequacy of railroad grade crossings are not affected by the federal highway aid provisions of the United States Code. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991), *aff'd*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

Wrongful death claim that the owner and operator of a train was negligent under Georgia law for failing to maintain adequate warning devices at a crossing was not pre-empted by federal law. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993), superseded by statute as stated in *Armijo v. Atchison, T. & S.F. Ry.*, 87 F.3d 1188 (10th Cir. 1996) (decided under prior law). But see *CSX Transp., Inc. v. Trism Specialized Carriers, Inc.*, 9 F. Supp. 2d 1374 (N.D. Ga. 1998), *aff'd*, 182 F.3d 788 (11th Cir. 1999).

Electric cooperative not exempt from state and local taxation. — An electric cooperative's right and privilege to distribute electric power purchased by it from the Tennessee Valley Authority pursuant to contract does not render it an instrumentality of the federal government exempt from state and local taxation. *North Ga. Elec. Membership Corp. v. City of Calhoun*, 264 Ga. 769, 450 S.E.2d 410 (1994), *cert. denied*, 514 U.S. 1109, 115 S. Ct. 1960, 131 L. Ed. 2d 852 (1995).

The Federal Election Campaign Act preempts O.C.G.A. § 21-5-35, pertaining to the acceptance of campaign contributions during legislative sessions, insofar as applies to candidates for federal office. *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996).

Oath of Office

Oath provisions of the United States and Georgia Constitutions do not violate U.S.

Const., amend. 1: but this requirement does not authorize a majority of state legislators to test the sincerity with which another duly

elected legislator can swear to uphold the Constitution. *Bond v. Floyd*, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

OPINIONS OF THE ATTORNEY GENERAL

Supremacy clause of federal Constitution prohibits United States military personnel

from serving on state juries. 1980 Op. Att'y Gen. No. 80-125.

RESEARCH REFERENCES

ALR. — Relation of treaty to state and Federal law, 4 ALR 1377; 134 ALR 882.

Conflict between federal and state statutes of limitations, 82 ALR 808.

Power of state or municipality to impose license fee or tax upon safe-deposit vaults maintained by national bank, 115 ALR 684.

Jurisdiction of state court to enforce or control performance by federal officer or employee of duties imposed upon him by a federal statute, 138 ALR 1200.

Effect of unreasonableness, or variance from constitutional, charter, or statutory provision, of penalty prescribed by ordinance, 138 ALR 1208.

Validity of ordinance relating to usury or interest rates as affected by variations from statutory provisions, 138 ALR 1492.

Duty of state courts to follow decisions of federal courts, other than the Supreme Court, on federal questions, 147 ALR 857.

Enforceability of federal penal statutes in state courts. 162 ALR 373; 172 ALR 231.

Federal court's adoption of state period of limitation, in action to enforce federally created right, as including related or subsidiary state laws or rules as to limitations, 90 ALR2d 265.

Constitutionality of statutory provision requiring reimbursement of public by child for financial assistance to aged parents, 75 ALR3d 1159.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 ALR5th 245.

Application of state and local construction and building regulations to contractors engaged in construction projects for the federal government, 131 ALR Fed. 583.

ARTICLE VII.

[Ratification and Establishment]

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the
Seventeenth Day of September in the Year of our Lord one thousand seven
hundred and Eighty seven and of the Independance of the United States of
America the Twelfth IN WITNESS whereof We have hereunto subscribed our
Names,

Go. WASHINGTON —

President and deputy from Virginia

New Hampshire

JOHN LANGDON

NICHOLAS GILMAN

Massachusetts

NATHANIEL GORHAM

RUFUS KING

Connecticut

WM. SAML. JOHNSON

ROGER SHERMAN

New York

ALEXANDER HAMILTON

New Jersey

WIL: LIVINGSTON

WM. PATERSON

DAVID BREARLEY

JONA: DAYTON

Pennsylvania

B FRANKLIN

THOMAS MIFFLIN

ROBT MORRIS

GEO. CLYMER

THOS. FITZSIMONS

JARED INGERSOLL

JAMES WILSON

GOUV MORRIS

Delaware

GEO: READ

GUNNING BEDFORD jun

JOHN DICKINSON

RICHARD BASSETT

JACO: BROOM

Maryland

JAMES MCHENRY

DAN of ST

DANL CARROLL

Virginia

JOHN BLAIR

JAMES MADISON JR

North Carolina

WM. BLOUNT

RICHD. DOBBS SPAIGHT

HU WILLIAMSON

South Carolina

J RUTLEDGE

CHARLES COTESWORTH PINCKNEY

CHARLES PINCKNEY

PIERCE BUTLER

Georgia

WILLIAM FEW

ABR BALDWIN

Attest:

WILLIAM JACKSON, *Secretary*.

Editor's notes. — The Constitution was submitted by resolution of the Constitutional Convention on September 17, 1787. It became effective on March 4, 1789, the day fixed for commencement of the operation of the government, by virtue of its ratification by the conventions of 11 states, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, Febru-

ary 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; and New York, July 26, 1788. The conventions of North Carolina and Rhode Island subsequently ratified the Constitution on November 21, 1789, and May 29, 1790, respectively.

Law reviews. — For note, "ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

AMENDMENTS TO THE CONSTITUTION

Editor's notes. — The first ten amendments were all proposed by Congress on September 25, 1789, and subsequently declared ratified by the constitutionally required number of states on December 15, 1791. The later amendments were proposed and declared ratified on the following dates: Amendment 11, proposed March 4, 1794 and ratified January 8, 1798; Amendment 12, proposed December 12, 1803 and ratified September 25, 1804; Amendment 13, proposed February 1, 1865 and ratified December 18, 1865; Amendment 14, proposed June 16, 1866 and ratified July 28, 1868; Amendment 15, proposed February 27, 1869 and ratified March 30, 1870; Amendment 16, proposed July 12, 1909 and ratified February 25, 1913; Amendment 17, proposed May 16, 1912 and ratified May 13,

1913; Amendment 18, proposed December 17, 1917 and ratified January 29, 1919; Amendment 19, proposed June 5, 1919 and ratified August 26, 1920; Amendment 20, proposed March 2, 1932 and ratified February 6, 1933; Amendment 21, proposed February 20, 1933 and ratified December 5, 1933; Amendment 22, proposed March 24, 1947 and ratified March 1, 1951; Amendment 23, proposed June 16, 1960 and ratified April 3, 1961; Amendment 24, proposed August 27, 1962 and ratified February 4, 1964; Amendment 25, proposed July 6, 1965 and ratified February 23, 1967; and Amendment 26, proposed March 23, 1971, and ratified July 5, 1971.

Cross references. — Bill of Rights Day, § 1-4-13.

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Cross references. — Freedom of religion, Ga. Const. 1983, Art. I, Sec. I, Para. III; Ga. Const. 1983, Art. I, Sec. I, Para. IV. Freedom of speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V. Freedom of assembly and petition, Ga. Const. 1983, Art. I, Sec. I, Para. IX. Forbidding direct or indirect aid to any church institution, Ga. Const. 1983, Art. I, Sec. II, Para. VII. Tax exemptions for religious groups, Ga. Const. 1983, Art. VII, Sec. II, Para. I-IV. Common day of rest, § 10-1-570 et seq. Prohibition against mass gatherings without a permit, § 31-27-2. Discrimination in public employment on basis of religion, §§ 45-19-29, 45-19-34. Access of news media to public meetings of departments, agencies, etc., of states, counties, etc., § 50-14-1. Immunity of broadcasters from liability for Levi's Call: Georgia's Amber Alert Program, § 51-1-50.

Editor's notes. — The Supreme Court has declared that the due process clause of U.S. Const., amend. 14, protects the personal

rights specified in this amendment from state, as well as Congressional acts. See *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (freedom of religion); *Fiske v. Kansas*, 274 U.S. 380, 47 S. Ct. 655, 71 L. Ed. 1108 (1927) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) (freedom of the press); and *Dejonge v. Oregon*, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937) (freedom of assembly).

Law reviews. — For article, "Religious Liberty and the Fourteenth Amendment," see 9 Ga. B.J. 141 (1946). For article criticizing operation of this amendment in relation to right of privacy, see 10 Ga. B.J. 53 (1947). For article discussing conflict between free speech guarantees and municipal ordinances protecting public tranquility, see 14 Ga. B.J. 191 (1951). For article "Free Speech and the Interest in Local Law and Order," see 1 J. of Pub. L. 41 (1952). For article, "Freedoms of the First Amendment in Geor-

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tion of this amendment's privilege in libel actions to be dependent upon whether or not the publication is a matter of public interest, see 20 J. of Pub. L. 601 (1971). For comment on *Anderson v. Laird*, 316 F. Supp. 1081 (D.C. Cir. 1970), as to religious regulations at military academies, see 5 Ga. L. Rev. 400 (1971). For comment discussing *In re Adoption of "E."*, 59 N.J. 36, 279 A.2d 785 (1971), as to the constitutionality of state court's refusal to approve adoption of child solely because of adopting parent's lack of religious beliefs, see 6 Ga. L. Rev. 221 (1971). For comment on *Mary Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), modified and aff'd, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), as to unconstitutionality of statutory limitation on reasons for abortion, see 22 Mercer L. Rev. 461 (1971). For comment on *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595, cert. denied, 397 U.S. 149, 90 S. Ct. 999, 25 L. Ed. 2d 183 (1970), as to the constitutionality under this amendment and U.S. Const., Amend. 14, of prohibiting succession by an incumbent Governor until after the expiration of a four-year period, see 22 Mercer L. Rev. 473 (1971). For comment discussing *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), as to this amendment's protection for distribution of handbills in privately owned shopping center in situation where reasonable alternative locations for such activity are present, see 7 Ga. L. Rev. 177 (1972). For comment on *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971), as to political activities by public employees, see 23 Mercer L. Rev. 995 (1972). For comment on *Jenkins v. State*, 230 Ga. 726, 199 S.E.2d 183 (1973), see 8 Ga. L. Rev. 225 (1973). For comment on *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456 (1973), see 8 Ga. L. Rev. 225 (1973). For comment discussing compulsory school attendance duty of parents despite religious convictions protected under this amendment in light of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), see 24 Mercer L. Rev. 479 (1973). For comment discussing the constitutional standard for judging obscenity, in light of *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), see 10 Ga. St. B.J. 327 (1973). For comment criticizing *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), calling for

application of contemporary community standards to determine obscenity, see 23 Emory L.J. 551 (1974). For comment criticizing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974), holding state right-of-reply statute intrudes upon the freedom of the press, see 24 Emory L.J. 217 (1975). For comment criticizing *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975), holding abortion advertisement protected by commercial speech doctrine, see 24 Emory L.J. 1165 (1975). For comment on *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), holding a state may not impose sanctions on accurate publication of name of rape victim obtained from official court records, see 24 Emory L.J. 1205 (1975). For comment on *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), see 9 Ga. L. Rev. 963 (1975). For comment on permissibility of court rules restricting attorney's right to comment publicly on litigation, in light of *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), see 10 Ga. L. Rev. 289 (1975). For comment discussing defamatory falsehoods and this amendment's protection in light of *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), see 25 Emory L.J. 705 (1976). For comment on constitutionality of municipal ban on "for sale" and "sold" signs on residential property to prevent panic selling, in light of *Linmark Assocs. v. Township of Willingboro*, 535 F.2d 786 (3d Cir. 1976), see 11 Ga. L. Rev. 230 (1976). For comment on *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 324 (1975), refusing to allow this amendment's exception to the privilege of legislative immunity, see 27 Mercer L. Rev. 1195 (1976). For comment on *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977), as to free speech violation by local ordinance banning "for sale" and "sold" signs on residential property, see 26 Emory L.J. 913 (1977). For comment discussing constitutionality of regulating location of "Adult Theaters" on basis of film content in light of *Young v. American Mini Theaters*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), see 28 Mercer L. Rev. 587 (1977). For com-

ment on *Coleman v. Bradford*, 238 Ga. 505, 233 S.E.2d 764 (1977), see 29 Mercer L. Rev. 335 (1977). For comment on *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977) upholding certain prison regulations relating to prisoners "union," see 27 Emory L.J. 137 (1978). For comment discussing doctrine of substituted judgment and constitutional underpinnings of a qualified right to refuse medical treatment asserted for an incompetent, in light of *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977), see 27 Emory L.J. 425 (1978). For comment on *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977), as to media's nonprotection under this amendment and U.S. Const., Amend. 14 from suit by performer whose "right of publicity" has been infringed, see 29 Mercer L. Rev. 861 (1978). For comment discussing impact of this amendment upon state statute prohibiting corporate spending to influence voters on referenda not materially affecting corporation's business in light of *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978), see 28 Emory L.J. 183 (1979). For comment on *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979), see 30 Mercer L. Rev. 1079 (1979). For comment, "Church Property Disputes: The Trend and the Alternative," see 31 Mercer L. Rev. 559 (1980). For comment, "The Extent of Accommodation to Employees' Religious Practices Under Title VII: Developments Since *Trans World Airlines, Inc. v. Hardison*," see 31 Mercer L. Rev. 595 (1980). For comment, "Private Search and Prior Restraint of Obscene Materials: The Interaction of Two Doctrines," see 31 Mercer L. Rev. 1029 (1980). For comment on *Shakman v. Democratic Organization*, 481 F. Supp. 1315 (N.D. Ill. 1979), regarding constitutionality of patronage hiring practices based on political affiliation, see 29 Emory L.J. 1217 (1980). For comment discussing the forcible medication of involuntarily committed mental patients with antipsychotic drugs in light of *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), see 15 Ga. L. Rev. 739 (1981). For comment discussing the legality of secondary boycotts, in light of *NLRB v. Retail Store Employees Local 1001 (Safeco)*, 447 U.S. 607, 100 S. Ct.

2372, 65 L. Ed. 2d 377 (1980), and *Soft Drink Workers Local 812 v. NLRB*, No. 79-1888 (D.C. Cir. Oct. 3, 1980), see 15 Ga. L. Rev. 763 (1981). For comment on the definition of religion under the federal Constitution, see 31 Emory L.J. 973 (1982). For comment on *Widmar v. Vincent*, 450 U.S. 909, 102 S. Ct. 269, 67 L. Ed. 2d 332 (1981), and discussion of the conflict between the religion clauses of the first amendment, see 33 Mercer L. Rev. 1283 (1982). For comment on *Terrebonne v. Blackburn*, 646 F.2d 997 (5th Cir. 1981), and discussion of proportionality principle in sentencing, see 33 Mercer L. Rev. 1365 (1982). For comment on *Widmar v. Vincent*, 454 U.S. 263 (1981), holding that a state university's policy of equal access to campus facilities for all organizations including those of a religious character does not violate the establishment of religion clause of the first amendment, see 32 Emory L.J. 319 (1983). For comment, "First Amendment Right of Access to Pre-trial Proceedings in Criminal Cases," see 32 Emory L.J. 619 (1983). For comment, "Free Press, Privacy, and Privilege: Protection of Researcher-Subject Communications," see 17 Ga. L. Rev. 1009 (1983). For comment on *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983), see 34 Mercer L. Rev. 1603 (1983). For comment, "A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict," see 35 Emory L.J. 163 (1986). For comment, "The Federal Highway Beautification Act After *Metromedia*," see 35 Emory L.J. 419 (1986). For comment, "Private Citizens in Foreign Affairs: A Constitutional Analysis," see 36 Emory L.J. 285 (1987). For comment, "Misrepresentation in Political Advertising: The Role of Legal Sanctions," see 36 Emory L.J. 853 (1987). For comment, "The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome — AIDS," see 37 Emory L.J. 217 (1988). For case comment, "*Stein v. Plainwell Community Schools*: The Constitutionality of Prayer in Public High School Commencement Exercises," see 22 Ga. L. Rev. 469 (1988). For comment, "*Lee v. Dong-A Ilbo*: Use of Official Report Privilege to Protect Defamatory Statements in Press Account Based on Foreign Government Report," see 23 Ga. L. Rev. 275 (1988). For comment, "First Amendment Implications

of State Takeover Legislation," see 38 Emory L.J. 827 (1989). For comment, "Defamation and Employment Relationships: the New Meanings of Private Speech, Publication, and Privilege," see 38 Emory L.J. 871 (1989). For comment, "An Establishment Clause Analysis of *Webster v. Reproductive Health Services*," see 24 Ga. L. Rev. 399 (1990). For comment, "Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities," see 39 Emory L.J. 1351 (1990). For comment, "The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms," see 40 Emory L.J. 241 (1991). For comment, "Employment Division, Department of Human Resources v. Smith: The Supreme Court Deserts the Free Exercise Clause," see 25 Ga. L. Rev. 567 (1991). For comment, "Dances With Justice: Peyotism in the Courts," see 41 Emory L.J. 1121 (1992). For comment, "Can Anyone Own a Piece of the Clock?: The Troublesome Application of Copyright Law to Works of Historical Fiction, Interpretation, and Theory," see 42 Emory L.J. 253 (1993). For comment, "Phone, Fax, and Frustration: Electronic Commercial Speech and Nuisance Law," see 42 Emory L.J. 359 (1993). For comment, "Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History," see 42 Emory L.J. 647 (1993). For comment, "Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act," see 42 Emory L.J. 721 (1993). For comments, "First Covenant Church v. City of Seattle: The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions," see 27 Ga. L. Rev. 589 (1993). For comment, "Sex, Violence, and Profanity: Rap Music and the First Amendment," see 44 Mercer L. Rev. 667 (1993). For comment, "The Reporter's Privilege in Georgia: 'Qualified' to Do the Job?," see 9 Ga. St. U.L. Rev. 495 (1993). For comment, "Media Hybrids and the First Amendment: Constitutional Signposts Along the Information Superhighway," see 44 Emory L.J. 213 (1995). For comment on the use of federal statutes against abortion protestors, see 44 Emory L.J. 433 (1995). For comment on hunter harassment statutes, see 48 Emory

L.J. 1023 (1999). For comment, “The Government’s Right to Read: Maintaining State Access to Digital Data in the Age of Impenetrable Encryption,” see 49 Emory L.J. 711 (2006). For comment, “Personal Jurisdiction and the Internet: Waiting for the Other Shoe to Drop on First Amendment Concerns,” see 51 Mercer L. Rev. 919 (2000). Dale v. Boy Scouts of America: Whether the application of New Jersey’s Public Accommodations Law, forcing the Boy Scouts to include an avowed homosexual, violates the Scouts’ First Amendment Freedom of Expressive Association, see 52 Mercer L. Rev.

745 (2001). For comment, “No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court’s Establishment Clause Jurisprudence,” see 54 Mercer L. Rev. 1669 (2003). For comment, “‘The Forgotten Child of Our Constitution’: The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children,” see 54 Emory L.J. 641 (2005). For comment, “Regulating Nonconnected 527s: Unnecessary, Unwise, and Inconsistent with the First Amendment,” see 55 Emory L.J. 193 (2006).

JUDICIAL DECISIONS

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General Consideration

Where plaintiff alleges statutory and constitutional predicates, federal court must assume jurisdiction. — Where a plaintiff alleges 28 U.S.C. § 1343(3), in conjunction

with 42 U.S.C. § 1983, as the jurisdictional predicate, and alleges federal constitutional predicates, such as fourteenth amendment property rights, first amendment rights to free speech and association, and fifth amendment just compensation or “taking”

General Consideration (Cont'd)

clause, a federal court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief, as well as to determine issues of fact arising in the controversy. *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D. Ga. 1983), *aff'd*, 746 F.2d 761 (11th Cir. 1984).

Conspiracy claims may be asserted against federal officials. — Conspiracy claims based on alleged violations of U.S. Const., amend. 1 may be asserted against federal officials as well as against those acting under color of state law. *McDowell v. Cheney*, 718 F. Supp. 1531 (M.D. Ga. 1989), *aff'd*, 9 F.3d 1559 (11th Cir. 1993).

Statute of limitations. — Where plaintiff's original complaint, based on 42 U.S.C. § 1983 violations, was filed within two years after the injury, and plaintiff asserted a first amendment claim in an amendment, even though the first amendment expression arose out of the plaintiff's prior activities, the plaintiff's claim for violation of such right arose out of defendant's acts which were the basis of the § 1983 claim and related back to the date of the original complaint. *Blue Ridge Mt. Fisheries, Inc. v. Department of Natural Resources*, 217 Ga. App. 89, 456 S.E.2d 651 (1995).

Cited in *RD-DR Corp. v. Smith*, 183 F.2d 562 (5th Cir. 1950); *McGill v. State*, 209 Ga. 282, 71 S.E.2d 548 (1952); *Atlanta Newspapers, Inc. v. State*, 101 Ga. App. 105, 113 S.E.2d 148 (1960); *Wolfe v. City of Albany*, 189 F. Supp. 217 (M.D. Ga. 1960); *Suggs v. Brotherhood of Locomotive Firemen & Enginemen*, 219 F. Supp. 770 (M.D. Ga. 1960); *Wilkinson v. United States*, 365 U.S. 399, 81 S. Ct. 567, 5 L. Ed. 2d 633 (1961); *Braden v. United States*, 365 U.S. 431, 81 S. Ct. 584, 5 L. Ed. 2d 653 (1961); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961); *Williams v. State*, 217 Ga. 312, 122 S.E.2d 229 (1961); *City of Atlanta v. Lopert Pictures Corp.*, 217 Ga. 432, 122 S.E.2d 916 (1961); *International Longshoremen's Ass'n v. Georgia Ports Auth.*, 217 Ga. 712, 124 S.E.2d 733 (1962); *City of Atlanta v. Columbia Pictures Corp.*, 218 Ga. 714, 130 S.E.2d 490 (1963); *Anderson v. City of Albany*, 321 F.2d 649 (5th Cir. 1963); *Rogers v. Mayor of Atlanta*, 219

Ga. 799, 136 S.E.2d 342 (1964); *Walker v. State*, 220 Ga. 415, 139 S.E.2d 278 (1964); *Mack v. Connor*, 220 Ga. 450, 139 S.E.2d 286 (1964); *Willis v. Pickrick Restaurant*, 231 F. Supp. 396 (N.D. Ga. 1964); *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965); *Barnum v. Chambliss*, 247 F. Supp. 794 (M.D. Ga. 1965); *Georgia v. Rachel*, 384 U.S. 780, 86 S. Ct. 1783, 16 L. Ed. 2d 925 (1966); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1966); *Wilson v. State*, 223 Ga. 531, 156 S.E.2d 446 (1967); *Southwire Co. v. NLRB*, 383 F.2d 235 (5th Cir. 1967); *Epstein v. Maddox*, 277 F. Supp. 613 (N.D. Ga. 1967); *Troutman v. Southern Ry.*, 296 F. Supp. 963 (N.D. Ga. 1968); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969); *Graves v. Walton County Bd. of Educ.*, 410 F.2d 1153 (5th Cir. 1969); *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Wesley v. City of Savannah*, 294 F. Supp. 698 (S.D. Ga. 1969); *Bon Air Hotel, Inc. v. Time, Inc.*, 295 F. Supp. 704 (S.D. Ga. 1969); *Great Speckled Bird v. Stynchcombe*, 298 F. Supp. 1291 (N.D. Ga. 1969); *Cato v. Georgia*, 302 F. Supp. 1143 (N.D. Ga. 1969); *Wilson v. Gooding*, 431 F.2d 855 (5th Cir. 1970); *Porter v. Kimzey*, 309 F. Supp. 993 (N.D. Ga. 1970); *United States v. Bob Lawrence Realty, Inc.*, 313 F. Supp. 870 (N.D. Ga. 1970); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970); *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971); 1024 *Peachtree Corp. v. Slaton*, 228 Ga. 102, 184 S.E.2d 144 (1971); *Edwards v. Sammons*, 437 F.2d 1240 (5th Cir. 1971); *United States ex rel. Huguley v. Martin*, 325 F. Supp. 489 (N.D. Ga. 1971); *United States v. Mitchell*, 327 F. Supp. 476 (N.D. Ga. 1971); *Cooley v. Endictor*, 340 F. Supp. 15 (N.D. Ga. 1971); *Dudley v. State*, 228 Ga. 551, 186 S.E.2d 875 (1972); *Breaux v. State*, 230 Ga. 506, 197 S.E.2d 695 (1973); *Fishman v. State*, 128 Ga. App. 505, 197 S.E.2d 467 (1973); *Sonesta Int'l Hotels Corp. v. Colony Square Co.*, 482 F.2d 281 (5th Cir. 1973); *Goodman v. Ault*, 358 F. Supp. 743 (N.D. Ga. 1973); *United States v. Best*, 363 F. Supp. 11 (S.D. Ga. 1973); *Hipple v. Warner*, 368 F. Supp. 301 (N.D. Ga. 1973); *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974); *Granese v. State*, 232 Ga. 193, 206 S.E.2d 26 (1974); *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974); *Jones v. Ault*, 67 F.R.D. 124 (S.D. Ga. 1974); *State v. Young*, 234 Ga.

488, 216 S.E.2d 586 (1975); Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975); Board of Educ. v. AFSCME, 401 F. Supp. 687 (N.D. Ga. 1975); Davis v. Griffin-Spalding County Bd. of Educ., 445 F. Supp. 1048 (N.D. Ga. 1975); United States v. Miller, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976); Ballew v. State, 138 Ga. App. 530, 227 S.E.2d 65 (1976); Hall v. State, 139 Ga. App. 488, 229 S.E.2d 12 (1976); Thomas v. State, 237 Ga. 690, 229 S.E.2d 458 (1976); Watts v. Six Flags Over Ga., Inc., 140 Ga. App. 106, 230 S.E.2d 34 (1976); United States v. King, 532 F.2d 505 (5th Cir. 1976); Nelson v. Rosenthal, 539 F.2d 1034 (5th Cir. 1976); Ashworth v. Fortson, 424 F. Supp. 1178 (N.D. Ga. 1976); Scott v. McDonald, 70 F.R.D. 568 (N.D. Ga. 1976); Pittman v. Cohn Communities, Inc., 240 Ga. 106, 239 S.E.2d 526 (1977); Cargal v. State, 144 Ga. App. 238, 241 S.E.2d 8 (1977); Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977); United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29 (N.D. Ga. 1977); Simpson v. State, 144 Ga. App. 657, 242 S.E.2d 265 (1978); Underwood v. State, 144 Ga. App. 684, 242 S.E.2d 339 (1978); Pierce v. State, 145 Ga. App. 680, 244 S.E.2d 589 (1978); Farmer v. Holton, 146 Ga. App. 102, 245 S.E.2d 457 (1978); Hess v. State, 146 Ga. App. 874, 247 S.E.2d 546 (1978); Beall v. Department of Revenue, 148 Ga. App. 5, 251 S.E.2d 4 (1978); Speight v. State, 148 Ga. App. 87, 251 S.E.2d 36 (1978); Paperback Book Mart, Inc. v. State, 148 Ga. App. 377, 251 S.E.2d 396 (1978); Love v. Sessions, 568 F.2d 357 (5th Cir. 1978); Rosanova v. Playboy Enters., Inc., 580 F.2d 859 (5th Cir. 1978); Willingham v. Carter, 447 F. Supp. 301 (S.D. Ga. 1978); United States v. Brown Transp. Corp., 448 F. Supp. 773 (N.D. Ga. 1978); High Ol' Times, Inc. v. Busbee, 449 F. Supp. 364 (N.D. Ga. 1978); Evans v. Just Open Gov't, 242 Ga. 834, 251 S.E.2d 546 (1979); Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979); Playmate Cinema, Inc. v. State, 154 Ga. App. 871, 269 S.E.2d 883 (1980); Hodges v. Tomberlin, 510 F. Supp. 1280 (S.D. Ga. 1980); Gateway Books, Inc. v. State, 247 Ga. 16, 276 S.E.2d 1 (1981); Williams v. Church's Fried Chicken, Inc., 158 Ga. App. 26, 279 S.E.2d 465 (1981); McCrary v. Poythress, 638 F.2d 1308 (5th Cir. 1981); Thomasville Branch of NAACP v. Thomas County, 639 F.2d 1384 (5th Cir.

1981); Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir. 1981); Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981); Bailey v. Vining, 514 F. Supp. 452 (M.D. Ga. 1981); Dunten v. Kibler, 518 F. Supp. 1146 (N.D. Ga. 1981); Windfaire, Inc. v. Busbee, 523 F. Supp. 868 (N.D. Ga. 1981); Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982); Ambassador College v. Geotzke, 675 F.2d 662 (5th Cir. 1982); Kyle v. Hanberry, 677 F.2d 1386 (11th Cir. 1982); Lamar v. Banks, 684 F.2d 714 (11th Cir. 1982); Clemons v. Dougherty County, 684 F.2d 1365 (11th Cir. 1982); Pierson v. News Group Publications, Inc., 549 F. Supp. 635 (S.D. Ga. 1982); Rhodes v. Gwinnett County, 557 F. Supp. 30 (N.D. Ga. 1982); Ray v. Edwards, 557 F. Supp. 664 (N.D. Ga. 1982); Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667 (N.D. Ga. 1982); Penthouse Int'l, Ltd. v. McAuliffe, 702 F.2d 925 (11th Cir. 1983); Fiske v. Lockheed-Georgia Co., 568 F. Supp. 590 (N.D. Ga. 1983); Kleiner v. First Nat'l Bank, 102 F.R.D. 754 (N.D. Ga. 1983); Caldwell v. Bateman, 252 Ga. 144, 312 S.E.2d 320 (1984); Ray v. Edwards, 725 F.2d 655 (11th Cir. 1984); Stone Mt. Game Ranch, Inc. v. Hunt, 746 F.2d 761 (11th Cir. 1984); Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663 (11th Cir. 1984); American Booksellers Ass'n v. Webb, 590 F. Supp. 677 (N.D. Ga. 1984); Watkins v. State, 254 Ga. 267, 328 S.E.2d 537 (1985); Holley v. Seminole County Sch. Dist., 763 F.2d 399 (11th Cir. 1985); Kelly v. Macon-Bibb County Bd. of Elections, 608 F. Supp. 1036 (M.D. Ga. 1985); Jersawitz v. Hanberry, 610 F. Supp. 535 (N.D. Ga. 1985); Stevens v. Gay, 792 F.2d 1000 (11th Cir. 1986); Speedway Grading Corp. v. Gardner, 206 Ga. App. 439, 425 S.E.2d 676 (1992); Top Shelf, Inc. v. Mayor & Alderman ex rel. City of Savannah, 832 F. Supp. 361 (S.D. Ga. 1993); Ford v. City of Oakwood, 905 F. Supp. 1063 (N.D. Ga. 1995); Anderson v. State, 231 Ga. App. 807, 499 S.E.2d 717 (1998); Cox v. Barber, 275 Ga. 415, 568 S.E.2d 478 (2002), cert. denied, 537 U.S. 1109, 123 S. Ct. 851, 154 L. Ed. 2d 780 (2003).

Scope and Purpose

1. In General

Right to receive information and ideas, regardless of their social worth, is fundamen-

Scope and Purpose (Cont'd)**1. In General (Cont'd)**

tal to free society. *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

U.S. Const., amend. 1 gives freedom of mind the same security as freedom of conscience. *Stoner v. Thompson*, 377 F. Supp. 585 (M.D. Ga. 1974).

Clear and present danger required for restricting rights. — No public official, absent a showing of clear and present danger, can restrict rights under U.S. Const., amend. 1. *Stoner v. Thompson*, 377 F. Supp. 585 (M.D. Ga. 1974).

Great secular causes, with small ones, are guarded. — The grievances for redress of which the right of petition was ensured, and with it the right of assembly, are not solely religious or political ones; the rights of free speech and free press are not confined to any field of human interest. *Stoner v. Thompson*, 377 F. Supp. 585 (M.D. Ga. 1974).

Guarantees in U.S. Const., amend. 1 are protected by U.S. Const., amend. 14. *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975).

First amendment rights take priority over national policy promoting racial integration. — Rights guaranteed under U.S. Const., amend. 1 are rights more compelling than any national policy promoting racial integration. *Daugherty v. City of E. Point*, 447 F. Supp. 290 (N.D. Ga. 1978).

Constitutional protection is presumed. — Constitutional protection under U.S. Const., amend. 1 is presumed, and exceptions to protection are few in number. *High Oil Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), *aff'd*, 621 F.2d 141 (5th Cir. 1980).

Under U.S. Const., amend. 1 there is no such thing as a false idea. *Lindsey v. Board of Regents*, 607 F.2d 672 (5th Cir. 1979).

Independent review of constitutional claims. — The first amendment values applicable to states are protected by powers vested in appellate courts to make an independent review of constitutional claims. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

The first amendment values applicable to states through U.S. Const., amend. 14 are

adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

First amendment, in conjunction with fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

When rights subject to regulation. — First amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982), *on rehearing*, 702 F.2d 532 (5th Cir. 1984), *rev'd on other grounds*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985).

Collection of records implicating rights. — Even where records implicating an individual's first amendment rights are involved, the prohibition against collection of such records is not absolute. *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982), *cert. denied*, 481 U.S. 1031, 107 S. Ct. 1961, 95 L. Ed. 2d 533 (1987).

No first amendment right to accident reports. — Private investigator seeking information for commercial solicitation has no first amendment constitutional right of special access to motor vehicle accident reports. *Spottsville v. Barnes*, 135 F. Supp. 2d 1316 (N.D. Ga. 2001).

Motorcycle helmet law. — There is no first amendment right to ride a motorcycle wearing a baseball cap, a bandanna, or bareheaded. *ABATE of Ga., Inc. v. Georgia*, 137 F. Supp. 2d 1349 (N.D. Ga. 2001), *aff'd*, 264 F.3d 1315 (11th Cir. 2001).

2. Balancing Interests of Citizen and State

Limitation upon individual liberty must have appropriate relation to the safety of the state. — Legislation which goes beyond this need violates the principle of the Constitu-

tion. *Wolfe v. City of Albany*, 104 Ga. App. 264, 121 S.E.2d 331 (1961).

Rights protected by U.S. Const., amend. 1, though fundamental, are not absolute, and must be tempered to a degree by the concepts of order and a healthy respect for the rights of other citizens. *Alonso v. State*, 231 Ga. 444, 202 S.E.2d 37 (1973), appeal dismissed, 417 U.S. 938, 94 S. Ct. 3062, 41 L. Ed. 2d 661 (1974).

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. *Community Action Group v. City of Columbus*, 473 F.2d 966 (5th Cir. 1973).

Two-tier test is utilized to determine whether an infringement of first amendment's rights is permissible. — First, there must be shown to exist a significant or compelling state interest served by the statute in question. Second, it must be determined whether there is a substantial relationship between the statute and the stated purpose, or compelling interest, of the state. *Stoner v. Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974).

Ordinance regulating sale and consumption of alcohol on adult premises. — The constitutionality of the ordinance was upheld and the County Board of Commissioners committed no error in employing a "reasonable belief" standard in scrutinizing the studies the county relied upon in enacting the ordinance that prohibited the sale and consumption of alcohol at adult entertainment establishments. *In re Gaff*, 272 Ga. 7, 524 S.E.2d 728 (2000).

First amendment freedoms are not absolute. — They are properly restricted when sufficiently important governmental interest appears. *Therault v. Carlson*, 495 F.2d 390 (5th Cir.), cert. denied, 419 U.S. 1003, 95 S. Ct. 323, 42 L. Ed. 2d 279 (1974), later appeal, 547 F.2d 1279 (5th Cir.), cert. denied, 434 U.S. 871, 98 S. Ct. 216, 54 L. Ed. 2d 150 (1977).

Conflict between legislative power and individual rights must be accommodated by legislation drawn more narrowly to avoid the conflict. A statute touching protected rights under U.S. Const., amend. 1 must be narrowly drawn to define and punish specific conduct as constituting a clear and present

danger to a substantial interest of the state. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

States bear the burden of proving exceptions to constitutional protection. — States bear the burden of proving that a particular exception to the protection of U.S. Const., amend. 1 is applicable. *High Oil Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).

Ultimate balancing of interests of citizen and state with regard to first amendment protection remains in sphere of court. *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), cert. denied, 452 U.S. 926, 101 S. Ct. 3063, 69 L. Ed. 2d 428 (1981).

U.S. Const., amend. 1 is a restraint on government, not on private persons. *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980).

3. Overbroad Legislation

Standards of permissible statutory vagueness are strict in the area of free expression. Because U.S. Const., amend. 1's freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Wilson v. Gooding*, 303 F. Supp. 952 (N.D. Ga.), appeal dismissed, 396 U.S. 112, 90 S. Ct. 397, 24 L. Ed. 2d 306 (1969), aff'd, 431 F.2d 855 (5th Cir. 1970), 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

First amendment rights have assumed a protected place in the jurisprudence. Great care must be taken to assure that vague or overbroad laws do not infringe upon constitutional rights under U.S. Const., amend. 1. *Wilson v. Gooding*, 303 F. Supp. 952 (N.D. Ga.), appeal dismissed, 396 U.S. 112, 90 S. Ct. 397, 24 L. Ed. 2d 306 (1969), aff'd, 431 F.2d 855 (5th Cir. 1970), 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

O.C.G.A. § 16-10-20 was not void for vagueness. — O.C.G.A. § 16-10-20 was not unconstitutionally vague under Ga. Const. 1983, Art. I, Sec. I, Para. I, as: (1) the statute gave a defendant ample notice that the prohibited conduct; (2) the statute also provided sufficient objective standards to those who were charged with enforcing it; and (3) a defendant's act was made criminal when a false statement was made, without regard to the result of that act, and the fact that application of the statute's standards some-

Scope and Purpose (Cont'd)**3. Overbroad Legislation (Cont'd)**

times required an assessment of the surrounding circumstances to determine if the statute was violated, did not render it unconstitutional. *Banta v. State*, 281 Ga. 615, 642 S.E.2d 51 (2007).

Broad prophylactic rules in the area of free expression are suspect. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

Improper restrictive pretrial publicity order. — Ga. St. Bar R. 4-102(d):3.6 required a finding that extrajudicial statements to media members would have had a substantial likelihood of materially prejudicing the trial; where, in restricting the extrajudicial statements to the media members by the non-lawyers, the parties, experts, witnesses, and investigators involved in a criminal trial, a trial court failed to find, based on evidence in the record, that the extrajudicial statements would have had a substantial likelihood of materially prejudicing the trial, and to the extent the order contravened Ga. St. Bar R. 4-102(d):3.6, it was overbroad, and was reversed. *Atlanta Journal-Constitution v. State*, 266 Ga. App. 168, 596 S.E.2d 694 (2004).

Purpose of striking down overbroad or vague statutes. — Overbreadth doctrine condemns those means to that legitimate end whereby first amendment rights may justifiably be infringed, which comprehend too broad an incursion upon the realm of first amendment activity. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

One of the purposes of striking down statutes which are "overbroad" is to assure the public that the dissemination of materials protected by the first amendment will not be suppressed. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

The purpose of striking down statutes which are "vague" is to prevent the arbitrary enforcement of laws that fail to give officials or the public any notice of what is prohibited. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

Abstention by federal courts inappropriate. — Abstention by federal courts, remitting controversy to state courts, is particularly inappropriate in an overbreadth or vagueness case grounded upon U.S. Const., amend. 1. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

No showing of appropriateness of narrower statute required. — Attacks on overly broad statutes are allowed with no requirement that the person making the attack demonstrate that the person's own conduct could not be regulated by a statute drawn with the requisite narrow specificity. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

Standing requirement relaxed for one attacking overly broad statute. — The Supreme Court has altered its traditional rules of standing to permit — in the area of U.S. Const., amend. 1 — attacks on overly broad statutes with no requirement that the person making the attack demonstrate that the person's own conduct could not be regulated by a statute drawn with the requisite narrow specificity. *Federal Election Comm'n v. Lance*, 635 F.2d 1132 (5th Cir. 1981), appeal dismissed and cert denied, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981) '.

Judicial remedy where no rehabilitative construction possible. — Where a law is substantially overbroad, in that it sweeps within its scope a wide range of both protected and nonprotected expressive activity, and where no readily apparent construction suggests itself as a vehicle for rehabilitating the statute in a single proceeding, the courts may reject simple interest balancing and require the legislature to achieve its ends by less drastic means. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971); *Smith v. Price*, 446 F. Supp. 828 (M.D. Ga. 1977), rev'd on other grounds, 616 F.2d 1371 (5th Cir. 1980).

Invalidation of statute to prevent "chilling" of protected conduct. — Rather than await case-by-case excision of a statute's overbreadth or vagueness through review of its application to particular conduct, which would be needlessly time-consuming and ineffective, courts, under the rubric of the overbreadth doctrine, may invalidate such a statute facially so as to end its deterrence of constitutionally protected activity, since otherwise the overbroad law would remain as a deterrent to others who, because of fear of statutory reprisals, might forego protected activity rather than test their privileges under U.S. Const., amend. 1 administratively or judicially. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

Governmental purposes should be narrowly achieved. — Even though a governmental purpose may be legitimate and sub-

stantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can more narrowly be achieved. A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971); *Smith v. Price*, 446 F. Supp. 828 (M.D. Ga. 1977), rev'd on other grounds, 616 F.2d 1371 (5th Cir. 1980).

Indecent or obscene speech statute overbroad. — Defendant's conviction for violating O.C.G.A. § 46-5-21(a)(1) was reversed as the statute was an overbroad infringement on defendant's first amendment and Ga. Const. 1983, Art. I, Sec. I, Para. V rights to free speech; the statute does not contain the necessary language setting out the least restrictive means to further a compelling state interest as it applies to indecent or obscene speech, whether heard by children or adults, and whether unwelcomed by listeners or spoken with intent to please. *McKenzie v. State*, 279 Ga. 265, 626 S.E.2d 77 (2005).

Vague statutes violate due process. — The test that has been enunciated is whether the terms of a statute are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *DeKalb Real Estate Bd., Inc. v. Chairman & Bd. of Comm'rs of Rds. & Revenues*, 372 F. Supp. 748 (N.D. Ga. 1973).

Vague statutes requiring people of common intelligence to guess at meaning are unconstitutional. — A statute concerning rights under U.S. Const., amend. 1 must not forbid or require the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application, because lack of a fair warning to actors or lack of adequate standards to guide enforcers also may lead to a "chill" on privileged activity. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

Absent some qualification on "bias or prejudice", O.C.G.A. § 17-10-17 is left so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application; thus, § 17-10-17 is too vague to justify the imposition of enhanced criminal punishment for its viola-

tion. Furthermore, § 17-10-17 may not be upheld because it impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications; therefore, the sentence enhancement that defendants selected their victims because of racial bias and prejudice violated defendants' due process rights under U.S. Const., amend. 1, 5, 8, and 14 and the corresponding state constitutional provisions and the sentence enhancements were reversed. *Botts v. State*, 278 Ga. 538, 604 S.E.2d 512 (2004).

United States Supreme Court has the duty to say where individual's freedom ends and state's power begins. — Choice on that border, always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by U.S. Const., amend. 1. *Stoner v. Thompson*, 377 F. Supp. 585 (M.D. Ga. 1974).

4. Intervention and Injunctive Relief

Loss of first amendment freedoms, for even minimal periods, unquestionably constitutes irreparable injury. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

Injunctive relief where irreparable harm to first amendment rights probable. — The United States Supreme Court recognized that mere prosecution under a statute which regulates expression and which is unconstitutional on its face, or under a statute which is being applied in bad faith for purposes of discouraging the exercise of protected rights under U.S. Const., amend. 1, gives rise to the irreparable harm which is a prerequisite to injunctive relief; but injunctive relief is not appropriate to interfere with the enforcement of state criminal laws which do not affect these rights, for in such cases mere prosecution will not produce irreparable harm. *Eberhart v. Massell*, 311 F. Supp. 654 (N.D. Ga. 1970).

Enjoining of state or military prosecution by federal court. — Only within narrow limits and where first amendment rights are involved will federal courts enjoin state or military prosecution. *Torres v. Connor*, 329 F. Supp. 1025 (N.D. Ga. 1970).

Ex parte temporary restraining orders without notice in area of first amendment

Scope and Purpose (Cont'd)**4. Intervention and Injunctive Relief (Cont'd)**

freedoms. — There is a place in jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by U.S. Const., amend. 1 for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate. *Sumbry v. Land*, 127 Ga. App. 786, 195 S.E.2d 228 (1972), cert. denied, 414 U.S. 1079, 94 S. Ct. 598, 38 L. Ed. 2d 486 (1973); *Anderson v. Dean*, 354 F. Supp. 639 (N.D. Ga. 1973).

Order involving first amendment must be narrowly couched. — Order issued in area of rights of U.S. Const., amend. 1 must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. *Anderson v. Dean*, 354 F. Supp. 639 (N.D. Ga. 1973).

Circumstances necessary for federal court intervention in ongoing state proceeding. — Even in the area of first amendment rights, special circumstances such as bad faith and harassment must be present before a federal court may intervene in an ongoing state proceeding. *Sanders v. McAuliffe*, 364 F. Supp. 654 (N.D. Ga. 1973).

Elements indicating injunction not illegal prior restraint. — If prior to the issuance of the injunction an adequate determination is made that certain communication is unprotected by U.S. Const., amend. 1; that the order is based on a continuing course of repetitive conduct; and that the order is clear and sweeps no more broadly than necessary, then the injunction is not invalid as an illegal prior restraint. *Retail Credit Co. v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975).

Freedom of Religion**1. Scope of Free Exercise**

Scope of establishment clause. — See *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), aff'd on reh'g, 698 F.2d 1098 (11th Cir. 1983).

Religious belief not justification for criminal act. — A party's religious belief cannot

be accepted as justification for committing an overt act made criminal by the law of the land. *Coleman v. City of Griffin*, 55 Ga. App. 123, 189 S.E. 427 (1936), appeal dismissed, 302 U.S. 636, 58 S. Ct. 23, 82 L. Ed. 495 (1937).

Personal beliefs are not to be considered religious for purposes of U.S. Const., amend. 1. *Sapp v. Renfro*, 511 F.2d 172 (5th Cir. 1975).

Restraints upon free exercise of religion unlawful. — Restraints upon the free exercise of religion according to the dictates of conscience are unlawful under the state and federal constitutions. *Coleman v. City of Griffin*, 55 Ga. App. 123, 189 S.E. 427 (1936), appeal dismissed, 302 U.S. 636, 58 S. Ct. 23, 82 L. Ed. 495 (1937).

Limits to free exercise of religion. — No external authority is to place itself between the finite being and the infinite when the former is seeking to render the homage that is due, and in a mode which commends itself to the finite being's conscience and judgment as being suitable for the finite being to render, and acceptable to its object; but religious liberty does not include the right to introduce and carry out every scheme or purpose which individuals see fit to claim as a part of their religious system. *Coleman v. City of Griffin*, 55 Ga. App. 123, 189 S.E. 427 (1936), appeal dismissed, 302 U.S. 636, 58 S. Ct. 23, 82 L. Ed. 495 (1937).

Only gravest abuses permit limitation on free exercise of religion. — Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation of the free exercise of religion. Restrictions on the free exercise of religion are allowed only when it is necessary to prevent grave and immediate danger to interests which the state may lawfully protect. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

First amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. The state must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. *Polakoff v. Henderson*, 370 F. Supp. 690 (N.D. Ga. 1973), aff'd, 488 F.2d 977, (5th Cir. 1974).

Validity of ordinance prohibiting distribution of literature impacting Jehovah's Wit-

ness. — Ordinance prohibiting the distributing of literature within the city limits without prior written permission from the city manager did not deprive the defendant, a Jehovah's Witness, of the constitutional right of free exercise and enjoyment of religious profession and worship, even though it prohibited the defendant from introducing and carrying out a scheme or purpose which the defendant saw fit to claim as a part of the defendant's religious system. *Coleman v. City of Griffin*, 55 Ga. App. 123, 189 S.E. 427 (1936), appeal dismissed, 302 U.S. 636, 58 S. Ct. 23, 82 L. Ed. 495 (1937).

Municipal ordinance restricting distribution of magazines valid for public safety. — A municipal ordinance providing that it shall be illegal "for any person, firm, or corporation to sell or offer for sale any goods, wares, merchandise, pamphlets, magazines, maps, or other article of value, on any Saturday between the hours of 12 noon and 9 P.M. on any of the following congested sidewalks of said city," designating certain sidewalks and providing a penalty therefore, is a valid and reasonable regulation for public safety and convenience, under the police power of the city; and where plaintiffs seek to enjoin enforcement against them of the ordinance, on the grounds that the magazines sold and offered for sale are devoted to religious subjects, and advocate the adoption of a particular form of religion, the distribution of which being a part of their religious belief, and urge that to prohibit the sale of the magazines would be in violation of their rights of religious freedom under the state and federal constitutions, it is not error to deny an injunction. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Ordinance forbidding sale of pamphlets for public safety invalid as applied to sale of religious literature. — Ordinance forbidding the sale of pamphlets between the hours of 10 A.M. and 9 P.M., on certain designated sidewalks, and providing a penalty therefore, is a valid reasonable regulation for public safety and convenience, but a proper interpretation excludes its application to the distribution of religious pamphlets or literature by selling or offering them for sale at the prohibited time and place, when such distribution does not interfere with the traffic, and the safety, comfort, or convenience of the public in the use of

the street, as such an application would render the ordinance unconstitutional, as a violation of the defendant's constitutional guarantee of freedom of religion. *Burns v. City of Carrollton*, 72 Ga. App. 628, 34 S.E.2d 621 (1945).

Exercise of religious freedom with due regard for others' rights. — A person's right to exercise religious freedom, which may be manifested by acts, ceases where it overlaps and transgresses the rights of others. Everyone's rights must be exercised with due regard for the rights of others. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Balancing of religious freedom with ordered liberty. — Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make their own standards on matters of conduct in which society as a whole has important interests. *Theriault v. Carlson*, 495 F.2d 390 (5th Cir.), cert. denied, 419 U.S. 1003, 95 S. Ct. 323, 42 L. Ed. 2d 279 (1974), later appeal, 547 F.2d 1279 (5th Cir.), cert. denied, 434 U.S. 871, 98 S. Ct. 216, 54 L. Ed. 2d 150 (1977).

Unlimited constitutional right to practice any religion. — Under the constitutional provisions, both state and federal, the right to adopt, profess, entertain, or advocate any religious views, or to fail or refuse to do so, is unlimited, and cannot be controlled by any law. There is no authority under the system of jurisprudence to alter, modify, or infringe upon this right. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Constitutional guarantee of religious freedom excludes objectionable acts. — While there is no power to control what a person may believe about religion or the type of religion a person may adopt or profess, yet there is a power under the law to limit the person's acts, even though to do such acts may be part of the person's religious belief. The constitutional guarantee of the exercise of religious freedom does not extend to acts which are inimical to the peace, good order, and morals of society. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Acts inimical to peace, good order, and morals not protected. — Constitutional guarantee of exercise of religious freedom

Freedom of Religion (Cont'd)**1. Scope of Free Exercise (Cont'd)**

does not extend to acts inimical to the peace, good order, and morals of society. A person's right to exercise religious freedom, which may be manifested by acts, ceases where it overlaps and transgresses the rights of others. *Ferguson v. City of Moultrie*, 71 Ga. App. 13, 29 S.E.2d 786 (1944).

Balancing of freedoms of speech and religion. — The constitutional right of one to freedom of speech is counterbalanced by the right of the many to their constitutional freedom in the practice of their religion; neither occupies a preferred position in the constitution. *Jones v. State*, 219 Ga. 848, 136 S.E.2d 358, cert. denied, 379 U.S. 935, 85 S. Ct. 330, 13 L. Ed. 2d 345 (1964).

Zoning ordinance excluding church from residential area invalid. — Generally, any zoning ordinance that absolutely excludes churches from residential areas is invalid under constitutional guarantees. Churches are, however, subject to reasonable regulation both referring to property in the zone generally and to churches specifically, provided that the regulations are reasonable and contain some standards. *Rogers v. Mayor of Atlanta*, 110 Ga. App. 114, 137 S.E.2d 668 (1964).

First amendment enjoins the employment of organs of government for essentially religious purposes. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969).

Civil courts forbidden from deciding ecclesiastical issues. — U.S. Const., amend. 1 commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, states, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969).

Although civil courts are the proper forum for resolving property disputes, in the case of disputes over church properties, they are forbidden from determining ecclesiastical questions in the process. *Presbyterian*

Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969), cert. denied, 396 U.S. 1041, 90 S. Ct. 680, 24 L. Ed. 2d 685 (1970).

U.S. Const., amend. 1 prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice; as a corollary to this commandment, the amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

A court could not, consistent with the first amendment, adjudicate a dispute concerning a parliamentary ruling at the 1985 Southern Baptist Convention. The first amendment bars civil court resolution of any controversy concerning a matter of ecclesiastical government. *Crowder v. Southern Baptist Convention*, 828 F.2d 718 (11th Cir. 1987), cert. denied, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (1988).

Courts can consider distribution of assets.

— While it is true that the courts may not inquire into a controversy relating to religious matters such as internal church procedures and expulsion from church membership, the trial court does have jurisdiction to resolve issues that do not require an impermissible intrusion or excessive entanglement into ecclesiastical matters without intruding upon religious or doctrinal matters; thus, trial courts may legitimately consider matters such as the distribution or disposition of tangible church property such as bank accounts, realty, and other temporal assets. *Members of Calvary Missionary Baptist Church v. Jackson*, 259 Ga. App. 647, 578 S.E.2d 275 (2003).

Trial court had jurisdiction to issue an interlocutory injunction against a minister from coming onto church property in order to protect the property rights of the property owner. *Anderson v. Dowd*, 268 Ga. 146, 485 S.E.2d 764 (1997).

Principle of separation of church and state guaranteed by U.S. Const., amend. 1 cannot extend beyond the grave any punishment imposed by sentence of courts for whatever term of years, and any attempt to do so will not be effective beyond the limit of the defendant's earthly span of existence. *Hill v. State*, 119 Ga. App. 612, 168 S.E.2d 327 (1969).

Prohibition of employment of government organs for religious purposes. — Because of the hazards to free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern, the first amendment enjoins the employment of organs of government for essentially religious purposes. *Hickman v. Owens*, 322 F. Supp. 1278 (N.D. Ga. 1971).

“Church” defined. — The term “church” is one of very comprehensive signification, and imports an organization for religious purposes, for the public worship of God. *McClure v. Salvation Army*, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff’d*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Salvation Army is a religion regardless of its lack of traditional houses of worship. *McClure v. Salvation Army*, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff’d*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Freedom of religious organizations from state interference. — U.S. Const., amend. 1 grants a spirit of freedom for religious organizations, an independence from secular control or manipulation, and, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Compelling state interest required for regulation of religion. — Only in rare instances where a compelling state interest in the regulation of a subject within the state’s constitutional power to regulate is shown can a court uphold state action which imposes even an incidental burden on the free exercise of religion. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Congressional inhibition of religious acts for public welfare. — Congress may inhibit or prevent acts, as opposed to beliefs, even where those acts are in accord with religious convictions or beliefs, where the public interest concerns outweigh first amendment protections. *McClure v. Salvation Army*, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff’d*, 460 F.2d 553, (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Judiciary as well as legislature prohibited from interfering with religious freedom. — Constitutional principles prevent the judiciary, as well as the legislature, from interfering with the free exercise of religion. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Decisions of church tribunals conclusive in secular courts. — In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest church judicatories to which the matter has been carried, legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Exclusion from church conclusive upon court. — The validity of the exclusion of individuals from membership in a church is conclusive upon the civil courts. *Anderson v. Dowd*, 268 Ga. 146, 485 S.E.2d 764 (1997).

Blanket prohibition of religious solicitation in public areas overbroad. — The blanket prohibition on the use of the public streets, areas, and parks for solicitation or propagation of religious doctrine, regardless of any other circumstances, between the hours of 6:00 P.M. and 9:00 A.M. is overbroad. *Westfall v. Board of Comm’rs*, 477 F. Supp. 862 (N.D. Ga. 1979).

Court order requiring mother to undergo surgery to save her baby not violative of religious freedom. — Court order requiring a mother to undergo surgery against her religious convictions in order to preserve the life of her fully developed unborn child did not violate U.S. Const., amend. 1. *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981).

Tithing under Bankruptcy Code. — A constitutional challenge to a determination that tithing is an unreasonable expense, subjecting a Chapter 7 debtor to dismissal under 11 U.S.C. § 707(b), is not sustainable, as the free exercise clause does not require

Freedom of Religion (Cont'd)**1. Scope of Free Exercise (Cont'd)**

the Bankruptcy Code to yield to the debtor's desire to tithe. In *re Lee*, 162 Bankr. 31 (Bankr. N.D. Ga. 1993).

Private employment terminated due to religious beliefs. — U.S. Const., amend. 1 did not bar an action by an employee of a for-profit corporation who was terminated because of the employee's rejection of certain religious beliefs. *Halverson v. Murzynski*, 226 Ga. App. 276, 487 S.E.2d 19 (1997).

Removal of board of directors of church was secular issue. — Trial court erred in entering summary judgment for the former board of directors of a church for want of jurisdiction as it could resolve the dispute between the church members and the church's former board of directors as to the removal of the former board of directors, under the Georgia Nonprofit Corporation Code, O.C.G.A. § 14-3-101 et seq., and as to the disposition of church property without considering ecclesiastical matters. *Members of Calvary Missionary Baptist Church v. Jackson*, 259 Ga. App. 647, 578 S.E.2d 275 (2003).

2. State Actions Affecting Religion

Establishment clause of first amendment is applicable to state governments by virtue of the fourteenth amendment. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

Limitations on applicability to states. — The establishment clause only speaks to acts of the United States Congress, and, as applied to the states under the due process clause of the fourteenth amendment, it still is limited only to governmental action respecting an establishment of religion. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

Challenged state action must pass three-part test. — To pass muster under the establishment clause, the challenged state action must pass a three-part constitutional

test: such action must have a secular as opposed to a religious purpose; the principal or primary effect of the state action must be one that neither advances nor inhibits religion; and, the challenged state action must not foster excessive government entanglement with religion. The third portion of the test actually raises two questions: it must not appear that the state is involved in the questioned action to an extent sufficient to justify the application of first amendment analysis; and the results of the action must not foster excessive entanglement between the state and religion. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

"Excessive entanglement" defined. — Excessive entanglement between state and religion for purposes of the establishment clause is defined as an impermissible merging or intermeddling of the proper spheres of religion and government. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

It is effect of state's acts which brings constitutional scrutiny to bear, not the manner of their implementation; state acts may be legislative, administrative, or judicial; so long as they use state resources in a manner offensive to the United States Constitution, federal courts may act. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

Religious accommodation provision of Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), violates establishment clause of U.S. Const., amend. 1 where the true purpose of such provision was the advancement of religion, the provision's principal and primary effect was to directly benefit religions, and the enforcement of the provision would result in an impermissible entanglement of government with religion. *Isaac v. Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980).

There is no conflict between establishment and free exercise clause where a court

strikes down the religious accommodation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), as unconstitutional because no free exercise problem arises, since no congressional action has taken place; the first amendment religious freedoms are not triggered by congressional inaction, but rather by the United States Congress' failure to adhere to the admonition that "Congress shall make no law". *Isaac v. Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980).

Standing to challenge government-sponsored religious statements. — City residents and taxpayers had standing to challenge the display of the city seal used both on city stationery and to emboss official documents, since a non-economic injury which results from a party's being subjected to unwelcome religious statements can support a standing claim. *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987).

Standing to sue under establishment clause. — Normally to have standing in order to bring a suit a party must allege that the challenged action has caused the party injury in fact, economic or otherwise, and the United States Supreme Court has limited citizen standing to bring suits challenging government action when plaintiffs have no interest in the suits other than that shared by all Americans; but, in the context of an establishment clause case, standing is more broadly permitted. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

For the ability to demonstrate Article III standing under the establishment clause, see *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

When establishment clause claim is raised, requirements for standing do not include proof that particular religious freedoms are infringed; rather, a spiritual stake in first amendment values will be sufficient to give standing to raise issues concerning the establishment clause. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982),

aff'd on reh'g, 698 F.2d 1098 (11th Cir. 1983).

Standing of organization or association. — In order to have standing to sue under the establishment clause, a plaintiff that is not a natural person, such as an organization or an association, must have individual persons or members with a constitutionally protected interest that is being infringed upon. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on rehearing*, 698 F.2d 1098 (11th Cir. 1983).

Standing adequately shown. — Where the individual plaintiffs in the instant case gave testimony on their concerns with the separation of church and state, this was sufficient to demonstrate standing to sue because they have alleged injury in fact to an interest protected by the establishment clause which each has a personal right to enforce. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

City residents and taxpayers had standing to challenge city's use of word "Christianity" on its official seal, since they unquestionably had a direct stake in the outcome of the litigation. *Saladin v. City of Milledgeville*, 628 F. Supp. 839 (M.D. Ga. 1986).

Roman Catholic priest's status as clergyman is sufficient to confer standing to sue under the establishment clause. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

Showing required by those seeking immunity from laws on religious grounds. — Those who seek immunity from requirements of law on religious grounds must, at the very least, demonstrate adherence to ethical standards and a spiritual discipline. *McClure v. Salvation Army*, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Religious groups not immune from property tax. — Religious groups do not enjoy a general immunity from the imposition of property taxes under U.S. Const., amend. 1.

Freedom of Religion (Cont'd)**2. State Actions Affecting****Religion (Cont'd)**

Leggett v. Macon Baptist Ass'n, 232 Ga. 27, 205 S.E.2d 197 (1974).

Unorthodoxy will not serve to disqualify a religious group from tax exemption, as long as the group holds a sincere and meaningful belief in God occupying in the life of its possessors a place parallel to that occupied by God in traditional religions, and dedicates itself to the practice of that belief. *Roberts v. Ravenwood Church of Wicca*, 249 Ga. 348, 292 S.E.2d 657 (1982).

Organizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Cult's claims dismissed. — Cult's claims against several denominations alleging spiritual fraud and financial extortion were dismissed as beyond the appropriate judicial exercise of constitutional powers in accordance with the first amendment's separation between church and state. *U-John v. Composite Bible-Based Religious Body*, 839 F. Supp. 861 (N.D. Ga. 1993).

Jurisdiction over church property dispute. — The first amendment did not prohibit appellate jurisdiction over an action by church members against a pastor and church seeking dissolution of the church, appointment of a receiver, an injunction against the defendant's disposing of corporate assets, and proper disposition of the assets since the dispute was capable of resolution by reference to neutral principles of law, i.e., applicable provisions of the Georgia Nonprofit Corporation Code, O.C.G.A. § 14-3-101 et seq., without infringing upon any first amendment values. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994).

Trial court was not prohibited by the first amendment from exercising judicial authority over competing claims of church groups for ownership of a certificate of deposit. *Kidist Mariam Ethiopian Orthodox Tawahedo Church, Inc. v. Kidist Mariam Ethiopian Orthodox Tawahedo Church,*

Inc., 219 Ga. App. 470, 465 S.E.2d 491 (1995).

Trial court's order that a church call for an annual meeting of its membership in accordance with the provisions of O.C.G.A. § 14-3-701 constituted an unconstitutional judicial interference in the government of the church. *First Born Church of Living God, Inc. v. Hill*, 267 Ga. 633, 481 S.E.2d 221 (1997).

Dispute between parishioners and their bishop. — The first amendment barred the court from exercising judicial authority in a dispute between parishioners and their bishop concerning the bishop's order that icons and an iconscreen in the church be replaced because they were not compatible with the religious organization's practices and principles. *Leopold v. St. Paul's Greek Orthodox Church*, 235 Ga. App. 188, 509 S.E.2d 121 (1998).

Presence of cross on state park land impermissibly enmeshes state and church by creating the appearance of official backing for Christianity. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), aff'd, 678 F.2d 1379 (11th Cir. 1982), aff'd on rehearing, 698 F.2d 1098 (11th Cir. 1983).

Use of religious grave markers in public cemetery permissible. — The erection and maintenance of religiously symbolic grave markers in a public graveyard in compliance with the religious sentiments of known descendants does not conflict with U.S. Const., amend. 1 or Ga. Const. 1983, Art. I, Sec. II, Para. VII. *Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

Erection of statue of Jesus in public cemetery impermissible. — The proposed erection and maintenance of a statue of Jesus as a part of a public cemetery memorial has an impermissible religious purpose and, therefore, violates the establishment clause. *Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

County courthouse display of the Ten Commandments. — Framed panel of the Ten Commandments and the Great Commandment displayed in a county courthouse violated the establishment clause, warranting court order requiring removal of panel unless remounted within a larger display of non-religious, historical items, to bring it

within constitutional parameters. *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 511 U.S. 1129, 114 S. Ct. 2138, 128 L. Ed. 2d 867 (1994).

Menorah allowed in public plaza. — Because the state would not contravene the dictates of the establishment clause by neutrally and nonpreferentially allowing a religious organization to display its menorah in a public plaza, the state's exclusion of the menorah was neither necessary, nor narrowly tailored to achieve a compelling state interest. *Chabad-Lubavitch v. Miller*, 5 F.3d 1383 (11th Cir. 1993).

Licensing of church-operated children's home. — A requirement that the Department of Human Resources license a church-operated children's home as a child caring institution pursuant to the Children and Youth Act and department regulations governing child caring institutions does not violate the free exercise clause of the first amendment, nor would it violate the establishment clause of the first amendment, since such a requirement in no way aids, furthers, or confers a special benefit on any religious group. *Darrell Dorminey Children's Home v. Georgia Dep't of Human Resources*, 260 Ga. 25, 389 S.E.2d 211 (1990).

Appeal by state to single religious group in effort to promote tourism is in any case constitutionally questionable. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *aff'd on reh'g*, 698 F.2d 1098 (11th Cir. 1983).

Jury's use of Christian Bible during sentencing phase after capital conviction. — No first amendment issue was presented when the court permitted the Christian Bible to go into the jury room at the request of the jurors apparently for consultation, although the possible use of the Bible by jurors cannot be reconciled with the eighth amendment's requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction. *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

Violation of zoning ordinance by minister. — Zoning ordinance that allowed only single family residences in agricultural-

residential areas did not violate a minister's right to free exercise of the minister's religion, where the minister rented a portion of the minister's home to a bankrupt family, and the minister was not acting on behalf of the minister's church by accepting rent. *Lacey v. State*, 270 Ga. 37, 507 S.E.2d 441 (1998).

Right to control church property. — If the church government is hierarchical, then "neutral principles of law" are used to determine whether the local church or parent church has the right to control local property; "neutral principles" are state statutes, corporate charters, relevant deeds, and the organizational constitutions of the denomination. *St. Mary of Egypt Orthodox Church, Inc. v. Townsend*, 243 Ga. App. 188, 532 S.E.2d 731 (2000).

Hierarchical religious organizations. — A hierarchical church is associated with other churches that share similar faith and doctrine and have a common ecclesiastical head and, as a matter of constitutional law, a hierarchical religious organization must be permitted to establish the rules and regulations by which it is governed. *St. Mary of Egypt Orthodox Church, Inc. v. Townsend*, 243 Ga. App. 188, 532 S.E.2d 731 (2000).

3. Federal Actions Affecting Religion

IRS summons of religious organization members' records permissible. — An IRS summons to a bank requesting records relevant to the tax liability of an individual member of a religious organization did not violate U.S. Const., amend. 1, as the summons imposed no restriction on the religious organization's freedom to espouse doctrine or solicit support. *United States v. Saunders*, 621 F. Supp. 745 (N.D. Ga. 1985).

4. Clergy

Legislation regulating church administration violative of first amendment. — Legislation that regulates church administration, the operation of the churches, or the appointment of clergy, prohibits the free exercise of religion and violates U.S. Const., amend. 1. Regulation of the employment relationship between a minister and church by the state would result in an encroachment into an area of religious freedom which government is forbidden to enter and would

Freedom of Religion (Cont'd)**4. Clergy (Cont'd)**

violate the free exercise clause of the first amendment. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153 (1972).

Matters involving clergy. — Civil court could not take jurisdiction of an ecclesiastical issue involving a clergyman's termination from the clergyman's capacity as minister of two mission churches, because U.S. Const., amend. 1 prohibits such action by the civil judicial system. *McDonnell v. Episcopal Diocese*, 191 Ga. App. 174, 381 S.E.2d 126, cert. denied, 493 U.S. 935, 110 S. Ct. 328, 107 L. Ed. 2d 318 (1989).

Superior court lacked jurisdiction to determine whether pastor was wrongfully terminated in violation of church's constitution and bylaws. *Bledsoe v. Morningside Baptist Church*, 232 Ga. App. 122, 501 S.E.2d 292 (1998).

Courts of Georgia are prohibited from determining issues of expulsion of members, pastors, and the internal procedures of a religious entity. *United Baptist Church, Inc. v. Holmes*, 232 Ga. App. 253, 500 S.E.2d 653 (1998).

Subject matter jurisdiction was lacking over plaintiff pastor's action alleging that the plaintiff's bishop transferred the plaintiff from one church to another without complying with church rules. *Jay v. Christian Methodist Episcopal Church*, 242 Ga. App. 833, 531 S.E.2d 369 (2000).

5. Prisoners

Denial of a prisoner's petition for a name change for religious purposes did not violate the freedom of religion clause. In re *Redding*, 218 Ga. App. 376, 461 S.E.2d 558 (1995).

Validity of prison regulations affecting religious and racial beliefs. — Arbitrary discrimination based upon the religious or racial beliefs of those concerned is constitutionally impermissible. But, rules and regulations are constitutionally valid when they are reasonable and justifiable in the administration of a large prison population, in light of the necessity to maintain prison discipline, and control any dangers and hazards presented. *Bethea v. Daggett*, 329 F.

Supp. 796 (N.D. Ga. 1970), aff'd, 444 F.2d 112 (5th Cir. 1971).

Prisoner's right to exercise religion. — Under U.S. Const., amend. 1, a prisoner has the right to exercise the prisoner's religion, and refusal to permit a prisoner access to religious publications states a cause of action. *Neal v. Georgia*, 469 F.2d 446 (5th Cir. 1972).

Failure of prison authorities to provide Islamic meals minor infringement of religious freedom. — Failure of prison authorities to provide means strictly in compliance with Islamic dietary laws and to specially prepare foods under the strict instructions of their religious practice, where the prisoners were otherwise allowed substantial time to practice their religion, was a very minor inconvenience which impinged on the prisoner's full exercise of their religious preferences only in a very limited way. *Elam v. Henderson*, 472 F.2d 582 (5th Cir.), cert. denied, 414 U.S. 868, 94 S. Ct. 177, 38 L. Ed. 2d 117 (1973).

Prison grooming regulation. — Prison regulation, to the extent that it prohibited Sunni Muslim inmate at a maximum security prison from growing a beard in conformity with the inmate's religious beliefs, was not violative of the first amendment. *Furqan v. Georgia State Bd. of Offender Rehabilitation*, 554 F. Supp. 873 (N.D. Ga. 1982).

Prison visits by ministers. — Inmate's complaint that prison officials did not make reasonable arrangements for the visitation of ministers from the Nation of Islam Muslim sect stated a prima facie case for relief. *Saleem v. Evans*, 866 F.2d 1313 (11th Cir. 1989).

6. Schools and Education

Religious invocations at high school games. — Practice of having religious invocations delivered prior to public high school football games violates the establishment clause of the first amendment. *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir.), cert. denied, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989).

Announcement of "secular" activities sponsored by religious organizations. — A school district's policy and practice of announcing "secular" activities sponsored by religious organizations through the use of various schools' public address systems and

bulletin boards creates excessive entanglement problems. *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (11th Cir. 1984).

Use of school property by religious youth group. — A junior high school's practice of permitting a religious youth group to meet on school property under faculty supervision had the primary effect of advancing or promoting religion when the school district also supported religious assemblies, religious signs, and announcements of church-sponsored activities via bulletin boards and the public address system. *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (11th Cir. 1984).

Georgia's Moment of Quiet Reflection in Schools Act is constitutional in its entirety, both facially and as applied and did not violate the establishment clause of the first amendment to the United States Constitution when the school principal announced over the intercom the quiet moment. *Bown v. Gwinnett County Sch. Dist.*, 895 F. Supp. 1564 (N.D. Ga. 1995), *aff'd*, 112 F.3d 1464 (11th Cir. 1997).

The Georgia Moment of Quiet Reflection in Schools Act does not violate the establishment clause because it satisfies all three prongs of the Lemon test. The Act does not have the primary effect of advancing or inhibiting religion and does not create an excessive government entanglement with religion. *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997).

A biology textbook which noted creationism was an explanation for the beginning of life in many cultures that could not be scientifically proved and that science could not resolve disputes about the origin of life did not sponsor religious actions or beliefs, so it did not violate the prohibition of a government establishment of religion, and it was unnecessary to analyze whether it: (1) had a secular purpose; (2) had a primary effect that advanced or inhibited religion; and (3) fostered excessive state entanglement with religion. *Moeller v. Schrenko*, 251 Ga. App. 151, 554 S.E.2d 198 (2001).

Biology textbook which contained a neutral discussion of creationism did not impinge upon the free exercise of a student's religious beliefs. *Moeller v. Schrenko*, 251 Ga. App. 151, 554 S.E.2d 198 (2001).

Freedom of Speech and Press

1. In General

Rights protected by first amendment. — Freedom of speech and of the press — which are protected by U.S. Const., amend. 1 from abridgment by Congress — are among the fundamental personal rights and liberties protected by the due process clause of the U.S. Const., amend. 14, from impairment by the states. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Statements can be without first amendment protection. *Masson v. Slaton*, 320 F. Supp. 669 (N.D. Ga. 1970).

Freedoms of expression must be ringed about with adequate bulwarks. *Anderson v. Dean*, 354 F. Supp. 639 (N.D. Ga. 1973).

Purpose of amendment. — Purpose of U.S. Const., amend. 1 includes the need to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

Broad prohibitions prohibited. — Content-neutral restrictions on the exercise of first amendment rights in traditional public forums such as streets, are valid only when narrowly tailored to serve significant governmental interests and when the restrictions leave open ample alternative channels of communication. A broad prohibition of all picketing in all streets, alleys, roads, highways, and driveways predominantly dedicated to the use of vehicular traffic did not serve the city's interests in the narrow fashion demanded by the first amendment. *United Food & Com. Workers Union Local 422 v. City of Valdosta*, 861 F. Supp. 1570 (M.D. Ga. 1994).

Content neutral. — Principal inquiry in determining whether a legislative act is content-neutral is whether the government has adopted a regulation of speech because of disagreement with the message it conveys;

Freedom of Speech and Press (Cont'd)

1. In General (Cont'd)

the government's purpose is the controlling consideration. Thus, regulations that serve purposes unrelated to the content of expression are deemed neutral, even if they have an incidental effect on some speakers or messages but not others; an ordinance designed to combat the undesirable secondary effects of sexually explicit businesses is content-neutral. *I.D.K., Inc. v. Ferdinand*, 277 Ga. 548, 592 S.E.2d 673 (2004).

Discussion and communication involving matters of public concern protected. — U.S. Const., amend. 1 grants constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous. *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971).

First amendment embraces publication, circulation and distribution of books and films. *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981).

Gathering of news protected. — Freedom to publish news, without some protected ability to gather it, would render freedom of the press an unduly gossamer right. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

It is apparent that the first amendment right to publish must logically include to some degree a right to gather news fit for publication. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

Music as speech which incites imminent lawless activity. — Creators and disseminators of a song entitled "Suicide Solution" were protected by the first amendment after the parents of a teenage boy who committed suicide after repeatedly listening to the song were unable to demonstrate any manner in which the music could be categorized as speech which incited imminent lawless activity. *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir.), *cert. denied*, 506 U.S. 916, 113 S. Ct. 325, 121 L. Ed. 2d 245 (1992).

Access to information protected. — U.S. Const., amend. 1 protects the public and press from abridgment of their rights of access to information about the operation of their government. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

Access to information not available to public generally. — First amendment does not guarantee press constitutional right of special access to information not available to the public generally. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

Arbitrary interference with access to important information is abridgment of the freedoms of speech and press protected by U.S. Const., amend. 1. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

Highly protected status of even provocative speech. — A function of free speech under the system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *Wilson v. Gooding*, 303 F. Supp. 952 (N.D. Ga.), *appeal dismissed*, 396 U.S. 112, 90 S. Ct. 397, 24 L. Ed. 2d 306 (1969), *aff'd*, 431 F.2d 855 (5th Cir. 1970), 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

Narrow construction of statutes prohibiting speech. — To withstand constitutional attack, a statute or ordinance which prohibits speech must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. *State v. Davis*, 246 Ga. 761, 272 S.E.2d 721 (1980).

One person's right to free speech must be balanced with another's right. — Freedom of speech or press does not mean that one can talk or distribute literature where, when, and how one chooses, but the right to do so must be adjusted to the rights of others. *Durham v. State*, 219 Ga. 830, 136 S.E.2d 322 (1964).

Dissemination of individual's opinions on matters of public interest is an "unalienable right" that "governments are instituted among men to secure." The founders were not always convinced that unlimited discussion of public issues would be "for the benefit of all of us" but they firmly adhered to the proposition that the "true liberty of

the press" permitted "every man to publish his opinion." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

Freedom of expression by public officials.

— Role that elected officials play in society makes it imperative that they be allowed freely to express themselves on matters of current public importance. *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

U.S. Const., amend. 1 in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the first amendment is that debate on public issues should be uninhibited, robust, and wide-open. *Bond v. Floyd*, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

Proper construction of "speech" and "press". — When taken as it must be as a harmonious part of the entire Constitution, and in light of history, a construction is demanded that the first amendment, by the words "speech" and "press", means only speech and press outside of infringement of the rights of others. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962).

Guarantee of freedom from abridgment of rights by federal or state government. — Constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

Rights protected from invasion by state action. — Freedom of speech and freedom of the press, which are protected by U.S. Const., amend. 1 from infringement by Congress, are among the fundamental personal rights and liberties which are protected by U.S. Const., amend. 14 from invasion by state action. *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938); *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958); *Walter v. State*, 131 Ga. App. 667, 206 S.E.2d 662, appeal dismissed, 233 Ga. 10, 209 S.E.2d 605 (1974).

State burden on fundamental right requires strong justification. — When a state burdens the exercise of a fundamental right, its attempt to justify that burden as a rational

means for the accomplishment of some significant state policy requires more than a bare assertion that the burden is connected to such a policy. *High Oil' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).

Interference with rights by states and municipalities. — States and municipalities may no more interfere with the freedom of speech than may the national government. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Ultimate responsibility to define limits of state power regarding freedom of speech and expression rests with the Supreme Court. *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

Penalizing speech because of its nonspeech aspect. — Under U.S. Const., amend. 1 even activity which is itself communicative may nevertheless be penalized because of its nonspeech aspect. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), rev'd on other grounds, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1984).

Speech advocating use of force or violation of law. — Constitutional guarantees of free speech and press do not permit state to forbid or proscribe advocacy of use of force or of law violation except where such advocacy is directed to inciting or producing lawless action and is likely to incite or produce such action. However, the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action. *Wilson v. Gooding*, 303 F. Supp. 952 (N.D. Ga.), appeal dismissed, 396 U.S. 112, 90 S. Ct. 397, 24 L. Ed. 2d 306 (1969), aff'd, 431 F.2d 855 (5th Cir. 1970), 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

Speech causing clear and present danger. — In order for state to proscribe printed material, it must foment imminent lawless conduct, and the threat from such incitement must be seen as posing a clear and present danger. *High Oil' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).

Talk of clear and present danger arising out of criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of jus-

Freedom of Speech and Press (Cont'd)

1. In General (Cont'd)

tice. *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

Curbing speech provoking others to action. — Since speech is normally intended to change the opinions or reinforce the opinions of others, problems arise as to the extent to which mere speech may be curbed when it provokes others into action. A speaker sometimes passes the bounds of arguments and persuasion and undertakes incitement to riot. *Wilson v. Gooding*, 303 F. Supp. 952 (N.D. Ga.), appeal dismissed, 396 U.S. 112, 90 S. Ct. 397, 24 L. Ed. 2d 306 (1969), *aff'd*, 431 F.2d 855 (5th Cir. 1970), 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

Aberrant, unpopular, and revolutionary speech protected. — The expanse of U.S. Const., amend. 1 by necessity includes speech which is aberrant, unpopular, and even revolutionary. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), *aff'd*, 621 F.2d 141 (5th Cir. 1980).

Speech drawing adverse reaction from majority protected. — Speech cannot be stifled by the state merely because it might draw an adverse reaction from a majority of the people. *Reineke v. Cobb County Sch. Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980).

Speech advocating illegal action in future. — Material merely advocating illegal action at some future time may not be criminally proscribed by the state. Printed matter either assailing the state's controlled substances laws or extolling the attractions of certain unlawful substances and glorifying the drug culture may not be generally restricted. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), *aff'd*, 621 F.2d 141 (5th Cir. 1980).

Freedom of speech does not always prevail over property rights. Property rights do not always prevail over the right of free speech. *Griffin v. Trustees of Atlanta Univ.*, 225 Ga. 859, 171 S.E.2d 618 (1969).

Ordinary forms of taxation not violative of freedom of press. — Businesses which exercise freedom of press are not thereby immune from ordinary forms of taxation. *Airport Bookstore, Inc. v. Jackson*, 242 Ga. 214, 248 S.E.2d 623 (1978), *cert. denied*, 441 U.S. 952, 99 S. Ct. 2182, 60 L. Ed. 2d 1057 (1979).

Private property becomes subject to protest or propaganda activity when both of the following are satisfied: (a) the protest is related to the use to which the property is put; and (b) there exists no reasonably effective alternative means of communication to reach the intended audience. *Hudgens v. NLRB*, 501 F.2d 161 (5th Cir. 1974), vacated on other grounds, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

Public forum for expression must be available to all members of the public for the exercise of rights under U.S. Const., amend. 1. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Protection accorded ideas disapproved by some in area where advanced. — Under the constitutionally protected right of freedom of speech, an organization cannot be penalized for disseminating ideas which are not opposed to our system of government, even though such ideas may not meet with the approval of all of the people in the area in which they are advanced. *Williamson v. Southern Regional Council, Inc.*, 223 Ga. 179, 154 S.E.2d 21 (1967).

Purpose of liberty of press. — Liberty of the press was intended to prevent all previous restraints upon publications as had been practiced by other governments in early times to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but a person who used it was to be responsible in case of its abuse. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Liberty of press must be responsibly exercised. — Guarantees of freedom of speech and press are not designed to prevent censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free person has an undoubted right to lay

what sentiments that person pleases before the public; to forbid this, is to destroy the freedom of the press; but if the person publishes what is improper, mischievous, or illegal, the person must take the consequence of the person's own temerity. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Pamphlets and leaflets protected. — The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

Access by press to news. — Inherent in the right of freedom of the press is a limited right of reasonable access to certain kinds of news. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

The right of access of the news media representatives is no greater and no less than any other member of the general public. *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982).

Access to information concerning government activities. — Rights guaranteed and protected by the first amendment include the right of access to news or information concerning the operations and activities of government. This right is held by both the general public and the press, with the press acting as a representative or agent of the public as well as on its own behalf. Without such a right, the goals and purposes of the first amendment would be meaningless. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

Qualified right of access to information concerning government activities. — The right of access to news and information concerning activities of government is qualified, rather than absolute, and is subject to limiting considerations such as confidentiality, security, orderly process, spatial limitation, and doubtless many others. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

The first amendment's protection of a citizen's right to obtain information concerning "the way the country is being run" does not extend to every conceivable avenue a citizen may wish to employ in pursuing this right. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

There does exist a limited right of the public and the press, under the first amendment, to access to information concerning governmental activities. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

Material printed by law publisher rating attorneys is protected by the first amendment. *Bergen v. Martindale-Hubbell, Inc.*, 248 Ga. 599, 285 S.E.2d 6 (1981).

Live theatre protected by U.S. Const., amend. 1. — Live theatrical productions, no less than novels or motion pictures, are media and organs for the expression of public opinion and the propagation of ideas and critical comments and are entitled to first amendment protection. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Theatrical productions are "speech" protected by U.S. Const., amend. 1. A musical play is a unitary form of constitutionally protected expression, and may not be separated into speech and nonspeech components. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Motion pictures protected. — Motion pictures are within the basic protection of U.S. Const., amends. 1 and 14, and are afforded the full protection constitutionally guaranteed to all speech or press. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962).

Expression by means of motion pictures included within free speech and press guaranty of U.S. Const., amends. 1 and 14. *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969).

Outdoor Advertising Control Act of 1971, O.C.G.A. § 32-6-70, does not violate right of freedom of expression by restricting outdoor advertising in areas adjacent to the rights-of-way of interstate and primary systems of highways in this state. *Department of Transp. v. Shiflett*, 251 Ga. 873, 310 S.E.2d 509 (1984).

O.C.G.A. §§ 50-16-14 and 50-16-16, allowing removal of persons who cause disruptions in state buildings, do not violate the first amendment guarantees of freedom of speech, the right to assemble peaceably, and petition the government for redress of their grievances. *State v. Storey*, 181 Ga. App. 161, 351 S.E.2d 502 (1986), *cert. denied*, 481 U.S. 1017, 107 S. Ct. 1895, 95 L. Ed. 2d 501 (1987).

Freedom of Speech and Press (Cont'd)

1. In General (Cont'd)

Ordinance unconstitutional absent reasonable relationship between restraints imposed and public welfare. — Where there is no reasonable relationship between the restraints imposed on freedom of speech and the general welfare of the community, the ordinance is unconstitutional. *Wolfe v. City of Albany*, 104 Ga. App. 264, 121 S.E.2d 331 (1961).

Burning of American flag. — Former Code 1933, § 26-2803, which prohibited misuse of the national flag, was unconstitutional as applied to an individual who burned a flag during a public demonstration protesting the United States' involvement in Iranian affairs since there was no likelihood of imminent public unrest. *Monroe v. State Court*, 739 F.2d 568 (11th Cir. 1984).

Display of the Georgia state flag did not violate African-American citizen's constitutional rights to equal protection and freedom of expression. *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997), cert. denied, 523 U.S. 1011, 118 S. Ct. 1199, 140 L. Ed. 2d 328 (1998).

Withholding of promotion by state as sanction for free speech. — For state to withhold expected promotion or pay raise as a sanction for the exercise of the right to free speech is a restriction of that right in violation of U.S. Const., amends. 1 and 14. *Goolsby v. Regents of Univ. Sys.*, 141 Ga. App. 605, 234 S.E.2d 165 (1977).

Claim on behalf of "talking cat" not entertained. — The Eleventh Circuit Court of Appeals will not hear a claim that a "talking cat's" right to free speech has been infringed by a business license ordinance since, although the talking cat arguably possesses a very unusual ability, a talking cat cannot be considered a "person" and is therefore not protected by the Bill of Rights, and even if the talking cat has such a right, there is no need for the cat's owners to assert the right *jus tertii*. A talking cat can clearly speak for on their own. *Miles v. City Council*, 710 F.2d 1542 (11th Cir. 1983).

Limiting hospital nurse's access to patients not unconstitutional. — Hospital which limited a nurse-midwife's access to certain patients had a primary interest in the safety and health of its patients which outweighed

the nurse's right to speak freely on the issue of natural birth, and such limitation therefore did not offend the first amendment. *Sweeney v. Athens Regional Medical Ctr.*, 705 F. Supp. 1556 (M.D. Ga. 1989).

Access to public places. — Streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of first amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely. *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

No total ban on parades in residential areas. — Cities may place reasonable restrictions on the right to parade in residential areas, but the activity may not be banned in toto. *United Food & Com. Workers Union Local 422 v. City of Valdosta*, 861 F. Supp. 1570 (M.D. Ga. 1994).

Notice of class action on defendant's property. — Notice of a class action against airlines could be published in in-flight magazines that were carried on defendants' airplanes and posted in defendants' ticket offices without offending the first amendment. *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534 (N.D. Ga. 1992).

City buses as public forum. — First amendment rights are not surrendered when one rides on or looks at a city bus. Buses operated daily by the city for the transportation of the public — like the city streets, city sidewalks, city auditorium, city coliseum, and city parks — are appropriate places and facilities for the exercise of first amendment rights. *Stoner v. Thompson*, 377 F. Supp. 585 (M.D. Ga. 1974).

Demonstration on sidewalk opposite courthouse. — Civil rights demonstration on sidewalk opposite courthouse is "speech plus," and is entitled to a lesser degree of protection than pure speech. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), rev'd on other grounds, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1984).

Military base is ordinarily not a public forum for first amendment purposes. *M.N.C. of Hinesville, Inc. v. United States Dep't of Defense*, 791 F.2d 1466 (11th Cir. 1986).

Air Force regulation prohibiting certain bumper stickers. — Air Force regulation

prohibiting bumper stickers which embarrass or disparage the Commander in Chief was viewpoint neutral, and was reasonable since the military has an interest in promoting order and discipline and only prohibited display of disparaging bumper stickers on base. *Ethredge v. Hail*, 795 F. Supp. 1152 (M.D. Ga. 1992), order vacated and appeal dismissed, 996 F.2d 1173 (11th Cir. 1993), *aff'd*, 56 F.3d 1324 (11th Cir. 1995).

Seizure of materials. — When materials are seized in violation of U.S. Const., amend. 1, the appropriate remedy is the return of the seized property, but not its suppression as evidence at trial. *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978).

Seizure properly anchored in probable cause can offend constitutional constraints when media of expression, such as movie films, are implicated. Presumptive free speech materials are qualitatively different from other kinds of alleged contraband. *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978).

Publication of information in court records. — States may not impose sanctions on publication of truthful information contained in official court records open to public inspection. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

Publication of information in court records. — The press may not be exposed to liability for truthfully publishing information released to the public in official court records. *Munoz v. American Lawyer Media*, 236 Ga. App. 462, 512 S.E.2d 347 (1999).

State Bar Rules. — An argument that State Bar Rules 4-102 (Standard 4), 4-202, 4-203(a)(2), 4-221(d) and 4-225(d) were unconstitutional because they violated the due process and equal protection clauses of the fourteenth amendment and because they impinged upon the first amendment right of free speech and redress was meritless. *Cohran v. State Bar*, 790 F. Supp. 1568 (N.D. Ga. 1992).

Advisory decision on validity of statute attacked on first amendment ground not to be rendered. — Where a plaintiff contends that a local ordinance is unconstitutional by first amendment standards as denying the plaintiff's freedom of expression by preventing the plaintiff from performing a particular dance, and such dance may also be

prohibited by a general statute, but no attack is made on the general statute, and the dance has not been performed, a decision as to the validity of the ordinance would be abstract or advisory only by its very nature, and it is proper to dismiss the plaintiff's complaint. *Jenkins v. Thomas*, 124 Ga. App. 286, 183 S.E.2d 489 (1971).

Requirement of prior adversary hearing is not warranted to protect first amendment rights where, inter alia, a speedy trial is available in state court. *Penthouse Int'l, Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978).

Standing. — Rules of standing have been expanded in the area of first amendment rights and special considerations are granted to litigants seeking to preserve rights of free expression. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

It is not necessary that a party first expose oneself to actual arrest or prosecution to be entitled to challenge a statute that the person claims deters the exercise of the person's constitutional rights. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

Protection of Anti-SLAPP statute. — Anti-Strategic Lawsuits Against Public Participation statute, O.C.G.A. § 9-11-11.1(b) and (c), provides protection for acts that can reasonably be construed as acts in furtherance of one's right of free speech or right to petition the government for redress of grievances in connection with an issue of public concern; such acts include any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or such a statement or petition made in connection with an issue under consideration or review by such a governmental body, even including those that initiate a proceeding to address matters of public concern. *Harkins v. Atlanta Humane Soc'y*, 264 Ga. App. 356, 590 S.E.2d 737 (2003).

Right to fair trial versus rights of public to gain access to hearings in criminal cases. — See *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982).

Punishment for contempt not proper means to expose errors in expression. — People are entitled to speak as they please on matters vital to them; errors in judgment,

Freedom of Speech and Press (Cont'd)**1. In General (Cont'd)**

or unsubstantiated opinions may be exposed, but not through punishment for contempt for the expression. Under the system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly. *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

Contempt order based on true newspaper articles fatally defective. — Rule for contempt issued by superior court judge, based on a series of newspaper articles, is fatally defective where the publications complained of were true, they related to a matter in another court and in nowise referred to the court issuing the rule and where they could not have obstructed or impaired the administration of justice in the court. *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78 (1953).

Injunction restricting activities of abortion protesters. — Injunction issued pursuant to a city ordinance declaring the actions of abortion protesters to be a public nuisance was not unconstitutional since the protesters were permitted to exercise their right of free speech by engaging in social protest, limited only by reasonable time, place, and manner restrictions. *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530, cert. denied, 501 U.S. 1221, 111 S. Ct. 2836, 115 L. Ed. 2d 1004 (1991).

Motorcycle helmet law. — The motorcycle helmet law, O.C.G.A. § 40-6-315, does not require that the Georgia Board of Public Safety issue a list approving specific types of headgear and, therefore, the failure of the board to publish a list of approved headgear and eye-protective devices did not violate the plaintiff's rights under the first, fifth, and fourteenth amendments to the United States Constitution. *Abate of Ga., Inc. v. Georgia*, 264 F.3d 1315 (11th Cir. 2001), cert. denied, 536 U.S. 924, 122 S. Ct. 2592, 153 L. Ed. 2d 781 (2002).

2. Limitations

Freedom of speech and press not absolute. — It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to

speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

The right of free speech is not an unlimited right. It entitles an individual to advocate certain ideas regardless of their popularity, but it does not extend to the threatening of terror, inciting of riots, or placing another's life or property in danger. *Masson v. Slaton*, 320 F. Supp. 669 (N.D. Ga. 1970).

All speech is not ultimately protected under U.S. Const., amend. 1. *State v. Davis*, 246 Ga. 761, 272 S.E.2d 721 (1980).

State may punish those abusing freedom of speech and press. — That a state in the exercise of its police power may punish those who abuse the freedom of speech and press by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Speech advocating overthrow of government by unlawful means prohibited. — A state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Freedom of speech and press does not protect disturbances to public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Freedom of speech and press does not protect publications prompting the overthrow of government by force, the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Question in every case is whether words used are used in such circumstances and of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. Speech which advocates a violation of the law is protected except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *State v. Davis*, 246 Ga. 761, 272 S.E.2d 721 (1980).

“Fighting words” not protected speech. — “Fighting words” constitute one of those narrow speech areas not constitutionally protected. *State v. Klinakis*, 206 Ga. App. 318, 425 S.E.2d 665 (1992).

Whether words are “fighting” words to be decided by jury. — Whether certain words were “fighting” words, tending to provoke violence, was a question of fact to be decided by the jury, not a question of law to be decided by the court. *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985).

Violent threats unprotected. — The communication of terroristic threats to another person to commit a crime of violence upon that person clearly falls outside of those communications and expressions which are protected by U.S. Const., amend. 1. *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975).

Certain utterances not within purview of first amendment. — Utterances which are not an essential part of any exposition of idea or which are not in any proper sense communication of information or opinion are not within the purview of U.S. Const., amend. 1. *United States v. Irving*, 509 F.2d 1325 (5th Cir.), cert. denied, 423 U.S. 931, 96 S. Ct. 281, 46 L. Ed. 2d 259 (1975).

Extortionate speech has no constitutional protection. *United States v. Quinn*, 514 F.2d 1250 (5th Cir. 1975), cert. denied, 424 U.S. 955, 96 S. Ct. 1430, 47 L. Ed. 2d 361 (1976).

Exceptions to free speech rights. — Recognized exceptions to constitutionally guaranteed speech include obscene material, fighting words, defamation, intolerable invasions of privacy, disruptions of the classroom, incitement to imminent lawless activity, and solicitation of illegal activity. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).

There are various defined categories of speech or communicative conduct which are

not entitled to constitutional protection. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *Walt Disney Prods., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981).

O.C.G.A. § 15-19-51(a)(7) did not limit defendant's right to free speech under U.S. Const., amend. 1 or Ga. Const. 1983, Art. I, Sec. 1, Para. V, as defendant had no right to engage in speech which was calculated to deceive or mislead people into thinking that the defendant was qualified to practice law. *Marks v. State*, 280 Ga. 70, 623 S.E.2d 504 (2005).

Prohibiting clear and present danger speech. — Utterance can be suppressed or penalized on ground that it tends to incite immediate breach of peace, if the words used are such in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. *Walt Disney Prods., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981).

The utterance is not protected if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Walt Disney Prods., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981).

Justifiable limitations on speech when combined with regulated “nonspeech”. — When “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on first amendment freedoms. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

No one would have the hardihood to suggest that freedom of speech sanctions are an incitement to riot. There might exist special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of U.S. Const., amend. 1. *Sumbry v. Land*, 127 Ga. App. 786, 195 S.E.2d 228 (1972), cert. denied, 414 U.S. 1079, 94 S. Ct. 598, 38 L. Ed. 2d 486 (1973).

Unprotected types of speech. — There are certain well-defined and narrowly lim-

Freedom of Speech and Press (Cont'd)**2. Limitations (Cont'd)**

ited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *Atlanta Coop. News Project v. United States Postal Serv.*, 350 F. Supp. 234 (N.D. Ga. 1972).

Motion pictures not entitled to protection afforded press. — Motion pictures are not to be regarded as a part of the press of the country or organs of public opinion and as such entitled to the protection afforded the press. *RD-DR Corp. v. Smith*, 89 F. Supp. 596 (N.D. Ga. 1950), *aff'd*, 183 F.2d 562 (5th Cir.), *cert. denied*, 340 U.S. 853, 1 S. Ct. 80, 95 L. Ed. 625 (1950).

Motion pictures not to be regarded as part of press. — The exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded as part of the press of the country, or as organs of public opinion. *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969).

Contemptuous statements not protected. — Statements made in the presence of the court or outside of the presence of the court are protected by the guarantee of freedom of speech of the U.S. Const., *amends. 1 and 14* and by the Georgia Constitution 1983, Art. I, Sec. I, Para. V, while contemptuous statements are not so protected. A statement is contemptuous and therefore not constitutionally protected when it poses a present danger to the orderly administration of justice but neither an inherent nor a reasonable tendency to do so is enough to justify a restriction of free expression. *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985).

Free speech limitations at trial. — Limitations on free speech assume different proportion when expression is directed toward trial as compared to grand jury investigation. *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

Publisher of newspaper has no special immunity from the application of general laws. A publisher has no special privilege to

invade the rights and liberties of others. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

Acts of nonstudents on campus enjoined as trespass and nuisance. — Acts of nonstudents on the grounds of a private university performed in observance of a vigil in memory of a well-known public figure were enjoined where such acts constituted trespass and nuisance. *Griffin v. Trustees of Atlanta Univ.*, 225 Ga. 859, 171 S.E.2d 618 (1969).

Hair style may be distinguished from other forms of expression in that it is not a direct, primary right under U.S. Const., *amend. 1*. Even where the wearing of long hair is assumed to be symbolic expression, it falls within that type of expression which is manifested through conduct and is therefore subject to reasonable state regulation in furtherance of a legitimate state interest. *Stevenson v. Wheeler County Bd. of Educ.*, 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957, 91 S. Ct. 355, 27 L. Ed. 2d 265 (1970).

Hair length is not an absolute first amendment right. *Howell v. Wolf*, 331 F. Supp. 1342 (N.D. Ga. 1971).

Right to wear one's hair as one sees fit has not been found to be within the periphery of any of our specific constitutional rights. There is no constitutionally protected right — plainly expressed or within the penumbra, the shadow, of the U.S. Const., *amends. 1, 8, 9, 10 or 14* — to wear one's hair in a public high school in the length and style that suits the wearer. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), *aff'd*, 505 F.2d 868 (5th Cir. 1975).

People cannot claim to hold an unearned degree. — First amendment rights are not violated by the state's refusal to allow a person to hold oneself out to the public under a degree which the person has not earned. *Oliver v. Morton*, 361 F. Supp. 1262 (N.D. Ga. 1973).

Prohibiting unlawful picketing. — State may prohibit picketing directed at achieving a union shop in violation of state law. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *rev'd on other grounds*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1984).

Draft card burning is conduct not protected by U.S. Const., amend. 1. *United States v. Southern Motor Carriers Rate Con-*

ference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), rev'd on other grounds, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1984).

State subdivision can constitutionally restrict facial hair of its male police officers because of its strong interest in having law enforcement personnel present a uniform appearance to the public. *Nalley v. Douglas County*, 498 F. Supp. 1228 (N.D. Ga. 1980).

Neither criminal nor civil law may be used to restrict free speech. — For purposes of U.S. Const., amend. 1, whether an utterance is suppressed under criminal law or penalized under tort law makes no difference. What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. *Walt Disney Prods., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981).

Uttered invitation to child did not present clear and present danger of injury. — Under first amendment jurisprudence, the adult should not be subjected to liability solely on the ground that statements uttered by the adult constituted an invitation to a child to do something causing the child injury, unless what the adult invited the child to do presented a clear and present danger that injury would in fact result. Although what the defendants allegedly invited the child to do during the course of a television broadcast posed a foreseeable risk of injury, it did not pose a clear and present danger of injury. *Walt Disney Prods., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981).

There is no absolute first amendment right to inspect judicial records. Instead, the media's access to judicial materials rests on a common-law right to inspect and copy judicial records. *United States v. Eaves*, 685 F. Supp. 1243 (N.D. Ga. 1988).

Ante litem notice not protected. — Plaintiff's ante litem notice under O.C.G.A. § 36-33-5 against the city did not constitute speech protected by U.S. Const., amend. 1. *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997).

3. Regulatory Powers

Ordinance prohibiting disorderly conduct. — City ordinances prohibiting disorderly conduct in the city have no connection whatever with infringement of the constitutional rights in U.S. Const., amend. 1. *Bennett v. City of Dalton*, 69 Ga. App. 438,

25 S.E.2d 726, appeal dismissed, 320 U.S. 712, 64 S. Ct. 197, 88 L. Ed. 418 (1943).

Ordinance prohibiting loud speakers from vehicles valid. — An ordinance forbidding the operation upon the public streets, alleys, or thoroughfares by any person, firm, or corporation of a loud speaker or public address system from any vehicle is not an infringement upon the rights of the defendant granted to the defendant by the provisions of the Constitution of the State of Georgia or of the United States. The thoroughfares of cities are maintained by the public and to say that anyone has a constitutional right to use, on these streets, a loud speaker or public address system from any vehicle seems to overlap and interfere with the constitutional rights of other people. It makes no difference whether the violator is using the loud speaker to broadcast what the violator terms recorded sermons or using the loudspeaker for vending goods or promoting some political candidate or for some other purpose. *Brinkman v. City of Gainesville*, 83 Ga. App. 508, 64 S.E.2d 344 (1951).

Ordinance requiring license for soliciting labor union members invalid. — Ordinance of City of Baxley shows on its face that it is repugnant to and violative of the first and fourteenth amendments to the Constitution of the United States in that it places a condition precedent upon, and otherwise unlawfully restricts, the defendant's freedom of speech as well as freedom of the press and freedom of lawful assembly by requiring, as conditions precedent to the exercise of those rights, the issuance of a license which the mayor and city council are authorized by the ordinance to grant or refuse in their discretion, and the payment of a license fee which is discriminatory and unreasonable in amount and constitutes a prohibitory flat tax upon the privilege of soliciting persons to join a labor union. *Staub v. City of Baxley*, 97 Ga. App. 221, 102 S.E.2d 643 (1958).

Licensing fees. — Governments may enact ordinances for legitimate purposes requiring those who would exercise their freedom of speech to obtain a license in advance; fees intended for the purpose of reimbursement of the costs of administering a licensing scheme that impacts businesses exercising their first amendment rights have been held by the U.S. Supreme Court to

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3. Regulatory Powers (Cont'd)

withstand constitutional muster. *I.D.K., Inc. v. Ferdinand*, 277 Ga. 548, 592 S.E.2d 673 (2004).

Placement of portable signs. — The portion of a county ordinance that required portable signs to be set back from the building setback line did not further the county's substantial governmental interests in either traffic safety or aesthetics and was, accordingly, unconstitutional. *Dills v. Cobb County*, 593 F. Supp. 170 (N.D. Ga. 1984), *aff'd*, 755 F.2d 1473 (11th Cir. 1985).

Olympic Sign Ordinance. — The Olympic Sign Ordinance, which creates a five-member committee charged with recommending "Concentrated Sign Districts" within the City of Atlanta and empowers the committee to grant permits to those desiring to erect signs pursuant to that ordinance and which permits only those signs which in some way promote an Olympic-related event, is unconstitutional in that it violates the first and fourteenth amendments of the U.S. Constitution. *Outdoor Sys. v. City of Atlanta*, 885 F. Supp. 1572 (N.D. Ga. 1995).

1994 Sign Ordinance. — The 1994 Sign Ordinance, a comprehensive regulatory framework for the posting of all signs within the City of Atlanta, does not violate equal protection or free speech guarantees. *Outdoor Sys. v. City of Atlanta*, 885 F. Supp. 1572 (N.D. Ga. 1995).

County ordinance's ban of off-premise, commercial billboards was an unconstitutional restraint on commercial speech, in the absence of any evidence that county officials considered esthetics and traffic safety before adopting the ordinance. *Adams Outdoor Adv. of Atlanta, Inc. v. Fulton County*, 738 F. Supp. 1431 (N.D. Ga. 1990).

Ban of off-premises signs in historic district. — Ordinance prohibiting off-premises signs in the city's historic district and in various specific locations was viewpoint neutral and did not favor commercial over non-commercial speech. *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 508 U.S. 930, 113 S. Ct. 2395, 124 L. Ed. 2d 296 (1993).

The government's interest in the aesthetics of a designated historic district were sufficiently significant to override the first

amendment rights of a property owner to off-premise noncommercial signs. *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 508 U.S. 930, 113 S. Ct. 2395, 124 L. Ed. 2d 296 (1993).

Exemptions from ordinance permitting process. — System of exemptions from the sign-permitting process did not violate the first amendment since the ordinance exempted from permitting requirements and permit fees and not from a general ban of all off-premise billboards; and since the exemptions did not favor commercial over non-commercial messages or express a preference between different noncommercial messages. *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 508 U.S. 930, 113 S. Ct. 2395, 124 L. Ed. 2d 296 (1993).

Ordinance limiting the maximum number of portable display signs that can be issued to a business to one temporary permit for every six months, the permit to last for a maximum of 16 days, was constitutional. *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 508 U.S. 930, 113 S. Ct. 2395, 124 L. Ed. 2d 296 (1993).

Discretion to vary parade fees. — The free speech guarantees of the first and fourteenth amendments are violated by an assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order since the decision how much to charge for police protection or administrative time — or even whether to charge at all — is left to the whim of the administrator, without any articulated standards either in the ordinance or in the county's established practice, and because the fee will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992).

Neither the \$1,000 cap on the fee charged, nor even some lower nominal cap, can save an unconstitutional assembly and parade ordinance because the level of the fee is irrelevant; a tax based on the content of the speech does not become more constitutional because it is a small tax. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992).

Municipal needs for protection of public overbalance inconvenience to paraders. —

The needs of the municipal authorities for notice of the time at which a parade, march, demonstration, assembly, or picketing is to take place in order to protect the general public, including those participating in such an activity, overbalances the inconvenience to plaintiffs of foreseeing the activity and applying for a permit by 4:00 P.M. on the day before the activity. *Jackson v. Dobbs*, 329 F. Supp. 287 (N.D. Ga. 1970), *aff'd*, 442 F.2d 928 (5th Cir. 1971).

Municipal parade permit valid. — The requirement that a parade permit be secured in order to enable municipal authorities to limit the amount of interference with use of the sidewalks by other members of the public by regulating the time, place, and manner of the parade, is valid under the first amendment. *Jackson v. Dobbs*, 329 F. Supp. 287 (N.D. Ga. 1970), *aff'd*, 442 F.2d 928 (5th Cir. 1971).

Ordinance banning parades on Saturday mornings was a reasonable time, place, and manner restriction on speech. *Nationalist Movement v. City of Cumming*, 92 F.3d 1135 (11th Cir. 1996), *cert. denied*, 519 U.S. 1058, 117 S. Ct. 688, 136 L. Ed. 2d 612 (1997).

Regulation of “nonspeech.” — There is a sufficiently important governmental interest in regulating “nonspeech” so as to justify incidental limitations on first amendment rights only if the governmental regulation is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Municipality may not restrict access to auditorium. — Municipality may not empower its licensing officials to dispense or withhold permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the “welfare,” “decency,” or “morals” of the community. Municipal officials do not, solely by reason of their authority to manage a municipal civic center and auditorium, have the unfettered

right to censor and monitor the types of speech, and to prescribe the types of productions which may be performed in such a public auditorium. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

City officials have an obligation to make a municipal auditorium available to all for the exercise of first amendment rights despite the fact that the potential users might be able to go elsewhere or that they hope to make money. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Municipality may prevent monopolization of auditorium. — City may set up various procedural rules so that one person cannot monopolize a municipal auditorium or use it for a purpose for which it is not physically suited. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Level of scrutiny. — In a prior restraint of speech setting, to determine what level of scrutiny applies to an ordinance, a court must decide whether the regulation is related to the suppression of expression; if the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the “less stringent” O’Brien standard for evaluating restrictions on symbolic speech. *I.D.K., Inc. v. Ferdinand*, 277 Ga. 548, 592 S.E.2d 673 (2004).

Statutes limiting speech must be narrowly drawn. — Constitutional guarantees of freedom of speech forbid states to punish use of words or language not within narrowly limited classes of speech. In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

Regulation of speech containing “fighting” words. — State has power constitutionally to punish “fighting” words under carefully drawn statutes not also susceptible of application to protected expression. *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

U.S. Air Force base order barring bumper stickers. — An administrative order barring from a U.S. Air Force base “bumper stickers or other paraphernalia” that “embarrass or

Freedom of Speech and Press (Cont'd)**3. Regulatory Powers (Cont'd)**

disparage" the President was viewpoint neutral and reasonable; accordingly, the order did not violate the first amendment. *Ethredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995).

Federal regulation of emergency care clinics. — Federal government regulations governing freestanding emergency care clinics violated first amendment rights of plaintiff physicians, where the regulations were more extensive than necessary to serve the governmental interest of prohibiting misleading advertising and were impermissibly vague in providing that facilities which used such terms as "emergency," "crisis," "sudden," "acute," or a similar meaning term fell within the regulatory ambit. *Primary Care Physicians Group v. Ledbetter*, 634 F. Supp. 78 (N.D. Ga. 1986).

Federal regulation of solicitors on postal property. — A federal regulation prohibiting solicitation of contributions on postal property did not violate U.S. Const., amend. 1. *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986).

Internal Revenue Service regulations. — Institute which certifies those who offer tax service to the public failed in its attempt to enjoin the Internal Revenue Service from enforcement of a directive prohibiting the use of the term "certified" by an individual who practices as an "enrolled agent" for the Internal Revenue Service; the institute failed to establish that the directive placed an unconstitutional burden on its first amendment rights in that it did not show any instance of threatened enforcement action by the Internal Revenue Service and did not show a concrete factual situation sufficient to establish a case in controversy. *Institute of Certified Practitioners, Inc. v. Bentsen*, 874 F. Supp. 1370 (N.D. Ga. 1994).

Statute outlawing economic exploitation of racial bias valid although inhibiting of speech. — A statute which makes unlawful economic exploitation of racial bias and panic-selling is one regulating conduct, and any inhibiting effect it may have upon speech is justified by the government's interest in protecting its citizens from discriminatory housing practices and is not violative of the first amendment. *United States v. Bob*

Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Application of statute regarding refusal to disperse. — The application of O.C.G.A. § 16-10-30 (refusal to disperse) to members of the Revolutionary Communist Party involved in an angry public confrontation with residents of an apartment complex, in the absence of any violent acts or of efforts of the police to respond directly to any illegal conduct without focusing enforcement efforts on those engaged in speech, was unconstitutional. *Sabel v. Stynchcombe*, 746 F.2d 728 (11th Cir. 1984).

Enabling public official to govern which expressions of view will be heard unconstitutional. — Allowing a public official, through the exercise of a broad discretion, to determine which expression of views will be heard and which will be silenced permits the official to act as a censor. Inherent in any such censoring system is the danger that some individual will be denied equal protection of the laws in violation of the U.S. Const., amend. 14. Therefore, it is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups by use of a statute providing a system of broad discretionary licensing power. *Stoner v. Thompson*, 377 F. Supp. 585 (M.D. Ga. 1974).

Regulatory statutes justified by valid state interests. — The freedom of expression guarantee under the Constitution has been consistently recognized as being narrower than an unlimited license to talk; and regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise are not regarded as violating the constitutional guarantee when justified by valid governmental interests. *Aycock v. Police Comm.*, 133 Ga. App. 883, 212 S.E.2d 456 (1975); *Hodnett v. City of Atlanta*, 145 Ga. App. 285, 243 S.E.2d 605 (1978).

Content of expression not valid basis for regulation. — While a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for first amendment purposes, what a municipality may not do under the first and fourteenth amendments

is to discriminate in the regulation of expression on the basis of the content of that expression. *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

Licensing of bookstores and movie theaters. — Licensing of bookstores and movie theaters is not a per se violation of U.S. Const., amend. 1. A city may enact an ordinance, for legitimate purposes, requiring those who would exercise their freedom of speech to obtain a license in advance. *Airport Bookstore, Inc. v. Jackson*, 242 Ga. 214, 248 S.E.2d 623 (1978), cert. denied, 441 U.S. 952, 99 S. Ct. 2182, 60 L. Ed. 2d 1057 (1979).

Adult films properly regulated. — A zoning ordinance, regulating the location of adult motion picture theaters and treating them differently from other motion picture theaters, does not violate the first or fourteenth amendments because even though a city may not suppress adult films, it may place them in a different classification from other films and regulate them. *Airport Bookstore, Inc. v. Jackson*, 242 Ga. 214, 248 S.E.2d 623 (1978), cert. denied, 441 U.S. 952, 99 S. Ct. 2182, 60 L. Ed. 2d 1057 (1979).

Reasonable time, place, and manner regulations. — Reasonable time, place, and manner regulations concerning speech may be necessary to further significant governmental interests and are permitted. A city ordinance prohibiting the display of "For Sale" signs in an effort to promote racial integration and prevent "white flight" violates a property owners' first amendment rights and is unconstitutional. *Daugherty v. City of E. Point*, 447 F. Supp. 290 (N.D. Ga. 1978).

Restricting printed material. — If printed material is not protected by the first amendment, the state has nearly free rein to regulate and control its publication and distribution. If, however, even a portion of the material enjoys constitutional protections, the state as a rule may only limit its publication under the most compelling circumstances, and with the least restrictive interference. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).

Ordinance prohibiting the distribution of printed materials to homes violated the freedom of speech and press under the United States and Georgia Constitutions because it was not narrowly tailored to meet the city's

interest in preventing litter and failed to provide for meaningful alternatives of communication. *Statesboro Publ. Co. v. City of Sylvania*, 271 Ga. 92, 516 S.E.2d 926 (1999).

Blanket restriction as to minors' access to printed material struck down. — Where the state imposed a blanket restriction on printed material, not merely a regulation within the confines of a school during school hours, the restriction as to minors' access to the material must be struck down as it would be if it infringed the freedom of expression of adults as well. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).

Restricting distribution of literature in public park. — Ordinance prohibiting distribution of literature anywhere in public park except at one of two specified booths, limiting number of leafleteers to four at each booth, requiring acquisition of a permit seven days in advance, and extensive identifying information in application for permit went beyond the narrow regulation allowed by the Constitution. *Stone Mt. Mem. Ass'n v. Zaubert*, 262 Ga. 661, 424 S.E.2d 279 (1993).

O.C.G.A. § 34-9-31 of the Workers' Compensation Truth in Advertising Act of 1995, requiring advertisers of workers' compensation services to include a notice regarding criminal penalties for filing fraudulent claims, violated U.S. Const., amend. 1. *Tillman v. Miller*, 133 F.3d 1402 (11th Cir. 1998).

Protesting on premises of federal building. — Injunction restricting a protester's activities on a portico of and inside a federal building was valid, only insofar as it did not prohibit the protestor from engaging in any expressive conduct at all inside the building or on the portico, including such activity as wearing a political button, or talking with someone about the day's news events. *United States v. Gilbert*, 920 F.2d 878 (11th Cir. 1991).

Injunction preventing a protester from using an unenclosed plaza of a federal building as the protester's residence was valid, only insofar as it did not prohibit the protester from sleeping in the unenclosed plaza, if the protester did so as part of a protest. *United States v. Gilbert*, 920 F.2d 878 (11th Cir. 1991).

A prior injunction against defendant placing certain restrictions on the defendant's

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activities on federal property did not forever guarantee the defendant immunity from other reasonable restrictions on first amendment activity that the government placed on all persons seeking to use the property. *United States v. Gilbert*, 945 F. Supp. 1571 (N.D. Ga. 1996), *aff'd*, 130 F.3d 1458 (11th Cir. 1997), *cert. denied*, 523 U.S. 1088, 118 S. Ct. 1547, 140 L. Ed. 2d 695 (1998).

4. Prior Restraint

Discretionary requirement of permit for enjoyment of basic freedoms invalid as prior restraint. — An ordinance which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958).

Mass Gatherings Act. — Because the Mass Gatherings Act, O.C.G.A. T. 31, Ch. 27 fails to provide a time limit within which the Department of Human Resources (DHR) must act upon an application for a permit, it delegates overly broad discretion to the DHR and, therefore, constitutes an unconstitutional prior restraint on the exercise of first amendment rights. *Bo Fancy Prods., Inc. v. Rabun County Bd. of Comm'rs*, 267 Ga. 341, 478 S.E.2d 373 (1996).

Ordinance requiring approval of films by censor not invalid. — A charter and ordinance which forbids the showing of any picture without its having been approved by a censor does not on its face offend the United States Constitution. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962).

Prior restraints presumed invalid. — While prior restraints are not per se indefensible, they bear a heavy presumption of invalidity. *United States v. Book Bin*, 306 F. Supp. 1023 (N.D. Ga. 1969), *aff'd sub nom. Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971).

Any imposition of prior restraint upon expression bears a heavy presumption of

constitutional invalidity. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Prior restraint upon expression bears a heavy presumption against its constitutional validity, but even where this presumption might otherwise be overcome the restraint must be the product of careful procedural provisions designed to assure the fullest consideration of the matter at hand which the circumstances permit. *Anderson v. Dean*, 354 F. Supp. 639 (N.D. Ga. 1973).

There is a strong presumption against the constitutional validity of a system of prior restraint. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Prerequisite showing for imposition of prior restraint. — No government may impose a prior restraint unless it has shown, at the very least, that the particular speech it is attempting to suppress is overwhelmingly likely to fall outside the protection of the first amendment. *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979).

There is a heavy burden on the defendants to justify their actions where they constitute a prior restraint. *Reineke v. Cobb County Sch. Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980).

Prior restraint requires showing of "clear and present danger". — Public officials who attempt prior restraint on speech are able to justify it only by showing an overwhelming contrary state interest, such as a clear and present danger of great violence and severe injury. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Possibility of criminal violations does not justify prior restraints. — Mere raising of possibility of criminal violations does not justify imposition of prior restraint upon expression. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Prohibiting mailing of abortion procurement information. — Statute prohibiting mailing of printed matter containing information concerning procuring of abortions is unconstitutional because such matter is protected speech under the first amendment and is entitled to be transmitted without prior restraint. *Atlanta Coop. News Project v.*

United States Postal Serv., 350 F. Supp. 234 (N.D. Ga. 1972).

Restraints on publishing. — A publisher cannot be restrained by a prior order from publishing what the publisher desires to publish, but this in no sense exonerates such publisher from liability for what the publisher has published. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Restraint on mailing letters. — Right to mail letters is first amendment right and prior restraint on that right, which bears heavy presumption of invalidity, must be carefully scrutinized. *Anderson v. Dean*, 354 F. Supp. 639 (N.D. Ga. 1973).

Injunction against publication of any information about person is prior restraint. — The power of a court of the United States to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information is a matter of concern. Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which any party has the right to publish. A court is without power to make such an order. *Anderson v. Dean*, 354 F. Supp. 639 (N.D. Ga. 1973).

Heavy restraints on adult cinemas invalid. — Local ordinance requiring numerous, extensive, and imprecise licensing standards and a high license fee from theaters showing "adult", but not obscene, films imposed invalid restraints on rights of U.S. Const., amend. 1. *Coleman v. Bradford*, 238 Ga. 505, 233 S.E.2d 764 (1977).

Limitation of communication between litigants not impermissible prior restraint. — Court orders limiting communications regarding ongoing litigation between a class and class opponents did not constitute unconstitutional prior restraint. *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985).

Balancing of private and public policy interests by government. — Fundamental purpose of U.S. Const., amend. 1 is to foreclose governmental control or manipulation of sentiments uttered to the public; therefore, before presumptively protected material is involuntarily removed from the mar-

ket place by governmental activity which arguably is not directed toward that end, competing private and public policy interests must be carefully balanced in light of all the circumstances. *Penthouse Int'l, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), aff'd in part and rev'd in part on other grounds, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Judicial interference required where state intends to remove protected speech from public eye. — Before state officials may undertake a series of warrantless arrests which generate reasonably foreseeable effects in terms of removing presumptively protected speech from the public eye, judicial intervention of some dimension is constitutionally required. *Penthouse Int'l, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), aff'd in part and rev'd in part on other grounds, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Courts must look through form to substance in determining whether system of informal censorship has been formulated; if a system of prior restraint is found, it comes before a federal district court bearing a heavy presumption against its constitutional validity. *Penthouse Int'l, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), aff'd in part and rev'd in part on other grounds, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

5. Broadcasting

Right to broadcast depends on availability of allocable frequencies. — Although broadcasting is clearly a medium affected by first amendment interest, differences in characteristics of news media justify differences in the first amendment standards applied to them. Where there are substantially more individuals who want to broadcast than there are frequencies to allocate there is no unbridgeable right of U.S. Const., amend. 1 to broadcast comparable to the right of every individual to speak, write, or publish. *United States v. WYNN Radio, Inc.*, 464 F. Supp. 101 (N.D. Ga. 1978), rev'd on other grounds, 614 F.2d 495 (5th Cir. 1980).

Natural monopoly argument inapplicable to cable television. — Cable television is

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entitled to the same first amendment protection as newspapers. The natural monopoly argument does not apply to cable television operators; granting an exclusive franchise does not serve an important or substantial governmental interest. *Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633 (M.D. Ga. 1991), rev'd on other grounds, 992 F.2d 1178 (11th Cir. 1993).

Personal attack rule promulgated by the Federal Communications Commission does not constitute an unlawful restraint upon the broadcast licensee's rights under U.S. Const., amend. 1 of freedom of speech and of the press. *United States v. WIYN Radio, Inc.*, 464 F. Supp. 101 (N.D. Ga. 1978), rev'd on other grounds, 614 F.2d 495 (5th Cir. 1980).

Statements not related to journalistic endeavor. — Where statements which defendant was charged with making and with encouraging others to make on the defendant's radio show were quite clearly unrelated to any legitimate form of journalistic endeavor, the defendant was not protected on ground of "journalistic privilege" in the defendant's refusal to divulge the identity of his news sources for the allegedly defamatory statements. *Georgia Communications Corp. v. Horne*, 164 Ga. App. 227, 294 S.E.2d 725 (1982).

Broadcaster liability for newsworthy report. — Broadcaster may be liable even for newsworthy report if it contains a defamatory statement and the broadcaster failed to employ the procedures a reasonable broadcaster under the circumstances would have employed to assure the accuracy of the statement before broadcasting the report. *Diamond v. American Family Corp.*, 186 Ga. App. 681, 368 S.E.2d 350, cert. denied, 186 Ga. App. 917, 368 S.E.2d 350 (1988).

Broadcaster prohibited from removing defamatory statements from candidates' speeches. — The fact that a broadcaster may be constitutionally prohibited by statute from removing defamatory statements contained in speeches broadcast by legally qualified candidates for public office does not demonstrate any right under U.S. Const., amend. 1 of a candidate to access. *Belluso v.*

Turner Communications Corp., 633 F.2d 393 (5th Cir. 1980).

No evidence FCC approved station refusal of plaintiff's commercial. — The fact that the Federal Communications Commission did not order the station to air plaintiff's message at the time an exemption from § 315(a) of the Federal Communications Act of 1934, 47 U.S.C. § 151 et seq., was requested is no evidence that the commission would have or did approve of the station's decision to refuse the commercial. *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980).

Determination of presence of governmental action. — Since broadcasters are not instrumentalities or agents of the government, but operate as private parties under government regulation, determination of whether there has been governmental action in any particular case turns on whether the government in fact was in some way involved in bringing about the alleged violation, either by requiring or urging the broadcaster to commit the challenged action. *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980).

Broadcaster's acts were private and not governmental under first amendment. — Since broadcasters exercise wide discretion over the content and format of their programming, where a broadcast licensee acts in a manner inconsistent with the requirements of the Federal Communications Act, 47 U.S.C. § 151 et seq., and where those acts are in no way sanctioned by a governmental body such as the Federal Communications Commission, they are private and not governmental acts for purposes of first amendment analysis. *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980).

Existence of regulations does not imply governmental entity. — Existence of regulations does not automatically transform regulated entity into government instrumentality for purposes of first amendment analysis. *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980).

Public television station's rules and regulations requiring that producers be respectful of others at the production facility were reasonable and the station's action in barring a violator from the facility was reasonable under the circumstances and did not violate the producer's first amendment

rights. *Jersawitz v. People TV*, 71 F. Supp. 2d 1330 (N.D. Ga. 1999).

Broadcaster's actions not imputable to government. — Once it is determined that a broadcaster acts as a private person subject to government regulations, a broadcaster's actions cannot be imputed to the government unless they are in some way approved or sanctioned by the government. *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980).

FCC's silence not construable as governmental action. — Where plaintiff failed to seek compliance with the Federal Communications Act, 47 U.S.C. § 151 et seq., before the Federal Communications Commission, that body's silence cannot be turned into governmental action for first amendment purposes. *Belluso v. Turner Communications Corp.*, 633 F.2d 393 (5th Cir. 1980).

Injunctive relief. — As a general rule, a plaintiff is entitled to a permanent injunction when copyright liability has been established and there is a threat of continuing infringement. However, the broadcast media present an unusual order of first amendment values due to the inherent difficulty in allocating a scarce number of broadcast frequencies among applicants. Under these circumstances, caution in fashioning a remedy is indicated and broad injunctive relief will not be granted to a broadcaster unless entitlement to and need for such relief is clear and convincing. *Pacific & S. Co. v. Duncan*, 572 F. Supp. 1186 (N.D. Ga. 1983), aff'd in part, rev'd in part, 744 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 1004, 105 S. Ct. 1867, 85 L. Ed. 2d 161 (1985).

A federal court, in fashioning a permanent injunction against a "TV news clip" service, which violated a television station's copyright by copying and selling that station's newscasts, was not free to exempt portions of broadcasts on a subject/format basis, i.e., to exempt film footage of public events. Accordingly, the news service was permanently enjoined from copying and selling copies of the television station's newscasts, in whole or in part. *Pacific & S. Co. v. Duncan*, 618 F. Supp. 469 (N.D. Ga. 1985), aff'd, 792 F.2d 1013 (11th Cir. 1987).

Off-the-air video-taping of live television news broadcasts by television news monitoring service, followed by the marketing and sale of news tapes to interested members of

the public, infringes the broadcaster's copyright under federal law. The first amendment does not prohibit interference with such activities. *Pacific & S. Co. v. Duncan*, 572 F. Supp. 1186 (N.D. Ga. 1983), aff'd in part, rev'd in part, 744 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 1004, 105 S. Ct. 1867, 85 L. Ed. 2d 161 (1985).

U.S. Const., amend. 1 did not conflict with a television station's effort to enforce its copyright against a business which videotaped its news broadcasts and sold the tapes to the subjects of the news reports. *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 1004, 105 S. Ct. 1867, 85 L. Ed. 2d 161 (1985).

Right to copy cable network's newscasts. — Any injunction that would prevent the copying of a cable television network's newscasts "in any part" would be inconsistent with the federal Copyright Act, particularly its fair use provisions, and both the copyright clause and the first amendment to the Constitution. *CNN, Inc. v. Video Monitoring Serv. of Am., Inc.*, 940 F.2d 1471 (11th Cir. 1991), appeal dismissed, 959 F.2d 188 (11th Cir. 1992).

Excluding candidate from political debate not unconstitutional. — Georgia Public Telecommunications Commission's decision to air a debate between Democrat and Republican candidates for Governor, while excluding a Libertarian candidate, was not viewpoint restrictive and did not violate the first amendment. *Chandler v. Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), cert. denied, 502 U.S. 816, 112 S. Ct. 71, 116 L. Ed. 2d 45 (1991).

Press access to criminal trial proceedings. — The press has no first amendment right of access to communications between counsel and the court which take place at the bench or in chambers, particularly when those communications involve evidence which the court determines to be inadmissible and which, if disclosed, could deprive the defendant of the fair trial by an impartial jury that the Constitution guarantees. *United States v. Moody*, 746 F. Supp. 1090 (M.D. Ga. 1990).

6. Employer — Employee Relations

First amendment protects the right of public employees to associate, speak, and petition freely, as well as the right of associations to engage in advocacy on behalf of

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their members. The government may not retaliate against individuals or associations for their exercise of first amendment rights by imposing sanctions for the expression of particular views it opposes. *Georgia Ass'n of Educators v. Gwinnett County Sch. Dist.*, 856 F.2d 142 (11th Cir. 1988).

Speech involving public employee's personal interests not protected. — Speech involving matters of public concern is protected by U.S. Const., amend. 1, whereas speech involving matters relating to a public employee's personal interest is not. *Ballard v. Blount*, 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir.), *cert. denied*, 469 U.S. 1086, 105 S. Ct. 590, 83 L. Ed. 2d 700 (1984).

Threshold inquiry surrounding a first amendment claim as to a "reprimand" in public employment is whether plaintiff's speech and speech-related conduct involved matters of "public concern," rather than matters relating to plaintiff's personal interest. If plaintiff's speech cannot be characterized as constituting speech on a matter of public concern, it is unnecessary for the court to scrutinize the reasons for the alleged reprimand. *Cook v. Ashmore*, 579 F. Supp. 78 (N.D. Ga. 1984).

Factors. — A state employee's claim that the employee was demoted on the basis of the exercise of constitutionally protected speech failed where: (1) the employee's conduct was closely connected with, and actually classified as, insubordination; (2) the employee's speech substantially interfered with the working operation of the employee's supervisors, and to a lesser extent disrupted subordinates' working environment; and (3) the demotion would have occurred in spite of the exercise of the speech. *Howkins v. Caldwell*, 587 F. Supp. 98 (N.D. Ga. 1983), *aff'd*, 749 F.2d 731 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117, 105 S. Ct. 2361, 86 L. Ed. 2d 261 (1985).

Test for determining occurrence of retaliation for protected speech. — In determining whether an employee has suffered retaliation for protected speech the court must employ a four-part test: First, the court must determine whether the employee's speech

may be fairly characterized as constituting speech on a matter of public concern; second, the court must weigh the employee's first amendment interest against the interest of the state, as an employer; third, should the employee prevail on the balancing test, the fact-finder must determine whether the employee's speech played a substantial part in the government's decision to demote or discharge the employee; and finally, if the employee shows that the speech was a substantial motivating factor in the employment decision, the state must prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S. Ct. 2708, 129 L. Ed. 2d 836 (1994).

Balancing test completed before jury decision on facts. — The Pickering balancing test, and the remainder of the qualified immunity inquiry, must be done before a case is sent to a jury for its determination of whether a plaintiff was actually fired for the plaintiff's speech. To do otherwise deprives defendants of the benefit of their qualified immunity defense. The entitlement is an immunity from suit rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Vista Community Servs. v. Dean*, 107 F.3d 840 (11th Cir. 1997).

Where a causal link between the employee's speech and the adverse employment decision is lacking, a claim of retaliatory discharge must fail and it is unnecessary to consider other elements of the test for retaliation. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739 (11th Cir. 1996).

Employee's private and informal complaints which focused primarily on how the employee's colleagues behaved toward the employee and how that conduct affected the employee's work did not rise to the level of public concern for purposes of the employee's first amendment retaliation claim. *Watkins v. Bowden*, 105 F.3d 1344 (11th Cir. 1997).

Public employee's statements must relate to matters of public concern. — To be protected by the first amendment, a public employee's statements must relate to a matter of public concern; that is, to a matter of

political, social, or other concern to the community. *Suber v. Bulloch County Bd. of Educ.*, 722 F. Supp. 736 (S.D. Ga. 1989).

Absent extraordinary circumstances, an employee's speech is beyond the protection of the first amendment when the employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest. *Pearson v. Macon-Bibb County Hosp. Auth.*, 952 F.2d 1274 (11th Cir. 1992).

Municipal housing authority employee's complaints challenging the employee's termination from the employee's job could properly be characterized as constituting speech on "a matter of public concern" protected by the first amendment. Therefore, the lower court's granting of summary judgment in favor of the employer was inappropriate. *Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904 (11th Cir. 1993).

Where a corrections officer's comments during a private conversation with an inmate did not involve facts, but instead expressed the officer's personal opinion about another officer's job performance, the officer did not speak on a matter of public concern, and the officer's actions, having the potential for compromising the safety and security of the institution, justified the officer's discharge. *Department of Cors. v. Derry*, 235 Ga. App. 622, 510 S.E.2d 832 (1998).

Alleged incidents of speech and association by plaintiff hospital employees were not afforded first amendment protection where the matter was best described as nothing more than private workplace grievances that took place at a public hospital. *Nero v. Hospital Auth.*, 86 F. Supp. 2d 1214 (S.D. Ga. 1999).

Statement of assistant county clerk to the clerk's employer, in the employer's capacity as a county commissioner, that the county could not lawfully refuse to pay overtime wages did not relate to a matter of public concern. *Chesser v. Sparks*, 248 F.3d 1117 (11th Cir. 2001).

Unsuccessful attempts to prevent protected speech. — The speech retaliation cases do not dictate the conclusion that an unsuccessful attempt to prevent protected speech violates the first amendment. *Suissa v. Fulton County*, 74 F.3d 266 (11th Cir. 1996), overruled in part by *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d

666 (2002), overruled on other grounds, *Overruled in part, Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

Sexual harassment complaint not protected speech. — Employee's speech, which was driven by the employee's own entirely rational self-interest in improving the conditions of employment towards an environment free of sexual harassment, concerned a private not public matter for which demotion or discharge were not constitutionally redressable. *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), cert. denied, 512 U.S. 1221, 114 S. Ct. 2708, 129 L. Ed. 2d 836 (1994).

Personal disagreement not a matter of public concern. — Statements involving matters of personal disagreement between a school teacher and the teacher's school administration were not related to matters of public concern, and were, therefore, not protected under the first amendment. *Suber v. Bulloch County Bd. of Educ.*, 722 F. Supp. 736 (S.D. Ga. 1989).

More protection granted whistle-blowers. — An employee's first amendment interest is entitled to more weight where the employee is acting as a whistle-blower exposing government corruption. *Abernathy v. City of Cartersville*, 642 F. Supp. 529 (N.D. Ga. 1986).

Sheriff who terminated a deputy's employment for cooperating with a law enforcement investigation into corruption at the sheriff's department violated the deputy's first amendment rights and the sheriff was not entitled to qualified immunity. *Cooper v. Smith*, 89 F.3d 761 (11th Cir. 1996).

Non-renewal of state teacher's contract non-retaliatory. — Non-renewal of state educational agency's employment contract with personal finance teacher was held not to be a retaliatory measure for the teacher's testimony in another discriminatory hearing where defendant's actions were justified ultimately by the declining enrollment in the course. *Durrani v. Valdosta Tech. Inst.*, 810 F. Supp. 301 (M.D. Ga. 1992), aff'd, 3 F.3d 443 (11th Cir. 1993).

Defendants' picketing customers of their employer entitled to protection. — In a case where questions arising under the federal Constitution are properly invoked, the state Supreme Court is bound to follow the decisions of the Supreme Court of the United

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States as respects such questions. Accordingly, the court held, under those decisions, that the superior court did not err in refusing to enjoin the defendants from picketing customers of their employer, since to have done so would have denied them their right of free speech. *Mason & Dixon Lines v. Odom*, 193 Ga. 471, 18 S.E.2d 841 (1942).

Violators of order prohibiting strike violence not entitled to protection. — Where an order of court forbidding the use of threats, violence, and intimidation for the purpose of preventing others from engaging in their employment during a labor strike is violated, the violator can find no protection under the constitutional guaranty of free speech. *Lassiter v. Swift & Co.*, 204 Ga. 561, 50 S.E.2d 359 (1948).

Picketing for purpose of aiding unlawful strike not protected. — The judicial theory that peaceful picketing is a form of free speech, which is protected by the federal and state Constitutions, cannot be stretched to shield malevolent picketing for the purpose of injuring the employer and aiding an unlawful strike. *Ellis v. Parks*, 212 Ga. 540, 93 S.E.2d 708 (1956); *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965), cert. dismissed, 384 U.S. 118, 86 S. Ct. 1306, 16 L. Ed. 2d 409 (1966).

Employee's seeking to enjoin enforcement of closed shop contract stated cause of action. — Where the United States Supreme Court has not held that an employee can by closed shop employment contracts be required as an alternative to losing the employee's job to join a union which will use contributions the employee makes to it to promote ideological and political issues and candidates the employee opposes, therefore, the state Supreme Court held that the petition of these employees seeking to enjoin the enforcement of the employment contract and decree it void because of such uses of their contributions alleged a cause of action and it was error to dismiss the cause of action. *Looper v. Georgia, S. & Fla. Ry.*, 213 Ga. 279, 99 S.E.2d 101 (1957).

Peaceful picketing with object of eliminating racial discrimination in department stores open to general public is a right

embraced in free speech under the first amendment to the Constitution, and made applicable to the states by U.S. Const., amend. 14. *Kelly v. Page*, 335 F.2d 114 (5th Cir. 1964).

Picketing for purpose of hurting plaintiff's business not protected. — Where the sole purpose of the picketing of plaintiff's place of business was to injure and damage the plaintiff's business, as punishment for the alleged beating of a Negro boy who worked for the plaintiff, the picketing was unlawful and not protected under the free speech provisions of the federal and state Constitutions. *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965), cert. dismissed, 384 U.S. 118, 86 S. Ct. 1306, 16 L. Ed. 2d 409 (1966).

Balancing rights of public employee and rights of state as employer. — Vital considerations to be weighed in balancing a public employee's rights under U.S. Const., amend. 1 and the rights of the state as an employer are whether the statements were directed toward a person with whom the speaker would normally be in daily contact, and whether such speech raised questions concerning either maintenance of discipline by immediate superiors or harmony among co-workers. *Cotten v. Board of Regents of Univ. Sys.*, 395 F. Supp. 388 (S.D. Ga. 1974), aff'd, 515 F.2d 1098 (5th Cir. 1975).

In determining whether a public employee's speech is constitutionally protected, the court must balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. *Courts v. Economic Opportunity Auth. For Savannah—Chatham County Area, Inc.*, 451 F. Supp. 587 (S.D. Ga. 1978).

Balancing test is to be applied in determining whether public employer may inhibit its employee's rights of free speech. In striking this balance between interests of a governmental employee as a citizen and interests of the government in promoting efficiency of the services it performs through its employees, there are factual matters appropriate for determination by a jury. *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980).

In determining whether a government

employee's speech is constitutionally protected, the interests of the employee, as a citizen, in commenting upon matters of public concern must be balanced against the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. *Press v. Board of Regents*, 489 F. Supp. 150 (M.D. Ga. 1980).

Confidentiality and harmony relevant in determining balance of interests. — In weighing the interests of the state versus that of citizen employee, the importance of confidentiality and harmony is relevant. *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), cert. denied, 452 U.S. 926, 101 S. Ct. 3063, 69 L. Ed. 2d 428 (1981).

Rule prohibiting police officer from criticizing superior. — Police officer is not denied freedom of speech by rule which forbids the officer from publicly criticizing official actions of a superior officer because finding such a rule unconstitutional would enable a police officer to engage in the rankest form of insubordination, which would lead to the complete disruption and destruction of the relationship between the superior and subordinate with the concomitant impairment of an effective municipal police department. *Aycock v. Police Comm.*, 133 Ga. App. 883, 212 S.E.2d 456 (1975).

Government employee prohibited from criticizing superiors. — Government employee may be required to forfeit the employee's right to publicly and truthfully criticize the employee's superiors if the employee occupies a high ranking position which requires continued loyalty to them and if such criticism actually undermines their working relationship. *Courts v. Economic Opportunity Auth. For Savannah—Chatham County Area, Inc.*, 451 F. Supp. 587 (S.D. Ga. 1978).

Retaliatory dismissal of federal employee for criticism of superiors not violation of right. — Where federal employee alleges that the employee's dismissal was due to a conspiracy of superiors who acted in retaliation to the employee's criticism, the employee may not claim a violation of the employee's right to free speech. *Metz v. McKinley*, 583 F. Supp. 683 (S.D. Ga.), aff'd, 747 F.2d 709 (11th Cir. 1984).

Police officer's claim of theft by high police officials was within the area of "pub-

lic concern" in which public employees may exercise their right of free speech as plaintiff alleged that the plaintiff was terminated from employment as a result of the plaintiff's testimony before a grand jury regarding improper actions by superior officers. *Abernathy v. City of Cartersville*, 642 F. Supp. 529 (N.D. Ga. 1986).

Dispute between police captain and police chief. — Although a police captain could not have been lawfully demoted or terminated for expressing the captain's displeasure with the police chief under the proper circumstances, the captain's speech was not protected when it disrupted the efficient functioning of the police department. *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989).

Obscene comments concerning supervisors not protected. — A firefighter's obscene comments regarding superiors made in front of the firefighter's co-workers, in violation of an administrative rule stating that "An employee shall be civil, orderly, and courteous to ... supervisors, and shall not use coarse, insensitive, abusive, violent or profane language," was not constitutionally protected. Also, the rule itself, as limited to on-duty conduct and speech, was not unconstitutionally overbroad. *Marshall v. City of Atlanta*, 614 F. Supp. 581 (N.D. Ga. 1984), aff'd, 770 F.2d 174 (11th Cir. 1985).

Use of racial epithets not protected speech. — A public employee's use of racial epithets in reference to coworkers was not protected speech about matters of public concern and, thus, a first amendment analysis would not be used to examine the propriety of the employee's termination. *Wright v. Glynn County Bd. of Comm'rs*, 932 F. Supp. 1476 (S.D. Ga. 1996).

Police officer's speech was protected. — A police officer's disparaging remarks about the police chief were protected by the first amendment where the remarks were made while the officer was off-duty, out of uniform, out of the department's jurisdiction, and speaking to another off-duty officer that the officer considered a friend and where the police department made no showing of actual harm or a reasonable likelihood of harm to its efficiency, discipline, or harmony. *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982).

An employee's freedom of speech is pro-

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tected under the first amendment when the interest of an employee in commenting on matters of public concern outweighs the interests of the employer in performing public services efficiently. Because of the case-by-case nature of the balancing test, qualified immunity will always protect an employer unless the employee's speech would definitely and necessarily pass the balancing test. Therefore, a police officer who supported the mayor's opponent was entitled to first amendment protection. *Clark v. City of Zebulon*, 156 F.R.D. 684 (N.D. Ga. 1993).

Police officers removal of flag patches from uniforms constituted protected speech. — Police officers were improperly dismissed for failing to obey a city resolution requiring a flag patch on police uniforms after they removed the patches in protest of police practices as the officers were exercising constitutionally protected rights. *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983), cert. denied, 468 U.S. 1204, 104 S. Ct. 3571, 82 L. Ed. 2d 870 (1984).

Refusal to discuss internal investigation. — Undercover investigator who refused to discuss with supervisor an on-going investigation into alleged illegal actions of the supervisor did not have the investigator's free speech rights violated when the sheriff's office transferred and subsequently dismissed investigator. Although the investigator's speech was a matter of public concern, the investigator's first amendment interests did not obviously outweigh the interest of the sheriff's department in providing efficient service, and the investigator failed to establish that the investigator would not have been discharged but for the speech at issue. *Smith v. Upson County*, 859 F. Supp. 1504 (M.D. Ga. 1994), aff'd, 56 F.3d 1392 (11th Cir. 1995).

Public employees who strike not constitutionally protected from being fired. — Public employees, like all citizens, enjoy the right and privilege of freedom of speech as guaranteed by U.S. Const., amend. 1 which includes the freedom to associate for the advancement of beliefs and ideas. As such, public employees cannot be prohibited from

participating in the activities of labor unions. Likewise, they cannot be penalized for advocating the right of public employees to strike or for joining unions which so contend. While they may so associate and advocate and not be retaliated against for doing so, they cannot go further and by striking compel their public employer to recognize or bargain with a union. When they do go further and by striking seek to force their public employer to recognize or bargain with a union they have gone beyond the outer limits of their constitutional protections of free expression and association, and they are not constitutionally insulated from being fired or otherwise penalized for refraining and continuing to refrain from working. *Johnson v. City of Albany*, 413 F. Supp. 782 (M.D. Ga. 1976).

Delegation of power by city to Director of Bureau of Corrections. — It is question of fact whether city delegated to Director of Bureau of Corrections the final or ultimate authority to make personnel decisions in the Bureau of Corrections with respect to work assignments, transfers, days off, discipline, hiring and firing of employees, and restrictions concerning employees' rights to engage in certain free speech activity. *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980).

City liable for official conduct of city official. — In a case by a former Bureau of Corrections employee claiming that the employee was constructively discharged for exercise of the employee's rights under U.S. Const., amend. 1, the Director of Correction's official conduct must be considered that of one whose edicts or acts may fairly be said to represent official policy for which the city may be held responsible where such conduct involves areas in which the director is the final authority or repository of power. *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980).

Burdens of proof. — Government employee has the burden of proving that the employee's speech was constitutionally protected and that its exercise was a substantial factor in the employee's discharge. *Courts v. Economic Opportunity Auth. For Savannah—Chatham County Area, Inc.*, 451 F. Supp. 587 (S.D. Ga. 1978).

Where former correctional officer attempted to organize "sick out" among offic-

ers in protest of alleged improper treatment of prisoners and unsatisfactory working conditions and brought suit claiming constructive discharge for exercise of right of freedom of speech under U.S. Const., amend. 1, for the government to prevail it must show that the employee's conduct substantially interfered with the discharge of duties and responsibilities inherent in governmental employment, while for plaintiff to prevail, the plaintiff must demonstrate that the asserted retaliation by the governmental employer was motivated specifically by what has been determined to be protected speech. *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980).

Plaintiff bears burden of proving speech or conduct was reason for improper dismissal. — In an action claiming improper dismissal on the basis of an exercise of first amendment rights, the plaintiff bears the initial burden of proving that the plaintiff's speech or conduct was a substantial or motivating factor in the decision not to hire the plaintiff and that the speech or conduct was constitutionally protected. *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983), cert. denied, 468 U.S. 1204, 104 S. Ct. 3571, 82 L. Ed. 2d 870 (1984).

Burden of city to show that firefighter not discharged for exercising free speech rights. — Where a firefighter demonstrated that the firefighter engaged in conduct protected by the first amendment and that this conduct was a substantial or motivating factor in a defendant city's decision to abolish the firefighter's position and to demote the firefighter, the burden shifted to the city to prove that it would have reached the same decisions as to the abolition and demotion even in the absence of the firefighter's protected conduct. *Williams v. City of Valdosta*, 689 F.2d 964 (11th Cir. 1982).

Question of law whether plaintiff's attempt to organize "sick out" was protected speech. — It was a question of law whether plaintiff's attempt to organize a "sick out" among the plaintiff's fellow employees was protected speech under U.S. Const., amend. 1 and the trial court erred in submitting this issue to the jury. Determining whether plaintiff's attempt to organize a "sick out" constituted protected speech is but a legal inference drawn from the basic facts in the case and is reviewable as any other legal ruling or

conclusion. *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980).

Question of fact whether plaintiff was discharged because of protected speech. — If plaintiff's attempt to organize a "sick out" among the plaintiff's fellow employees is found to be protected speech under the first amendment, it is then a question of fact whether the plaintiff was constructively discharged because of it. *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980).

Bona fide factual dispute, precluding summary judgment, existed as to whether a county tax appraiser was terminated in retaliation for the appraiser's public speeches supporting a system of appraising personalty known as "trending." *Lovell v. Floyd County*, 710 F. Supp. 1364 (N.D. Ga. 1989).

Plaintiff's discharge question of law. — Whether plaintiff was constructively discharged for reasons that impermissibly abridged the plaintiff's rights under U.S. Const., amend. 1 was ultimately a question of law for the trial court. *Schneider v. City of Atlanta*, 628 F.2d 915 (5th Cir. 1980).

Public's right to know official malfeasance and police officer's duty to make it known outweighed other interests. — In a case involving discharge of appellee, a police officer, for leaking information about falsification of records by one official for the protection of another official, although the working relationship of the parties was damaged, this exigency paled before the need of the public to know of the malfeasance involved, and the right of the appellee to make it known both for the appellee's own protection and as the appellee's duty as servant to the people. *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), cert. denied, 452 U.S. 926, 101 S. Ct. 3063, 69 L. Ed. 2d 428 (1981).

Nature of communication relevant to balancing interests of public employee and state. — Although protection under the first amendment is not dependent upon the "social worth" of ideas, the nature of the communication is relevant to the balancing of the interests of the employee as a citizen against the interest of the governmental unit. *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), cert. denied, 452 U.S. 926, 101 S. Ct. 3063, 69 L. Ed. 2d 428 (1981).

Analysis regarding discharge from employment for communication the same regard-

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less of confidentiality. — The balancing analysis under U.S. Const., amend. 1 with regard to a discharge from employment for communication is the same regardless of the existence of a confidentiality policy. *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), cert. denied, 452 U.S. 926, 101 S. Ct. 3063, 69 L. Ed. 2d 428 (1981).

Interest of public accorded greatest weight. — Analysis under U.S. Const., amend. 1 requires that the quality and nature of the speech be balanced with the exigencies of the work place but with the far greater weight attached to the interest of the public. *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), cert. denied, 452 U.S. 926, 101 S. Ct. 3063, 69 L. Ed. 2d 428 (1981).

Freedom of speech of public employee talking privately with employer. — U.S. Const., amend. 1 forbids abridgment of freedom of speech. Neither the amendment itself nor the United States Supreme Court decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with an employer rather than to spread the employee's views before the public. *Press v. Board of Regents*, 489 F. Supp. 150 (M.D. Ga. 1980).

Employee's arranging meeting between co-employee and attorney not protected. — The conduct for which a union employee was disciplined — arranging for a meeting between an injured co-employee and an attorney for the purpose of filing a suit against the employer and personally taking the co-employee to meet with the attorney — was not protected by U.S. Const., amend. 1. *Woodrum v. Southern Ry.*, 750 F.2d 876 (11th Cir.), cert. denied, 474 U.S. 821, 106 S. Ct. 71, 88 L. Ed. 2d 58 (1985).

City firefighter's conduct was protected. — A city firefighter who helped form a local firefighters union, spoke out on many issues affecting firefighters, and filed an affidavit in support of a challenge of the city's failure to validate promotion exams as required by the city personnel management policy engaged in conduct protected by the first amendment. *Williams v. City of Valdosta*, 689 F.2d 964 (11th Cir. 1982).

Valid governmental interest in prohibiting officials from coercing employees to contribute to their campaigns. — The government, as employer, has a legitimate interest in prohibiting public officials from using their authority to coerce their inferior employees into contributing to their campaigns. *McCallum v. Hinson*, 489 F. Supp. 627 (M.D. Ga. 1980).

Sheriff's authority as to appointment of deputies not limited by first amendment considerations. — Deputies who claimed that they were not rehired because of their failure to support a new sheriff when the sheriff was a candidate were not protected by the first amendment since their term of office ended with the term of the former sheriff and the newly elected sheriff had the right not to retain the deputies. *Brett v. Jefferson County*, 925 F. Supp. 786 (S.D. Ga. 1996), aff'd in part and vacated in part, 123 F.3d 1429 (11th Cir. 1997).

Court clerk's termination of a deputy clerk, who had advised the clerk that the deputy clerk planned to run against the clerk for the position of clerk in the upcoming election, did not violate the deputy clerk's free speech rights as guaranteed by the first amendment. *Zellner v. Ham*, 735 F. Supp. 1052 (M.D. Ga. 1990).

Dismissal of employee who wrote critical editorials in an employees' newsletter violated the employee's free speech rights, where there was no evidence that the employee's speech impeded the employee's ability to do work, disrupted the employee's working relationships, or affected the morale of fellow employees. *Williams v. Roberts*, 904 F.2d 634 (11th Cir. 1990).

7. Libel and Slander

Standard for recovery in libel by public figures. — Public officials are permitted to recover in libel only when they prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone are held insufficient to satisfy this standard. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

The first amendment mandates that a public figure plaintiff prove actual malice by clear and convincing evidence. *Barber v. Perdue*, 194 Ga. App. 287, 390 S.E.2d 234

(1989), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 414 (1990).

To survive a defendant's motion for summary judgment in an action for libel and slander, a plaintiff who is a public figure must produce evidence that the speaker knew the charge was false or at least had serious doubts concerning its truth. *Smith v. Turner*, 764 F. Supp. 632 (N.D. Ga. 1991).

Limitation on state's power to award libel damages to public officials. — U.S. Const., amend. 1 limits the state's power to award damages in a libel action brought by a public official against critics of the official's official conduct. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Protection under the first amendment is conditioned on a lack of actual malice, i.e., knowledge on the part of the person claiming first amendment protection that a statement is false, or reckless disregard of whether or not it is false. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Proof of actual malice. — Actual malice is not presumed, but is a matter of proof by the plaintiff. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

The constitutional standard demands that proof of actual malice be made with convincing clarity. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

No longer any need to prove actual malice. — Statements made by the press about a private individual which concern a matter of public interest are still granted a conditional privilege to the extent that such statements are not subject to "strict liability" which might otherwise be imposed at common law. However, there is no longer a constitutional requirement that the individual must prove actual malice in order to recover, and the Georgia Supreme Court adopted the standard of the majority of states, i.e., ordinary care. *Diamond v. American Family Corp.*, 186 Ga. App. 681, 368 S.E.2d 350, cert. denied, 186 Ga. App. 917, 368 S.E.2d 350 (1988).

Publications concerning matters of public interest are protected by the first amendment absent proof of actual malice. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Misstatement of fact in discussing public figures. — Guarantees under U.S. Const., amend. 1 are applicable to misstatements of

fact in discussing public figures. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Scope of freedom of discussion. — Freedom of discussion must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Innocently published false reports of matters of public interest entitled to protection. — The constitutional protections for speech and press preclude the application of statutes designed to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Criminal defamation statute, O.C.G.A. § 16-11-40, requiring a communication which "tends to provoke a breach of the peace" is vague and overbroad under U.S. Const., amends. 1 and 14. *Williamson v. State*, 249 Ga. 851, 295 S.E.2d 305 (1982).

Magazine article of legitimate public interest entitled to protection. — An article in a *Time*, Inc., publication, focusing on Augusta, the Masters' Golf Tournament, and the public accommodations available for the many thousands of spectators, was of a legitimate public interest, and entitled to protection. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Summary judgment for defendant absent pretrial proof of actual malice. — In an action for libel where the publisher is protected by U.S. Const., amend. 1, unless the trial court finds, on the basis of pretrial affidavits, depositions, or other documentary evidence, that the plaintiff can prove actual malice, i.e., actual knowledge of the statement's falsity or reckless disregard of the truth, it should grant summary judgment for the defendant. Summary judgment for publishers is proper where the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with a reckless disregard of whether it was true or false. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Summary judgment not allowed where actual malice inferable. — A publisher's

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motion for summary judgment may not be allowed where facts were presented from which a jury could find that a statement was made with actual malice. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Proper measure for determination of actual malice. — In a libel suit, reckless conduct on the part of a publisher is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the defendant's publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. *Jackson v. Atlantic Monthly Co.*, 324 F. Supp. 1302 (N.D. Ga. 1971).

It is not sufficient to measure reckless disregard by what a reasonably prudent man would have done under similar circumstances nor whether a reasonably prudent man would have conducted further investigation. Rather, the evidence must show in a clear and convincing manner that defendant in fact entertained serious doubts as to the truth of the defendant's statements. *Miller v. Woods*, 180 Ga. App. 486, 349 S.E.2d 505 (1986).

Slander per se. — Since the appellee did not include in an amended complaint a plea for special damages under O.C.G.A. § 9-11-9(g), the defamation count of the amended complaint was limited to a claim alleging slander per se; employment of the Milkovich factors determined only that the alleged opinion was actionable as slander, but the Milkovich factors had no bearing on whether the words used constituted slander per se; statements which could have been interpreted as having the purpose of injuring the appellee's business by stating or implying that the appellee was going out of the real estate development business in which the appellee was still engaged and leaving the area were not recognizable as injurious on their face, and the appellant was entitled to summary judgment on the appellee's slander per se claim. *Bellemead, LLC v. Stoker*, 280 Ga. 635, 631 S.E.2d 693 (2006).

Public figure must demonstrate actual malice. — A public figure cannot recover for libel unless the public figure demonstrates actual malice or the publishing of a knowing falsehood with reckless disregard of the truth. *Jackson v. Atlantic Monthly Co.*, 324 F. Supp. 1302 (N.D. Ga. 1971).

Negligence is proper standard for defamation involving private individual. — Classroom discussion regarding America's involvement in Iraq was not an action intended to thrust the professor into the forefront of controversy in any public forum, and the trial court erred in finding that the professor was a limited-purpose public figure and requiring a showing of actual malice on the part of a reporter, newspapers, and others in the professor's defamation claims; rather, the professor was a private person to whom a negligence standard applied and, as there was no claim by defendants that they were not negligent, the trial court erred in granting summary judgment to them. *Sewell v. Trib Publ'ns, Inc.*, 276 Ga. App. 250, 622 S.E.2d 919 (2005).

Facts concerning plaintiff in libel suit allowing court to infer that the plaintiff is a "public figure". See *Jackson v. Atlantic Monthly Co.*, 324 F. Supp. 1302 (N.D. Ga. 1971).

Proof of actual malice required regarding statement made about one's official conduct. — The constitutional protection of freedom of the press requires that a public official not be allowed to collect damages for a defamatory falsehood relating to the official's official conduct unless the official can prove that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971).

Publications regarding "public figures" protected. — The limited protection of U.S. Const., amend. 1 reaches publications regarding all "public figures," not just those who are public officials. *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971).

Burdens of proof in libel or slander actions. — For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard

of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited. *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971).

Clear and convincing standard required of plaintiff. — In a libel suit for an allegedly defamatory falsehood, U.S. Const., amend. 1 requires that the plaintiff not be permitted to recover damages except upon a clear and convincing showing that the falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not. *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971).

Publications concerning matters of public interest are protected by U.S. Const., amend. 1, absent proof of actual malice. Actual malice may be inferred when the investigation for a story which is not “hot news” was grossly inadequate under the circumstances. *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971).

Forcing defendant to trial in itself a curtailment of press freedom. — Forcing a defendant to go to trial when the defendant has acted with the first amendment’s protection can in itself be a curtailment of freedom of the press, even if the defendant should subsequently prevail on the merits. *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971).

Invalidity of prior restraint on suspected libel. — Just as a prior restraint may not be imposed upon material thought to be obscene without adequate safeguards, so, too, a prior restraint may not be imposed upon a suspected libel without adequate safeguards. *Anderson v. Dean*, 354 F. Supp. 639 (N.D. Ga. 1973).

Injunction against libel not unconstitutional. — Libel, like obscenity, is not protected by U.S. Const., amend. 1. Thus, an injunction directed against a libel is not unconstitutional. *Anderson v. Dean*, 354 F. Supp. 639 (N.D. Ga. 1973).

One may attain status of public figure by position alone, or by commanding a substantial amount of public interest. In some in-

stances an individual may achieve such pervasive fame or notoriety that the individual becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects oneself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

“Public figure” defined. — “Public figures” are those persons who, though not public officials, are involved in issues in which the public has a justified and important interest and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who the person is or what the person has done. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976); *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), aff’d, 580 F.2d 859 (5th Cir. 1978).

Police chief is “public official”. — Since a chief of police is a public official, the police commissioner’s memorandum recommending the chief’s reduction to patrolman must have contained false allegations which were uttered with actual malice in order for the allegations therein to be libelous. *Miller v. Woods*, 180 Ga. App. 486, 349 S.E.2d 505 (1986).

Police officer is properly classified as a “public official” for purposes of libel and slander suits regarding comments on the officer’s official activities. *Pierce v. Pacific & S. Co.*, 166 Ga. App. 113, 303 S.E.2d 316 (1983).

Sports figure involved in controversial on-field incident as a “public figure”. — A sports figure who, years earlier, played for a college football team and who was personally involved in a controversial incident during one particular game, was considered a public figure, whose actions on the field sports-writers could criticize within the protective “breathing space” required by U.S. Const., amend. 1. *Holt v. Cox Enters.*, 590 F. Supp. 408 (N.D. Ga. 1984).

Civil remedy allowed only if speaker knew or suspected statement was false. — A public figure might be allowed a civil remedy for a statement about the public figure only if the speaker knew the speaker’s statement was false, or entertained serious doubts as to whether it was true or false. The defamatory statement against a public figure may be

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false but it is still not actionable unless it was uttered with knowledge of its falsity or in reckless disregard for the truth. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Elements of proof of constitutional malice. — Knowledge of the falsity of the statement, a reckless disregard of whether it was false or true, or a serious doubt as to its truth, is imperative to proof of malice in the constitutional sense as to statements within the immunity of U.S. Const., amend. 1. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Absent pretrial evidence of actual malice, summary judgment for defendant. — Unless the court finds, on the basis of pretrial affidavits, depositions, or other documentary evidence, that the plaintiff public figure can prove actual malice, it should grant summary judgment for the defendant. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Inapposite inquiries into question of actual malice. — The speaker's motives, though malicious in the statutory or common-law sense; what a reasonable man in the same circumstances may have said; and the lack of or inadequacy of prior investigation; all are inapplicable to the question of actual malice in the constitutional sense as to defamation of a public figure. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Actual malice is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for summary judgment and directed verdict. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Whether a matter is of public or general concern is a question of law for the court. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

Whether plaintiff a public figure for court. — Although the issue of whether a plaintiff in a defamation action is a public figure poses a mixed question of law and fact, it is nevertheless one for the court, not the jury, to determine. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Use of summary judgment. — Summary judgment procedures have been determined

to be particularly appropriate in defamation actions where the first amendment is applicable. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Because of the importance of free speech, summary judgment is the rule, and not the exception, in defamation cases. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

In libel cases, where no substantial danger to reputation is apparent, summary judgment is appropriate, since the press should be more carefully guarded against exposure to liability for defamation than where clearly defamatory content warns it of liability. *Southard v. Forbes, Inc.*, 588 F.2d 140 (5th Cir.), *cert. denied*, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

Malice requires awareness of falsity or reckless disregard of falsity. — Constitutional malice does not involve motives of the speaker or publisher, though they may be wrong, but rather it is the publisher's awareness of actual or probable falsity, or the publisher's reckless disregard for their falsity. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Constitutional malice distinguished from common-law. — Malice in the constitutional sense is distinguished from common-law sense of ill will, hatred, or charges calculated to injure. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Actual malice in the sense of libeling a public official does not necessarily extend to ill will, hatred, or actions calculated to injure, for this may run afoul of the freedom of speech protected by the first amendment. *Miller v. Woods*, 180 Ga. App. 486, 349 S.E.2d 505 (1986).

Evidence sufficient to prove actual malice. — To prove actual malice there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the defendant's publication. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Given that defendants, a newspaper, its editor, and a columnist, so doubted the truthfulness of their articles (alleging that a deputy sheriff beat an arrestee to death with a flashlight) that they refused to print contradictory versions of the events, actual malice could be inferred; as a result, the trial

court properly denied their motions for a directed verdict and awarded compensatory and punitive damages to a deputy sheriff in the deputy's libel action. *Lake Park Post, Inc. v. Farmer*, 264 Ga. App. 299, 590 S.E.2d 254 (2003), cert. denied, 543 U.S. 875, 125 S. Ct. 104, 160 L. Ed. 2d 125 (2004).

Absent prima facie showing of malice, burden falls on plaintiff. — If a prima facie showing is made that there did not exist actual malice in the constitutional sense, the burden is cast upon the plaintiff public figure to come forward with proof that the statements were made with knowledge that they were false or with reckless disregard of whether they were false or not. If the plaintiff fails in this duty of rebuttal, summary judgment is proper. *Williams v. Trust Co.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Right to vindicate reputation and good name. — The first amendment guarantees to an individual the right to vindicate the individual's reputation and good name in the civil courts. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Defamed public officials and public figures can recover only upon a showing of malice, express or implied. — Private individuals cannot recover unless the defamation is the result of fault or negligence on the part of the publisher. Recovery is restricted to actual or special damages. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Convincing clarity is the constitutional standard to proof actual malice. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Recovery of presumed and punitive damages. — In an action for libel or slander where actual malice is shown, presumed and punitive damages are recoverable if the applicable state law permits such damages, and hence special damages need not be shown. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Reckless disregard of truth equated with subjective awareness of probable falsity. — United States Supreme Court has equated reckless disregard of the truth with subjective awareness of probable falsity; thus, in a

libel or slander action there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the defendant's publication. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Failure to investigate. — In an action by a high school football coach against the superintendent of schools and a television station news reporter, a television news report concerning allegations of the coach's prior involvement in illegal gambling did not constitute "defamatory," slander, or false light, or invasion of privacy, even if the reporter failed to investigate adequately. *Brewer v. Rogers*, 211 Ga. App. 343, 439 S.E.2d 77 (1993).

Proof of defamation relating to official conduct requires showing of actual malice. — Damages cannot be awarded to a public official for defamatory falsehood relating to official conduct in the absence of proof of actual malice or reckless disregard of whether the statement was true or false. Even where the statement is false, the plaintiff must meet this standard. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Issue of whether plaintiff public official or figure for court. — In an action for libel or slander it is for the trial judge in the first instance to determine whether the proof shows plaintiff to be a public official. Similarly, while the issue of whether a plaintiff in a defamation action is a public figure poses a mixed question of law and fact, it is nevertheless one for the court, not the jury, to determine. *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Governmental entity barred from bringing libel action. — A governmental entity is absolutely barred from prosecuting a cause of action for libel regardless of whether the libel was against the governmental entity in its governmental or its proprietary function. *Cox Enters., Inc. v. Carroll City/County Hosp. Auth.*, 247 Ga. 39, 273 S.E.2d 841 (1981).

Government official may sue for libel. — An individual, albeit a government official, libeled for action taken in the official's official capacity may sue for libel. *Cox Enters.,*

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Inc. v. Carroll City/County Hosp. Auth., 247 Ga. 39, 273 S.E.2d 841 (1981).

Hospital authority cannot sue for libel. *Cox Enters., Inc. v. Carroll City/County Hosp. Auth.*, 247 Ga. 39, 273 S.E.2d 841 (1981).

8. Obscenity

Freedom of expression not extended to obscenity. — All citizens of the United States are guaranteed freedom of expression. This freedom does not extend to obscenity because it is utterly without redeeming social importance. *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969).

Obscenity is not entitled to protection under U.S. Const., amend. 1. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

It is firmly established that obscenity is not protected by the free speech clause of the first amendment and may be regulated by the state. *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

Free expression is rooted deeply in our way of life and cannot be suppressed through statutes which compromise the exercise of this freedom. This does not mean that one is free to express obscenity. Injunctive procedures are available to stop obscene expressions. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Obscenity is not protected by the free speech clause of U.S. Const., amend. 1 and may be regulated by the state. *S.S.W. Corp. v. Slaton*, 231 Ga. 734, 204 S.E.2d 155 (1974).

Private possession of obscene material is protected. — U.S. Const., amends. 1 and 14 prohibit making mere private possession of obscene material a crime. *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

Obscenity is not within the protected pale of U.S. Const., amends. 1 and 14. However, the private possession of obscene materials is protected. *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969), aff'd, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970).

State and federal governments may not constitutionally prohibit mere possession of

admittedly obscene material in the privacy of one's own home. *United States v. Thevis*, 320 F. Supp. 713 (N.D. Ga. 1970).

Commerce in obscene material is unprotected by any constitutional doctrine of privacy. — The states have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called "adult" theaters from which minors are excluded. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

The sale and delivery of obscene material to willing adults is not protected under U.S. Const., amend. 1. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768 (1971), vacated on other grounds, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446, on remand, 231 Ga. 312, 201 S.E.2d 456 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

Obscene films. — No reason exists why the sale and delivery of films should be immune to state control any more than the sale and delivery of multiple copies of an obscene book, pamphlet, or magazine. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768 (1971), vacated on other grounds, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446, on remand, 231 Ga. 312, 201 S.E.2d 456 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

Obscenity as lacking redeeming social importance. — Implicit in the history of the first amendment is rejection of obscenity as utterly without redeeming social importance. *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 180 S.E.2d 712, cert. denied, 404 U.S. 950, 92 S. Ct. 281, 30 L. Ed. 2d 267 (1971).

The Constitution offers no protection to pornography without redeeming literary or artistic qualities. *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

Even obscene literature entitled to procedural safeguards. — Obscenity is not protected by U.S. Const., amend. 1; but this does not mean that literature which is in fact obscene is not entitled to the same procedural safeguards that are thrown around nonobscene materials. *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

Portrayal of sex not in itself sufficient reason to deny procedural safeguards. — Portrayal of sex, e.g., in art, literature, and

scientific works, is not in itself sufficient reason to deny material the constitutional protection of freedom of speech and press. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Public policy permits state regulation or prohibition of obscene materials. — The states have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize the state's right to maintain a decent society. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

Obscene material not protected. — Devices “designed or marketed as useful primarily for the stimulation of human genital organs,” are prohibited from distribution under O.C.G.A. § 16-12-80, and are not protected expressions under either U.S. Const., amend. 1 or the free speech clause of the Georgia Constitution. *Morrison v. State*, 272 Ga. 129, 526 S.E.2d 336 (2000).

Regulation of obscenity must ensure against infringement of protected expression. — What is obscene and what is not obscene is sometimes separated by a line which is finely drawn. Accordingly, U.S. Const., amend. 14 requires that regulation by the states of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969).

While freedom of expression does not extend to obscenity, state regulation of obscenity must conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969).

Obscenity cannot be defined by local community standard. — Definition of obscenity simply cannot be so reduced to a standard applied by a particular local community. *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972).

“Community” defined. — The term “community” means, not the minute local community, but society at large, that is, the

public, or people in general. *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972).

Children are not to be included as part of the “community” as that term relates to obscene materials. — A jury conscientiously striving to define the relevant community of persons, the “average person,” by whose standards obscenity is to be judged would reach a much lower “average” when children are part of the equation than if they restricted their consideration to the effect of allegedly obscene materials on adults. *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978).

Obscenity as defined by society at large. — The concept of obscenity is the meaning applied by society at large which may vary “from time to time,” but “not from county to county, or town to town.” *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972).

Foul words do not, standing alone, constitute obscene expression. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Lewd and obscene utterances are not an essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

Test for obscenity. — The test for obscenity is whether or not to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest. *Feldschneider v. State*, 127 Ga. App. 745, 195 S.E.2d 184 (1972); *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

The United States Supreme Court has set down three basic guidelines for determining whether material could be judged obscene and therefore regulated by the state: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Ameri-*

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can Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981).

A particular issue of a self-styled "magazine for men" fell within O.C.G.A. § 16-12-80 (distributing obscene material) in that: (1) It contained a large number of photographs of women in various degrees of nudity, depicting sexual conduct and lewd exhibition in a patently offensive way; (2) the magazine's overwhelming effect, obviously planned, was to create sexual excitement and stimulation, predominantly appealing, as a whole, to the prurient interest, even though there were items that concerned topics other than sex; and (3) the magazine, taken as a whole, had no serious literary, artistic, political, or scientific value, although there may have been some slight literary, artistic, and political value to a small number of items. Penthouse Int'l, Ltd. v. Webb, 594 F. Supp. 1186 (N.D. Ga. 1984).

Every element of three-prong obscenity test must be met. — When examining a publication to determine whether it is obscene, the three-prong test is conjunctive so every element of the test must be met before a publication may be adjudicated obscene. Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Reasons for judicial finding of material as obscene. — Courts may find material obscene where the dominant theme of the material taken as a whole appeals to a prurient interest in sex, where the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matter, and where the material is utterly without redeeming social value. Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971); Feldschneider v. State, 127 Ga. App. 745, 195 S.E.2d 184 (1972); Gornto v. McDougall, 336 F. Supp. 1372 (S.D. Ga. 1972), appeal dismissed, 482 F.2d 361 (5th Cir. 1973).

Obscene material as appealing to prurient interest. — Obscene material is material which deals with sex in a manner appealing to the prurient interest, i.e., material having a tendency to excite lustful thoughts. Whisenhunt v. State, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Book or magazine must be judged as a whole to determine obscenity. — An arguably obscene book or magazine is going to be published or banned as a discrete unit, and must be judged as a "whole" to determine whether it is obscene. A magazine is a "whole" within the meaning of Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and it must be judged as such. Penthouse Int'l, Ltd. v. McAuliffe, 454 F. Supp. 289 (N.D. Ga. 1978).

In determining whether a work is obscene, the basic guidelines for the trier of facts are whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Penthouse Int'l, Ltd. v. McAuliffe, 454 F. Supp. 289 (N.D. Ga. 1978); Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

In considering whether an allegedly obscene work, taken as a whole, lacks serious literary, artistic, political, or scientific value, each magazine must be treated as a separate work that is to be taken as a whole. Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Warrant seeking videotapes. — Trial court properly suppressed videotapes that were seized from defendant's home during the execution of a search warrant, as the description in the warrant that the items sought were videotapes that were instruments used in the crimes of molesting and sexually exploiting children did not meet the particularity requirements of U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, especially in light of the fact that the videotapes involved activity protected by U.S. Const., amend. 1, where there was no evidence of any videotape activity involving the victim, and the warrant did not elaborate on what types of videotapes were to be seized, leaving that determination solely to the discretion of the officers, which amounted to an impermissible general warrant; circumstances may make an exact search warrant

description of instrumentalities a virtual impossibility and, in those circumstances, the searching officer can only be expected to describe the generic class of items sought, but a warrant authorizing the seizure of "videotapes" with nothing more does not pass constitutional muster. *State v. Kramer*, 260 Ga. App. 546, 580 S.E.2d 314 (2003).

Simulated sexual activity as obscene. — Fact that sexual activity depicted by a film is simulated does not prevent it from being obscene. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768 (1971), vacated on other grounds, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446, on remand, 231 Ga. 312, 201 S.E.2d 456 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

Former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80), was not violative of U.S. Const., amends. 1, 4, 5, 9, and 14 on the ground that the constitutional right to mere possession of obscene material necessarily implies the right to purchase such material and, hence, the right of others to distribute it. *Gornton v. State*, 227 Ga. 46, 178 S.E.2d 894 (1970).

Former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80) is constitutionally sound against attacks alleging amendment violations. *Brown v. State*, 156 Ga. App. 201, 274 S.E.2d 572 (1980).

Former Code 1933, § 26-2610 (see O.C.G.A. § 16-11-39) was not unconstitutional as a violation of U.S. Const., amends. 1 and 14. *Grantham v. State*, 151 Ga. App. 707, 261 S.E.2d 445, aff'd, 244 Ga. 775, 262 S.E.2d 777 (1979).

Statute prohibiting sale or display to minors deemed harmful. — O.C.G.A. §§ 16-12-102—16-12-104, which make it a criminal offense to sell to minors or to display in a place accessible to minors any material deemed "harmful to minors", produced only a slight burden on adults' access to protected material and fully comported with the first amendment. *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 941, 111 S. Ct. 2237, 114 L. Ed. 2d 479 (1991).

Statute prohibiting admission of persons between ages of 18 and 21 to sexually explicit performances. — O.C.G.A. § 16-12-103(b)(2), prohibiting the admission of persons between 18 and 21 years of age to premises where sexually explicit per-

formances are exhibited, is unconstitutional as an infringement on free speech rights without proof of a compelling state interest justifying the application of such restriction. *State v. Cafe Erotica, Inc.*, 269 Ga. 486, 500 S.E.2d 574 (1998).

Attack on constructive knowledge statute as violative of constitutional requirements for scienter not meritorious. — Constitutional attack upon former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80) that the constructive knowledge as found therein is a violation of the constitutional requirements as to scienter was not meritorious. *Showcase Cinemas, Inc. v. State*, 156 Ga. App. 225, 274 S.E.2d 578 (1980), cert. dismissed, 451 U.S. 934, 101 S. Ct. 2037, 68 L. Ed. 2d 343 (1981).

Statute prohibiting certain nude and sexual conduct on premises where alcoholic beverages are sold or dispensed for consumption on the premises infringes upon protected speech and must fall as an improper exercise of the state's police power. *Harris v. Entertainment Sys.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

Although a state may have a certain amount of its police power restored to it under the twenty-first amendment that would otherwise be limited under the first amendment, the expression involved in an establishment offering sexually-oriented communication where alcohol is served is still within the purview of the first amendment, and is still protected by Georgia's free expression guarantees. Because Georgia has no constitutional equivalent to the twenty-first amendment, the state's police power, though possibly not limited under the U.S. Constitution, is limited by Georgia's Constitution. *Harris v. Entertainment Sys.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

Authority to regulate alcoholic beverages where nudity is exhibited. — The provisions of Ga. Const. 1983, Art. III, Sec. VI, Para. VII, giving the state authority to regulate alcoholic beverages and to delegate authority to counties and municipalities to regulate the exhibition of nudity in connection with the sale or consumption of alcoholic beverages, did not violate the U.S. Const., amend. 1. *Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997), cert. denied, 522 U.S. 818, 118 S. Ct. 70, 139 L. Ed. 2d 31 (1997).

County ordinance prohibiting nudity in drinking establishments. — Construing an

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exception in a county ordinance prohibiting nude dancing on premises selling alcohol as requiring that a business be found to be "mainstream" before the exception applied, constituted an improper prior restraint on protected speech. *S.J.T., Inc. v. Richmond County*, 215 Ga. App. 73, 449 S.E.2d 868 (1994).

County ordinance regulating adult entertainment establishments. — Where there was no evidence that, before passing an ordinance to regulate adult entertainment establishments, the county commission considered and relied upon adverse secondary effects of sexually explicit businesses, the ordinance could not pass constitutional muster. *Chambers v. Peach County*, 266 Ga. 318, 467 S.E.2d 519 (1996).

City ordinance regulating adult entertainment establishments. — It is error to dismiss, for failure to state a claim, constitutional challenges to a city ordinance prohibiting private modeling sessions or other sexual displays in one-on-one sessions and close mingling between customers and employees of adult entertainment establishments. *Quetgles v. City of Columbus*, 264 Ga. 708, 450 S.E.2d 677 (1994), cert. denied, 514 U.S. 1083, 115 S. Ct. 1794, 131 L. Ed. 2d 722 (1995).

"Total nude dancing" municipal ordinance unconstitutional. — Municipal ordinance prohibiting total nude dancing and placing restrictions on partial nude dancing was an unconstitutional infringement on protected expression as overly broad and void for vagueness. *Pel Assoc., Inc. v. Joseph*, 262 Ga. 904, 427 S.E.2d 264 (1993).

City ordinance prohibiting nudity in drinking establishments. — Municipal ordinance's distinction between mainstream and non-mainstream performances was not constitutionally impermissible; the twenty-first amendment outweighs any first amendment interest in nude dancing. *Top Shelf, Inc. v. Mayor & Aldermen*, 840 F. Supp. 903 (S.D. Ga. 1993).

Constitutionality of a city ordinance prohibiting nudity in establishments serving alcoholic beverages was established where it was shown to further an important govern-

ment interest by the city's proof of reliance on specific studies showing a correlation between adult establishments and crime, and proof that the motivating factor for passage of the ordinance was crime prevention. *World Famous Dudley's Food & Spirits, Inc. v. City of College Park*, 265 Ga. 618, 458 S.E.2d 823 (1995).

A city ordinance adopted pursuant to the authority of Ga. Const. 1983, Art. III, Sec. VI, Para. VII, and providing that a liquor license would not be issued for locations where adult entertainment licenses were required did not violate constitutional free speech guarantees. *Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997), cert. denied, 522 U.S. 818, 118 S. Ct. 70, 139 L. Ed. 2d 31 (1997).

Restrictive adult entertainment ordinance constitutional. — County ordinance restricting adult entertainment establishments of-fering nude dancing and alcohol was sufficiently narrow in its descriptions of prohibited attire and conduct to pass constitutional challenges for "overbreadth". *S.J.T., Inc. v. Richmond County*, 263 Ga. 267, 430 S.E.2d 726 (1993).

Interlocutory restraint of obscene material constitutional. — Interlocutory judicial restraint of obscene material, with adequate provision being made that claims can proceed to final judgment at the earliest practicable date, is not violative of first amendment rights. *S.S.W. Corp. v. Slaton*, 231 Ga. 734, 204 S.E.2d 155 (1974).

Arrest and seizure of obscene materials without constitutionally sufficient warrant is unreasonable and the evidence is not admissible. *Wood v. State*, 144 Ga. App. 236, 240 S.E.2d 743 (1977), cert. denied, 439 U.S. 899, 99 S. Ct. 265, 58 L. Ed. 2d 247 (1978).

Proper limitation of injunction order against obscene film. — Where, after viewing a film, a superior court judge finds probable cause that the film is obscene and enjoins the defendant from exhibiting or showing the film in public within the jurisdiction of the court, the injunction feature of the order should be limited so as to provide that it shall continue only "until further order of the court." *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464, cert. denied, 404 U.S. 1003, 92 S. Ct. 560, 30 L. Ed. 2d 557 (1971).

Public officials may impose a prior restraint upon obscene motion pictures. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Unconstitutional system of prior restraint. — Unconstitutional system of prior restraint with respect to certain men's magazines was engaged in by local law enforcement authorities where such authorities did not obtain a warrant from a neutral and detached magistrate based upon a threshold determination of obscenity before making a series of arrests of dealers and distributors on charges that their dealings in such magazines violated obscenity laws. *Penthouse Int'l, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), *aff'd in part and rev'd in part* on other grounds, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Officer's activities constituted informal system of prior restraint. — Where officer's activities constituted a calculated scheme of warrantless arrests and harassing visits to retailers of publications, the substance of the procedures resulted in a "constructive seizure" of the magazines from the shelves of the retail establishments and created an informal system of prior restraint in violation of U.S. Const., *amends. 1 and 14*. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Reasons for requirement of prior adversary judicial hearing. — The requirement that there be a prior adversary judicial hearing on the question of obscenity before a seizure does not mean that courts, either federal or state, desire to protect obscenity. It does mean that the Supreme Court of the United States has decided that lest the nonobscene and the constitutionally protected be suppressed it is better that some judicial officer first after hearing competent evidence judicially determine that the challenged matter is obscene before its seizure. Nor is it any reflection upon law enforcement officers to suggest that a judicial officer trained in the process of weighing evidence and making decisions is better equipped than they to pass upon the important and sometimes difficult question of obscenity. This is so because the separation of legitimate from illegitimate speech calls for sensitive tools. *Carter v. Gautier*, 305 F. Supp.

1098 (M.D. Ga. 1969).

Judicial determination of obscenity necessary prior to seizure. — There must be some judicial determination of obscenity before a seizure or "constructive seizure" may occur. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Any seizure of allegedly obscene film should be preceded by state court finding of obscenity in an adversary judicial hearing. A prior adversary judicial hearing designed to focus searchingly on the question of obscenity must be held before the state may seize any motion picture film. *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969).

Seizure and confiscation of materials in advance of adversary hearing on issue of obscenity is now prohibited by U.S. Const., *amend. 1*. *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

Criminal prosecution or threat thereof prior to adversary determination of obscenity constitutes an unconstitutional burden upon the freedom of expression. *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

Any criminal prosecution prior to an adversary hearing without plaintiff having the subsequent opportunity to refrain from selling materials determined to be obscene is violative of the plaintiff's rights under U.S. Const., *amend. 1*. *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969).

Police officers may not indiscriminately seize as contraband items they consider obscene publications without adequate safeguards to assure constitutional protection to possible nonobscene material. The owner of the property must be afforded an adversary hearing as to obscenity before the warrant issues to seize the obscene material. *State v. Smalley*, 138 Ga. App. 747, 227 S.E.2d 488 (1976); *Lee v. City of Rome*, 866 F. Supp. 545 (N.D. Ga. 1994).

No prior restraint where warrantless arrest without seizure made. — There is no prior restraint of the freedom of expression by any unlawful state-initiated or state-enforced restraint where a warrantless arrest is made but no obscene materials are seized. *Wood v. State*, 144 Ga. App. 236, 240 S.E.2d 743 (1977), *cert. denied*, 439 U.S. 899, 99 S. Ct. 265, 58 L. Ed. 2d 247 (1978).

Defendant must have notice as to material sought to be seized. — The government-

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instituted proceeding must place the defendant exhibitor or seller on notice as to what film or publication the defendant has exhibited, sold, or held for sale that the government seeks to seize or suppress. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Seizure of film illegal absent prior hearing. — It is illegal for officers to seize a movie film unless and until there has been held a prior adversary judicial hearing upon the question of obscenity. *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969).

Presumptively protected material must be afforded greater procedural safeguards before seizure. — Retailer or distributor of presumptively protected material must be afforded greater procedural safeguards before seizure or "constructive seizure" may take place. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

When dealing in area of presumptively protected material, greater procedural safeguards must be afforded before occurrence of "constructive seizure"; this usually involves the requirement of a judicial determination of some type by a neutral, detached magistrate either before or immediately after the seizure of allegedly obscene material. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Neutral magistrate must find probable cause before warrant may issue. — The Constitution at a minimum apparently requires the imposition of a neutral, detached magistrate in the procedure to make an independent judicial determination of probable cause prior to issuing an arrest warrant or some other warrant authorizing the seizure of allegedly obscene material to be used as evidence. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Merely conclusory warrant prima facie insufficient. — A warrant was clearly insufficient on its face to show probable cause if it merely stated the bold conclusion of the affiant district attorney that the defendant exhibited two named films which were ob-

scene material. *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

Admission in evidence of motion picture seized under insufficient warrant erroneous. — Admission in evidence of allegedly obscene motion picture films seized under the authority of a warrant issued by a justice of the peace on a police officer's affidavit giving the films' titles, and stating that the officer had determined from personal observation of the films and of the theater's billboard that they were obscene, was erroneous as the issuance of the warrant without the justice of the peace's inquiry into the factual basis for the officer's conclusions fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

The proceeding must provide for a prompt and final judicial determination of the obscenity of the film or material. — Temporary restraints to preserve the status quo in this regard are authorized after an adversary hearing and when followed by a prompt final determination of obscenity. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Necessity for prompt judicial review in obscenity cases. — There is a necessity for early and definitive judicial review in matters involving rights under U.S. Const., amend. 1, particularly in obscenity cases. *United States v. One Carton Containing Quantity of Paperback Books*, 324 F. Supp. 957 (N.D. Ga. 1971).

A judge may act as a finder of fact in civil proceedings involving obscenity. *Penthouse Int'l, Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978).

Burden of proof of obscenity on government. — In each case, the government must institute judicial proceedings whereby the material or film is seized or suppressed, and it must further bear the burden of proof of the obscenity of the material or film. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Charge to jury proper and not burden-shifting. — In obscenity case, it was not error to charge that "every person of sound mind and discretion is presumed to intend the natural and probable consequences of their act, but that presumption may be rebutted." Such charge is not burden-shifting and does not contravene

Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), where the jury is also instructed such presumption may be rebutted. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Charge by court as to constructive knowledge of obscene material proper. — In trial of case involving distribution of obscene material, charge by court on constructive knowledge as contained in former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80) was not subject to complaint that it shifts burden of proof and relieved the state of proving every essential element of the crime in violation of U.S. Const., amends. 1 and 14, where the front cover of the magazine would put anyone on notice as to its contents. *Spry v. State*, 156 Ga. App. 74, 274 S.E.2d 2 (1980).

Court did not err in charging jury on constructive knowledge of obscene nature of contents of magazines which defendants possessed. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Jury may consider setting in which publication presented to public. — To assist the jury in determining the issue of obscenity, the jury may consider the setting in which the publication was presented to the public, and view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Jury may consider creation, promotion, and dissemination of materials. — To aid jury in its determination of whether materials are obscene, methods of their creation, promotion, or dissemination are relevant. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Finding of obscenity based on pandering. — The jury could find the material obscene if they found the material was pandered, that is, the distribution was a “commercial exploitation of erotica solely for the sake of their prurient appeal.” This phrase has come to be known as the “Ginzburg pandering instruction.” *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Sufficient evidence for triggering “Ginzburg pandering instruction.” — The government need not offer extensive evidence of the methods of production, editorial goals, if any, or methods of operation in

order for the evidence to be sufficient to trigger the “Ginzburg pandering instruction.” *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

No harmful error where “acceptance” used for “tolerance” in charge to jury. — Absent a clear indication from either the Georgia Supreme Court or the United States Supreme Court that the term “acceptance,” when charged to a jury in the context of instructions concerning the difficult legal concept of “community standards,” impermissibly expands the parameters of the standards announced in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) beyond the scope contemplated in the decisions of the United States Supreme Court, there is no harmful error predicated solely upon the use of the word “acceptance” in lieu of the word “tolerance” in obscenity prosecutions. *Brown v. State*, 156 Ga. App. 201, 274 S.E.2d 572 (1980).

Jury should see film before judging it obscene. — It is inconceivable how a jury could apply an obscenity test to a film without having seen it, i.e., make a sophisticated value judgment on the libidinous effect of a visual experience, without having had the experience. *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

Appellate courts must review independently the constitutional fact of obscenity. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Refrainment of federal court from interfering in state case by requiring release of unlawfully seized evidence. — Where allegedly obscene films and projectors are seized as evidence of a violation of former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80) and the case is pending in the state courts, the federal courts will not interfere with the pending case by requiring release of the contraband as an unconstitutional seizure. *G & E Bus. Servs., Inc. v. McAuliffe*, 480 F. Supp. 239 (N.D. Ga. 1979).

Municipality bound to issue business licenses and then suppress sale of obscene materials. — After applicants complied with all the requirements necessary for obtaining business licenses to sell materials that are protected by U.S. Const., amend. 1, a municipality must issue the licenses applied for and thereafter suppress the sale of porno-

Freedom of Speech and Press (Cont'd)**8. Obscenity (Cont'd)**

graphic materials through proper proceedings that will not damage the doctrine of prior restraint. *Mayor of Savannah v. TWA, Inc.*, 233 Ga. 885, 214 S.E.2d 370 (1975).

Obscene language directed at police officer. — Language such as calling a police officer a “[goddamn] liar” and telling the officer to “[fuck off]” is not protected by the first amendment. *Evans v. State*, 188 Ga. App. 347, 373 S.E.2d 52 (1988).

Publications obscene as matter of law and fact. — Where publications depict acts of natural and aberrational sexual conduct, including the participants’ genitals, solely for their own lewd and lascivious purpose and there is no discernible meaning other than pornographic, these magazines are obscene as a matter of law and fact. The magazines are not protected expression under U.S. Const., amends. 1 and 14. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Defendant’s films statutorily obscene and not protected by first amendment. — Where defendant’s films amounted to nothing more than a public portrayal of hard core sexual conduct, for its own sake, and for the ensuing commercial gain, the films were not protected by U.S. Const., amend. 1 and were obscene within the definition of former Code 1933, § 26-2101(b) (see O.C.G.A. § 16-12-80). *Clayton v. State*, 149 Ga. App. 374, 254 S.E.2d 495 (1979).

Motel owner’s interest in providing obscene films to guests at the motel in the privacy of their own rooms was not protected by the first amendment, notwithstanding the possibility that the people receiving the objects of the owner’s commerce might be shielded from state regulation in their use of the obscene materials. *Majmundar v. Veline*, 256 Ga. 8, 342 S.E.2d 682 (1986).

Videotape viewing not protected in child molestation prosecution. — In a prosecution for child molestation based on defendant’s forcing a minor to watch sexually explicit videotapes with the defendant, the defendant’s claimed first amendment right to possess and view the tapes was not a defense. *Stroeining v. State*, 226 Ga. App. 410, 486 S.E.2d 670 (1997).

Statute regulating profane words on bumper stickers unconstitutionally restricts

freedom of expression as guaranteed by the first and fourteenth amendments of the United States Constitution and by the Georgia Constitution. *Cunningham v. State*, 260 Ga. 827, 400 S.E.2d 916 (1991).

9. Political Activities

First amendment freedoms extend to political activities such as running for elective office; and state election practices must therefore serve legitimate state interest narrowly and fairly to avoid obstructing and diluting these fundamental liberties. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

A political speech would be subject to first amendment protections. *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982), cert. denied, 481 U.S. 1031, 107 S. Ct. 1961, 95 L. Ed. 2d 533 (1987).

Restricting political speech. — Restrictions upon political speech should not lightly be imposed, and the public should generally be able to speak on public issues free from fear of resulting criminal or civil penalties. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

Ordinance restricting political activities of public employees subject to overbreadth doctrine. — An ordinance restricting political activity, despite the fact that it applies to public employees, must be tested by traditional overbreadth principles. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

Public employee to be treated as member of public where activities unrelated to duties. — Where the political activities of a public employee are unrelated to the performance of the employee’s duties, the employee is to be treated, for purposes of adjudicating the employees rights under U.S. Const., amend. 1, as a member of the general public. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

City ordinance restricting political activities of firemen overbroad and vague. — A city ordinance proscribing city firemen from “contributing any money to any candidate, soliciting votes, or prominently identifying themselves in a political race with or against any candidate for office” is an overbroad and unconstitutionally vague restriction upon the firemen’s rights under U.S. Const., amend. 1, despite its application to public

employees. *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

Standing to challenge election ballot access. — In a suit filed by a number of political organizations and individuals seeking access to the general election ballot, the plaintiffs demonstrated “some actual or threatened injuries” and, thus, had standing, although they were unable to comply with the election law provisions restricting ballot access. There was, however, an insufficient factual record to carry out a constitutional analysis. Specifically, the state failed to introduce evidence to justify both the interests it asserted and the burdens it imposed on those seeking ballot access. *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985).

Right to appear on ballot. — The right to appear on a general election ballot is constitutionally favored, but less than fundamental. *Duke v. Cleland*, 783 F. Supp. 600 (N.D. Ga. 1992), *aff’d*, 954 F.2d 1526 (11th Cir. 1992).

Role of Secretary of State. — The Georgia Secretary of State’s preparation of the ballot for Georgia without making substantive determinations (which are left to the parties) is not state action. *Duke v. Cleland*, 783 F. Supp. 600 (N.D. Ga. 1992), *aff’d*, 954 F.2d 1526 (11th Cir. 1992).

Presidential candidate selection committee. — State statute creating the presidential candidate selection committee, by identifying three logically representative members of each party to serve on the committee, and by providing a check against arbitrariness by allowing only one member of the party on the committee to override the unanimous decision of the committee, is narrowly tailored to advance the interests of the state in conducting orderly and efficient elections and allowing the parties to choose their candidates, and is not in violation of the first and fourteenth amendments. *Duke v. Cleland*, 884 F. Supp. 511 (N.D. Ga. 1995), *aff’d*, 87 F.3d 1226 (11th Cir. 1996).

State may disenfranchise voters convicted of felony. — State may constitutionally disenfranchise otherwise qualified voters because they have been convicted of a felony since the state has a compelling interest in protecting the integrity of its electoral process. *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

Submitting package bond issue to voters. — In requesting the county board of com-

missioners to submit a package bond issue to the voters instead of three separate bond issues, the county board of education did not time and structure the school bond referendum with the intent of diluting minority voting strength and manipulating the minority vote in violation of U.S. Const., amends. 1, 13, 14, and 15. *Lucas v. Townsend*, 783 F. Supp. 605 (M.D. Ga.), *aff’d*, 967 F.2d 549 (11th Cir. 1992).

Exemption of political lobbying of government officials from antitrust laws. — Where the evidence was insufficient to support application of the coconspirator exception to the Noerr-Rennington doctrine, immunizing genuine political lobbying of government officials from antitrust laws, defendant chiropractic board of examiner’s appearances and other communications to the state chiropractic licensing boards qualified as protected petitioning activity and could not serve as the basis for antitrust liability. *Sherman College v. American Chiropractic Ass’n*, 654 F. Supp. 716 (N.D. Ga. 1986), *aff’d*, 813 F.2d 349 (11th Cir.), *cert. denied*, 484 U.S. 854, 108 S. Ct. 160, 98 L. Ed. 2d 114 (1987).

Determination of state’s delegation to national party convention. — A political party’s choice among the various ways of determining the makeup of a state’s delegation to the party’s national convention is protected by the Constitution. *Stuckey v. Richardson*, 188 Ga. App. 147, 372 S.E.2d 458, *cert. denied*, 188 Ga. App. 912, 372 S.E.2d 458 (1988).

Dispute concerning the internal affairs of the Georgia Republican Party was a nonjusticiable controversy which had to be resolved by the 1988 National Republican Convention rather than by the Georgia courts. *Stuckey v. Richardson*, 188 Ga. App. 147, 372 S.E.2d 458, *cert. denied*, 188 Ga. App. 912, 372 S.E.2d 458 (1988).

Campaign and opinion polling near polling place. — O.C.G.A. § 21-2-414(a), which restricts election campaign activities and public opinion polling within 250 feet (changed to 50 feet by the 1989 amendment) of a polling place, infringes upon the first amendment’s protection of political speech; however, a 25-foot limit on campaign and polling activities withstands constitutional scrutiny, and enforcement beyond that limit would be permanently enjoined. *NBC v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988).

Freedom of Speech and Press (Cont'd)
9. Political Activities (Cont'd)

Activities deemed "contributions to political campaign" protected from legislative chilling. — Activities in the exercise of first amendment freedoms may not be harshly channeled and controlled simply by being deemed "contributions to a political campaign," for these activities are constitutionally protected from significant legislative chilling. *Fortson v. Weeks*, 232 Ga. 474, 208 S.E.2d 68 (1974).

Soliciting signatures for a petition, particularly one designed to petition the government for municipal annexation or incorporation, is constitutionally protected speech and conduct. *Committee for Sandy Springs, Ga., Inc. v. Cleland*, 708 F. Supp. 1289 (N.D. Ga. 1988).

Limitations on expenditures for campaign constitutionally infirm. — Limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from the candidate's personal funds are constitutionally infirm. *State Ethics Comm'n v. McDowell*, 238 Ga. 141, 231 S.E.2d 734 (1977).

Statute regulating political contributions constitutional. — The state has a legitimate interest in preserving the integrity of the democratic process by forbidding a regulated entity from contributing to the holder of the office which oversees the regulation of the entity, or a candidate for that office; thus, O.C.G.A. § 21-5-30.1(b), which is narrowly tailored to meet this interest, is constitutional. *Gwinn v. State Ethics Comm'n*, 262 Ga. 855, 426 S.E.2d 890 (1993).

Distributing leaflets on state-owned property. — Because defendant had a right under the first amendment to engage in expressive activity (distributing leaflets encouraging older workers to unite in order to gain political power to oppose age discrimination) at the time and place involved here (in the parking lot of a department of labor facility), the defendant could not be convicted of criminal trespass because the state would not be able to prove that the defendant was present "without authority." This holding, however, must not be misunderstood to constitute a declaration that all

property owned by the State of Georgia is now totally open to all expressive activity by all persons, or even that all state-owned parking lots are available for that purpose. *Langton v. State*, 261 Ga. 878, 413 S.E.2d 708 (1992).

Statute making vote buying a felony not void for vagueness or overbreadth. — Former Code 1933, § 34-1933 (see O.C.G.A. § 21-2-570), providing that any person who buys or sells, or offers to buy or sell, or knowingly participates in the buying or selling of votes, at any primary or election, shall be guilty of a felony, was not void for vagueness or overbreadth. *King v. State*, 244 Ga. 536, 261 S.E.2d 333 (1979).

Bribery statute is not an impermissible restraint upon free speech under U.S. Const., amend. 1; the bribery statute, which places no limitation upon amounts of contributions or expenditures, restricts the purposes for which any benefit, reward or consideration may be offered or given to, or solicited or accepted by, a public officer. *State v. Agan*, 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 494 U.S. 1057, 110 S. Ct. 1526, 108 L. Ed. 2d 765 (1990).

County regulations requiring investigator for solicitor general to vacate post upon election as mayor unconstitutional. — Provisions of county personnel regulations which required the chief investigator for the solicitor general of the county: (1) to take a leave without pay from the investigator's employment with the county in order to file as a candidate or conduct an election campaign; and (2) to forfeit the investigator's employment with the county in order to serve as nonpartisan mayor of a town in another county, violated the investigator's first amendment rights and, therefore, were unconstitutional as applied to the investigator. *Segars v. Fulton County*, 644 F. Supp. 682 (N.D. Ga. 1986).

Termination of plaintiff's position as a parole review officer of the board of pardons and paroles after the plaintiff's election to county and state political party committees did not violate the plaintiff's constitutional rights of due process and equal protection or the plaintiff's constitutionally protected rights of political speech and association. *MacKenzie v. Snow*, 675 F. Supp. 1333 (N.D. Ga. 1987).

10. Prisoners

State may not curtail prisoner's rights absent compelling interest. — If there is no question of security or discipline involved, and no other conflicting and compelling state interest, the state may not curtail a prisoner's rights under U.S. Const., amend. 1. *Neal v. Georgia*, 469 F.2d 446 (5th Cir. 1972).

Balancing of competing interests. — As to rights of prisoners under U.S. Const., amend. 1, the Supreme Court has apparently discarded the use of such rigid standards as "rational nexus" and "compelling state interest," and has substituted in their place a more flexible balancing of the competing interests in each case. *Hamilton v. Saxbe*, 428 F. Supp. 1101 (N.D. Ga. 1976), aff'd, 551 F.2d 1056 (5th Cir. 1977).

Prisoner retains only those rights consistent with the prisoner's status. — A federal prisoner is not stripped of the prisoner's constitutional rights when the prisoner enters the prison gate; but a prisoner only retains those rights under U.S. Const., amend. 1 that are not inconsistent with the prisoner's status as a prisoner or with legitimate penological objectives of the corrections system. *Hamilton v. Saxbe*, 428 F. Supp. 1101 (N.D. Ga. 1976), aff'd, 551 F.2d 1056 (5th Cir. 1977).

Prisoners maintain limited first amendment rights. — Although incarcerated, a prisoner was not barred from asserting claims of first amendment violations when prison officials refused to deliver a magazine to the inmate. However, where the magazine contained inflammatory material which could have lead to disorder and violence within the prison, the prison officials did not violate the inmate's constitutional rights by denying delivery of a single magazine to ensure the safety of officials and inmates. *Olson v. Loy*, 951 F. Supp. 225 (S.D. Ga. 1996).

Balancing of interests where prison regulations challenged. — Where prison regulations affecting rights under the first amendment of inmates are challenged, the courts will examine the interests sought to be protected by the challenged regulations and determine whether these objectives are, in fact, furthered by the regulations in a means which does not unduly interfere with constitutional rights. *Hamilton v. Saxbe*, 428 F.

Supp. 1101 (N.D. Ga. 1976), aff'd, 551 F.2d 1056 (5th Cir. 1977).

Correspondence and visitation rights of prisoners protected in some degree by the first amendment. *Hamilton v. Saxbe*, 428 F. Supp. 1101 (N.D. Ga. 1976), aff'd, 551 F.2d 1056 (5th Cir. 1977).

Regulations affecting either correspondence or visitation rights of prisoners must be tailored to achieve substantial governmental interests. However, governmental interests need not be as compelling when the form of expression regulated is just one of a series of alternative forms of communication, and the means used to achieve governmental interests need not be as tailored when interests under the first amendment are less substantial, but where the institutional concern for security and rehabilitation becomes more pressing. *Hamilton v. Saxbe*, 428 F. Supp. 1101 (N.D. Ga. 1976), aff'd, 551 F.2d 1056 (5th Cir. 1977).

Prisoners have no absolute correspondence or visitation rights with respect to friends, pen pals, fiancées, and even women who have borne the children of prisoners. When an inmate seeks to have his girl friend or paramour visit him, prison officials are entitled to look more closely at the relationship than if the visitor were a wife and make an independent judgment as to the appropriateness of the visit. This, however, does not give prison officials free rein to grant and deny visitation privileges at will. *Hamilton v. Saxbe*, 428 F. Supp. 1101 (N.D. Ga. 1976), aff'd, 551 F.2d 1056 (5th Cir. 1977).

Inmates' right to visitation. — Inmates do not have an absolute right to visitation, such privileges being subject to the prison authorities' discretion provided that the visitation policies meet legitimate penological objectives; concerns that former prison employees visiting inmates may pose a threat to security because of their knowledge of security procedures constitutes a legitimate penological objective. *Caraballo-Sandoval v. Honsted*, 35 F.3d 521 (11th Cir. 1994).

Censorship of prisoner mail is allowed if: (1) the regulation or practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression; and (2) the limitation of rights is no greater than generally necessary to protect one or more legitimate govern-

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10. Prisoners (Cont'd)

mental interests. Legitimate governmental interests include the security and order of penal institutions and the rehabilitation of inmates. *Blue v. Hogan*, 553 F.2d 960 (5th Cir. 1977); *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Parameters of censorship of prisoner's reading material. — Censorship of prisoner's reading material is allowed only when the government shows that the censorship furthers an important or substantial governmental interest unrelated to the suppression of expression and that the censorship is no greater a limitation on the prisoner's rights than generally necessary to protect one or more legitimate governmental interests. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Censorship of letters requires minimum procedural safeguards. — The decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards, since the interest of prisoners and their correspondents in uncensored communications by letter, grounded as it is in U.S. Const., amend. 1, is plainly a "liberty" interest within the meaning of U.S. Const., amend. 14. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Constitutionally sufficient reasons for withholding letters. — Unless a letter contains a threat to prison order and security or is in direct violation of law, there is usually no constitutionally sufficient reason to stop it. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Inspection and perusal of outgoing letters. — Outgoing letters from prisoners may be inspected and, when deemed necessary, read to determine whether they contain escape plots, violations of law, or threats to the institution. Letters containing simply profane or obscene language, however, are not the proper subject of direct censorship through either halting the letter or suspending the mailing privilege. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Bodily privacy. — A prisoner retains a constitutional right to bodily privacy and the district court improperly dismissed a class action for injunctive relief based on alleged violations of this right involving the supervi-

sion of male personal hygiene by female correctional officers. *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993).

Newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public. *Jersawitz v. Hanberry*, 783 F.2d 1532 (11th Cir.), cert. denied, 479 U.S. 883, 107 S. Ct. 272, 93 L. Ed. 2d 249 (1986).

Retaliatory searches unconstitutional. — Search, confiscation, or destruction of an inmate's material in retaliation for the inmate's filing lawsuits and administrative grievances violates both the inmate's right of access to the courts and the inmate's rights under U.S. Const., amend. 1. *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986).

Retaliation for exercise of right prohibited. — The first amendment prohibits state officials from retaliating against prisoners for exercising the right of free speech. *Thomas v. Evans*, 880 F.2d 1235 (11th Cir. 1989), cert. denied, 498 U.S. 901, 111 S. Ct. 261, 112 L. Ed. 2d 218 (1990).

To state a first amendment claim for retaliation, a prisoner need not allege violation of a separate and distinct constitutional right. The gist of a retaliation claim is that a prisoner is penalized for exercising the right of free speech. The penalty need not rise to the level of a separate constitutional violation. *Thomas v. Evans*, 880 F.2d 1235 (11th Cir. 1989), cert. denied, 498 U.S. 901, 111 S. Ct. 261, 112 L. Ed. 2d 218 (1990).

Destruction of inmate's pleadings and legal materials constitutes denial of access to courts. — An allegation that prison officials seized a prisoner's pleadings and law book and destroyed other legal papers clearly states a claim of denial of access to the courts. *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986).

Access to courts may not be denied. — The first amendment prohibits state officials from denying a prisoner's legal right of access to the courts. *Thomas v. Evans*, 880 F.2d 1235 (11th Cir. 1989), cert. denied, 498 U.S. 901, 111 S. Ct. 261, 112 L. Ed. 2d 218 (1990).

The Constitution forbids courts to abridge inmates' rights to have meaningful access to and communications with the courts, and a blanket declaration that all filings would be "null and void by operation of law" was impermissible. *Hooper v. Harris*, 236 Ga.

App. 651, 512 S.E.2d 312 (1999).

Prison inmate's right of access to courts.

— It is state's option to choose method by which to implement prison inmate's right of access to courts; a law library is only one alternative which fills this responsibility. *Bell v. Hopper*, 511 F. Supp. 452 (S.D. Ga. 1981).

Standing. — An inmate does not have standing to assert the first amendment rights of prison guards relative to a prison policy prohibiting its employees from communicating directly with the parole board on behalf of prisoners. *Harris v. Evans*, 20 F.3d 1118 (11th Cir.), cert. denied, 513 U.S. 1045, 115 S. Ct. 641, 130 L. Ed. 2d 546 (1994).

11. Schools and Universities

First amendment does not prevent a board of education from limiting the use of school facilities solely to educational purposes. If, however, the schools choose to open their doors to expression by outside groups and individuals, they must do so under principles that are consistent with U.S. Const., amend. 1. *Searcey v. Crim*, 642 F. Supp. 313 (N.D. Ga. 1986), modified, 815 F.2d 1389 (11th Cir. 1987). See *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989).

Peace activists entitled to same access as military recruiters. — Denying "peace activists" an opportunity equal to the one afforded military recruiters to place their literature on school bulletin boards and in the offices of school guidance counselors and to participate in school "Career Days" and "Youth Motivation Days" violated their rights under U.S. Const., amend. 1. *Searcey v. Crim*, 642 F. Supp. 313 (N.D. Ga. 1986), modified, 815 F.2d 1389 (11th Cir. 1987). See *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989).

Oath requiring professors to refrain from certain teachings unconstitutional. — Language of an oath "to refrain from directly or indirectly subscribing to or teaching any theory of government or economics or social relations which is inconsistent with the fundamental principles of patriotism and high ideals of Americanism" provides no ascertainable standard of conduct. It is vague and uncertain in that there is no definition of fundamental principles of patriotism or high ideals of Americanism and one would necessarily teach at one's peril in the areas of government, economics, or so-

cial relations. This language is, thus, unconstitutional and void under U.S. Const., amends. 1 and 14. It constitutes a denial of due process under U.S. Const., amend. 14 in light of the penal provision, and a prohibited inhibition on the first amendment's right to freedom of speech, which right is protected from state invasion by U.S. Const., amend. 14. *Georgia Conference of Am. Ass'n of Univ. Professors v. Board of Regents of Univ. Sys.*, 246 F. Supp. 553 (N.D. Ga. 1965).

Teacher's right under the first amendment. — The first amendment gives a teacher the right to speak the teacher's mind; but it does not give the teacher the right to disrupt a school, or to choose its principals, or to sabotage its programs. *Glover v. Daniel*, 318 F. Supp. 1070 (N.D. Ga. 1969), aff'd, 434 F.2d 617 (5th Cir. 1970).

Balancing of teacher's and state's interests. — While teachers unquestionably enjoy the right under U.S. Const., amend. 1 to comment upon matters of public concern and to offer constructive criticism of school policy under the umbrella of academic freedom, the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees must be balanced. *Cotten v. Board of Regents of Univ. Sys.*, 395 F. Supp. 388 (S.D. Ga. 1974), aff'd, 515 F.2d 1098 (5th Cir. 1975).

Rights of discharged or nonrenewed teacher asserting constitutionally "protected" right. — A discharged or nonrenewed teacher asserting a constitutionally "protected" right was entitled to a de novo hearing in federal court regardless of whether that teacher resorted to an administrative hearing or whether such hearing purported to decide the issue, and the teacher should have been allowed to present evidence in the court that other teachers had engaged in similar "improper" conduct, such as that which allegedly justifiably caused the teacher's discharge, known to school personnel and the board, and those teachers were not disciplined, raising an inference that the teacher in question was disciplined for reasons other than "improper" conduct. *Holley v. Seminole County Sch. Dist.*, 755 F.2d 1492 (11th Cir. 1985).

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11. Schools and Universities (Cont'd)

Necessity of punitive damages determination. — Where plaintiff-professor contended that the professor was deprived of employment and employment benefits because of the exercise of the professor's freedom of speech rights, in addition to finding a violation of the professor's free speech rights, the jury also had to determine whether the conduct of one or more of the defendants was so egregious as to warrant the award of punitive damages in some amount. *Kemp v. Ervin*, 651 F. Supp. 495 (N.D. Ga. 1986).

Minors possess first amendment rights. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).

Regulation of student's protected expression. — Student's protected expression may only be reasonably regulated in carefully restricted circumstances at school in order to avoid any material disruption of the classroom, any substantial disorder of school work, and any invasion of the rights of others. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980).

Under U.S. Const., amend. 1: (1) expression by high school students can be prohibited altogether if it materially and substantially interferes with school activities, or with the rights of other students or teachers, or if the school administration can demonstrate reasonable cause to believe that the expression would engender such material and substantial interference; (2) expression by high school students cannot be prohibited solely because other students, teachers, administrators, or parents may disagree with its content; (3) efforts at expression by high school students may be subjected to prior screening under clear and reasonable regulations; and (4) expression by high school students may be limited in manner, place, or time by means of reasonable and equally applied regulations. *Reineke v. Cobb County Sch. Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980).

Requiring a student's public apology. — Demand that a student make an apology to a teacher and class for "off-color" remarks the student made in the classroom did not violate the student's first amendment rights. *Kicklighter v. Evans County Sch. Dist.*, 968 F.

Supp. 712 (S.D. Ga. 1997), aff'd, 140 F.3d 1043 (11th Cir. 1998).

Comment on matters of public concern by faculty on questionnaire is protected speech.

— Where a questionnaire solicits the views of faculty on a broad range of issues, such as the degree of mutual confidence existing between administration and faculty, the extent to which good teaching and good research are rewarded, the extent to which faculty opinions are listened to and respected, the effectiveness of the administration in dealing with grievances, the accuracy and completeness of information used to evaluate teachers, and other matters that are of public importance and concern, comment upon them is protected speech. *Lindsey v. Board of Regents*, 607 F.2d 672 (5th Cir. 1979).

Teachers' comments on allocation of school funds protected speech. — The question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the school board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question, free and open debate is vital to informed decision making by the electorate; teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent; accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. *Lindsey v. Board of Regents*, 607 F.2d 672 (5th Cir. 1979).

A confidentiality policy would constitute a defense to a complaint under U.S. Const., amend. 1 only if it: (1) factually existed; (2) was consistent with other state statutes and regulations; (3) was not vague; (4) did not proscribe protected speech overbroadly; (5) was communicated to the appellant, and (6) was not void as a matter of public policy in its instant application. *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), cert. denied, 452 U.S. 926, 101 S. Ct. 3063, 69 L. Ed. 2d 428 (1981).

Restraining of student publication prior to disruption. — School administrators need not await occurrence of actual disruption before exercising reasonable restraint over a student publication, but mere undifferenti-

ated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. *Reineke v. Cobb County Sch. Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980).

Forms of censorship based on power of purse cannot be imposed on student publication. — Censorship of constitutionally protected expression of student publication at state-supported institutions cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse. *Reineke v. Cobb County Sch. Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980).

School officials must show interference with school activities by prohibited expression. — The primary issue is whether school officials can demonstrate reasonable cause to believe that the prohibited expression would have engendered material and substantial interference with school activities or with the rights of others. *Reineke v. Cobb County Sch. Dist.*, 484 F. Supp. 1252 (N.D. Ga. 1980).

Required showing to justify prohibition of expression of unpopular opinion. — In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972).

Evidence relevant in assessing professor's termination. — Where plaintiff-professor contended that the professor had been deprived of employment and employment benefits because the professor exercised the professor's freedom of speech rights by speaking out against preferential treatment given university athletes, principles of relevancy did not preclude the professor from proving the truth of the assertions that revenue-producing athletes (scholarship athletes) and other influential students received preferential academic treatment at the university. Other purposes for which this evidence would have been relevant included proof of motive and state of mind of the defendants for the purpose of determining

the level and nature of their misconduct, evidence critical to assessment of the credibility of both defendants, and evidence that the stated reasons for the job action were pretextual. *Kemp v. Ervin*, 651 F. Supp. 495 (N.D. Ga. 1986).

"Career Day" restrictions held to violate first amendment. — School board regulations barring "Career Day" participants from criticizing the opportunities provided by other participants, through providing students with valid and informative disadvantages of that career, violated the first amendment right to freedom of speech. *Searcey v. Crim*, 681 F. Supp. 821 (N.D. Ga.), *aff'd* as modified sub nom. *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989).

12. Commercial Speech

"Commercial speech" construed. — "Commercial speech" is speech which does nothing more than propose commercial transaction. State interest cannot negate the protections afforded speech, even commercial in content, by U.S. Const., amend. 1. *Daugherty v. City of E. Point*, 447 F. Supp. 290 (N.D. Ga. 1978).

Federal regulation of commercial speech. — Federal government may in some circumstances prohibit purely commercial speech made in connection with conduct which Congress can permissibly regulate or prohibit. While speech made in a political or informational context deserves the highest degree of protection from governmental restraint, government may regulate speech made incidental to a purely commercial activity. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 49 (1973).

No protection afforded commercial advertising. — While freedom of communicating information and disseminating opinion enjoys the fullest protection of the first amendment, the Constitution imposes no such restraint on government as respects purely commercial advertising. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Commercial speech is unprotected by the first amendment. *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. de-*

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nied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974).

Protection of commercial speech. — First amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it seeks to implement a substantial governmental interest, directly advances that interest, and reaches no farther than necessary to accomplish the given objective. *H & H Operations, Inc. v. City of Peachtree City*, 248 Ga. 500, 283 S.E.2d 867 (1981), cert. denied, 456 U.S. 961, 102 S. Ct. 2037, 72 L. Ed. 2d 484 (1982).

There is no substantial governmental interest in permitting commercial signs yet prohibiting posting of prices. Numbers (prices) are not esthetically inferior to letters of the alphabet forming words (name of the business and products available). *H & H Operations, Inc. v. City of Peachtree City*, 248 Ga. 500, 283 S.E.2d 867 (1981), cert. denied, 456 U.S. 961, 102 S. Ct. 2037, 72 L. Ed. 2d 484 (1982).

Court enforcement of agreement limiting speech rights. — Where two disputing parties in positions of equal bargaining power agree, through a settlement stipulation, to restrict, in a limited degree, their first amendment rights on commercial speech, the court enforcement of that agreement is not governmental action for first amendment purposes. *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940 (11th Cir. 1995).

Commercial solicitation. — O.C.G.A. § 33-24-53, by criminalizing requests for public records for commercial solicitation purposes, implicates U.S. Const., amend. 1. *Statewide Detective Agency v. Miller*, 115 F.3d 904 (11th Cir. 1997).

Constitutionality of O.C.G.A. § 16-8-60(b). — Trial court did not err in finding that O.C.G.A. § 16-8-60(b) was not unconstitutionally vague nor overbroad and was not preempted by federal law, as: (1) the statute aimed to protect the public and entertainment industry from piracy and bootlegging, a legitimate governmental interest unrelated to free speech concerns; (2) it did not impinge upon pure speech, but, at most,

regulated a combination of commercial conduct and speech; (3) its deterrent effect on legitimate expression was minimal; and (4) it plainly prohibited the sale, or possession for the purposes of sale, of an article that did not prominently display the name and address of the individual (or entity) who transferred the sounds to the article. *Briggs v. State*, 281 Ga. 329, 638 S.E.2d 292 (2006).

Commercial exploitation of film is private, not public, interest. — Although expression by means of motion pictures is included within the free expression or free press guarantee of the first and fourteenth amendments, the right of commercial exploitation of a film does not represent a great public interest, but amounts to a private right. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Business license tax. — Where the purpose of a business license tax was for the purpose of revenue raising and not for the control of solicitation, it was not in violation of freedom of speech and association. *Miles v. City Council*, 551 F. Supp. 349 (S.D. Ga. 1982), aff'd, 710 F.2d 1542 (11th Cir. 1983).

City sign ordinance that prohibited the display of noncommercial messages at locations where commercial messages were permitted was unconstitutional. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 467 S.E.2d 875 (1996).

Ordinance that restricted signs in residential zoning districts to on-premise signs and certain temporary or special signs, allowing temporary political signs, but not providing for permanent signs expressing the political, religious, or other noncommercial views of residents, was unconstitutional. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 467 S.E.2d 875 (1996).

City ordinance which prohibits billboards, defined as offsite advertising signs, does not impermissibly restrict commercial speech. *Southlake Prop. Assoc. v. City of Morrow*, 112 F.3d 1114 (11th Cir. 1997).

Misleading or false advertising subject to restraint. — While commercial speech is entitled to some protection, deceptive or misleading advertising disserves the aims of the first amendment. Misleading advertising

is subject to restraint, and false advertising may be prohibited entirely. *Energy Four, Inc. v. Dornier Medical Sys.*, 765 F. Supp. 724 (N.D. Ga. 1991).

Advertising restrictions. — City bus company's written advertising policy that restricted access to its advertising space to those ads which do not support or oppose any position in regard to a matter of public controversy was void for vagueness and overbreadth. *National Abortion Fed'n v. Metropolitan Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320 (N.D. Ga. 2000).

Commercial use of law enforcement records. — Former O.C.G.A. § 35-1-9, prohibiting the inspection of law enforcement records for the purpose of using information contained in the records for commercial solicitation, violated first amendment commercial speech rights. *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994).

Alcohol advertisements. — Trial court erred in upholding a city's decision to suspend a liquor license for 30 days for violations of the Jasper, Ga., Alcoholic Beverages Ordinance, which banned alcohol advertisements, because the ordinance was a blanket prohibition on commercial speech that violated the first amendment as the city did not show that the ordinance advanced the substantial governmental interest of temperance and that the ordinance was no more restrictive than necessary. *Folsom v. City of Jasper*, 279 Ga. 260, 612 S.E.2d 287 (2005).

Jasper, Ga., Alcoholic Beverages Ordinance, which authorized the city council to suspend or revoke an alcohol license if the council determined to its own satisfaction that the licensee was guilty of any violation of federal or state law, was facially overbroad as it did not limit the types of violations that would justify revocation of a license to those violations related to the regulatory purpose of the license; however, the ordinance was not overbroad as applied to a cafe owner as the alleged violation of the ordinance was the battery of a patron by a cafe employee and the risk of unruly patrons, and an overzealous response to that unruliness by employees was one of the reasons for the regulation of the sale and consumption of alcohol. *Folsom v. City of Jasper*, 279 Ga. 260, 612 S.E.2d 287 (2005).

Sale of alcohol in erotic dance establishments. — City ordinance prohibiting the

sale of alcohol at an erotic dance establishment was constitutional. The adult entertainment establishment ordinance was narrowly drawn to promote the city's interest in combating the secondary effects of adult entertainment establishments. *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993).

A legislative restriction on adult entertainment must satisfy a tripartite test in order to comport with the free speech guarantees of the federal and state constitutions. The constitutionality of a law regulating adult entertainment will be upheld only (1) if it furthers an important government interest; (2) if that government interest is unrelated to the suppression of speech; and (3) if the incidental restriction of speech is no greater than is essential to the furtherance of that government interest. *Discotheque, Inc. v. City Council*, 264 Ga. 623, 449 S.E.2d 608 (1994).

Where the stated purpose of a municipal ordinance regulating adult entertainment on premises licensed to sell alcoholic beverages was to reduce criminal activity and deterioration of neighborhoods as pernicious secondary effects of adult entertainment establishments, the city failed to show there was no genuine issue of material fact as to these issues. *Discotheque, Inc. v. City Council*, 264 Ga. 623, 449 S.E.2d 608 (1994).

County ordinance prohibiting nude dancing at establishments that serve alcohol did not violate first amendment rights of operators of the establishments. *Wise Enters. v. Unified Gov't of Athens-Clarke County*, 217 F.3d 1360 (11th Cir. 2000).

Restricting off-site advertising of erotic dance establishments. — A statute proscribing any form of off-site advertising for commercial establishments featuring nude dancing impedes the free flow of information and far exceeds the state's legitimate interest in preventing hazards to the traveling public, and thus, impermissibly infringes the right of free speech. *State v. Cafe Erotica, Inc.*, 270 Ga. 97, 507 S.E.2d 732 (1998).

13. Electronic Communication

Internet users had standing to bring an action for declaratory and injunctive relief challenging the constitutionality of O.C.G.A. § 16-9-93.1, prohibiting internet transmissions which falsely identify the sender or use trade names or logos without legal authority

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because a credible threat of prosecution existed. *American Civil Liberties Union v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

Internet users challenging the constitutionality of O.C.G.A. § 16-9-93.1, prohibiting internet transmissions which falsely identify the sender or use trade names or logos without legal authority, were entitled to a preliminary injunction because they were likely to show that the section imposed content-based restrictions not narrowly tailored to achieve a compelling state interest, it was vague and overbroad, there was a substantial threat of irreparable injury, and the balance of hardships weighed heavily in plaintiffs' favor. *American Civil Liberties Union v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

14. Criminal Matters

Burden on government to protect defendant from unfair news coverage. — Although the right of a free press embodied in the first amendment is guaranteed, the individual's right to a fair trial guaranteed by the fifth amendment's due process clause and in the other individual provisions of the bill of rights is absolute, and where prejudicial news coverage is present, the burden is on the government to protect the rights of the defendant. While government has no authority to restrain the reporting of the press, nor to dictate what it does or does not report, a person accused of crime has the right to expect that the government of the accused and its judicial officers to protect the accused from massive and prejudicial publicity surrounding the case. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Access to criminal proceedings. — Where a third party seeks access to material disclosed during discovery and covered by a protective order, the constitutional right of access requires a showing of good cause, and not a showing of a compelling interest, by the party seeking protection. *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001).

No public access to search warrants. — No first amendment right of public access to search warrants, and affidavits filed in support of the warrants, exists. This is so even after the search warrants have been executed, to the extent that secrecy of the warrant materials is necessary to preserve the grand jury's processes inviolate. In re *Macon Tel. Publishing Co.*, 900 F. Supp. 489 (M.D. Ga. 1995).

Search warrant affidavits. — There is no first amendment right of access to search warrant affidavits. In re *Four Search Warrants*, 945 F. Supp. 1563 (N.D. Ga. 1996).

Restraining order prohibiting publication of certain information on criminal suspect impermissible. — A restraining order which prohibited a newspaper from publishing any information on an alleged suspect in a murder case which was obtained through discovery without the newspaper first following a procedure of notifying the court of its intent to disclose any information and obtaining the permission of the court to disclose in the event an objection was filed constituted an unwarranted restraint upon the newspaper's liberty of speech and of the press. *Georgia Gazette Publishing Co. v. Ramsey*, 248 Ga. 528, 284 S.E.2d 386 (1981).

Disclosure of identity of sexual assault victim. — By passing the rape shield statute, O.C.G.A. § 24-2-3, the legislature has stated as a matter of public policy that, where the crime involved is rape, sexual assault or attempted sexual assault, the legitimate public interest in the identity of the victim does not outweigh the victim's privacy interest. *Macon Tel. Publishing Co. v. Tatum*, 208 Ga. App. 111, 430 S.E.2d 18 (1993).

Rape victim confidentiality statute. — The victim of a sexual assault could not recover damages from a newspaper for invasion of privacy since, when she shot and killed the perpetrator of the assault, she became the object of legitimate public interest and the newspaper had the right under the United States and Georgia Constitutions to accurately report facts regarding the incident, including her name. *Macon Tel. Publishing Co. v. Tatum*, 263 Ga. 677, 436 S.E.2d 655 (1993).

Georgia "Anti-Mask Act", O.C.G.A. § 16-11-38, which proscribes intimidating or threatening mask-wearing behavior, does not violate the constitutional rights of freedom

of speech, freedom of association, and equal protection of the law. *State v. Miller*, 260 Ga. 669, 398 S.E.2d 547 (1990).

Criminal prosecution to penalize exercise of first amendment rights. — While the institution of criminal prosecution to penalize the exercise of first amendment rights is actionable under 42 U.S.C. § 1983, plaintiffs must demonstrate some evidence of retaliatory motive or bad faith in order to succeed in such an action. *Howell v. Roberts*, 656 F. Supp. 1150 (N.D. Ga. 1987).

Bribery statute constitutional. — Bribery statute (O.C.G.A. § 16-10-2) does not violate the first amendment on its face since it includes corrupt intent as an element. Therefore, the section was not unconstitutional as applied to defendant's offer of campaign contributions to influence the decision of county commissioners' regarding the defendant's zoning variance request. *Agan v. Vaughn*, 119 F.3d 1538 (11th Cir. 1997), cert. denied, 523 U.S. 1023, 118 S. Ct. 1305, 140 L. Ed. 2d 470 (1998).

Traffic regulations must be observed despite exercising of rights. — Mere fact that defendant is exercising the defendant's rights under U.S. Const., amend. 1 does not shield the defendant from observance of normal traffic regulations, such as under former Code 1933, § 68A-507(b) (see O.C.G.A. § 40-6-98). *Zeiger v. State*, 140 Ga. App. 610, 231 S.E.2d 494 (1976).

Loitering ordinances. — Local ordinance providing that "No person shall remain or loiter upon any premises to which the public has access, including but not limited to such places as business and shopping area parking lots, where the person's presence upon such premises is unrelated to the normal activity, use or business for which such premises are made available to the public" violates U.S. Const., amend. 1 and U.S. Const., amend. 14. *Bullock v. City of Dallas*, 248 Ga. 164, 281 S.E.2d 613 (1981).

Freedom of Association

Protection against disclosure of associational relationship. — Undeniably, U.S. Const., amend. 1 in some circumstances protects an individual from being compelled to disclose the individual's associational relationships; however, the protections of U.S. Const., amend. 1, unlike a proper claim of the privilege against self-incrimination un-

der U.S. Const., amend. 5, do not afford a witness the right to resist inquiry in all circumstances. *Braden v. United States*, 272 F.2d 653 (5th Cir. 1959), aff'd, 365 U.S. 431, 81 S. Ct. 584, 5 L. Ed. 2d 653 (1961).

Barring of governmental interrogation. — When first amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. *Braden v. United States*, 272 F.2d 653 (5th Cir. 1959), aff'd, 365 U.S. 431, 81 S. Ct. 584, 5 L. Ed. 2d 653 (1961).

Primary limitation on freedom to assemble. — The freedom to assemble, a right zealously guarded by the courts, and properly so, finds its primary limitation in the words of the first amendment "to peacefully assemble." *Durham v. State*, 219 Ga. 830, 136 S.E.2d 322 (1964).

Nature of freedom of association. — The freedom of association which the Supreme Court has recognized as protected by the first amendment is a right to freedom of expression through associational affiliations. *Eberhart v. Massell*, 311 F. Supp. 654 (N.D. Ga. 1970).

Right of association is derivative of first amendment free speech rights. — The fact that revealing names of members of a grand jury may diminish their desire to associate with the organization has no constitutional significance unless protected free speech interests are implicated. Thus, on a motion to quash a grand jury subpoena duces tecum, the motion will be quashed where the potential impact on free speech rights is only speculative. *In re Roberts*, 650 F. Supp. 159 (N.D. Ga. 1987), aff'd, 842 F.2d 1229 (11th Cir. 1988).

Elements of right of association. — The elements of which the right of free association is composed include as an obvious minimum the right to organize and join any association for the advancement of beliefs and ideas, regardless of the nature of such beliefs and ideas, or whether they pertain to religious, political, economic, social, civil, cultural, or other matters. The right of association also includes the right to adhere to an organization without public identification, and the right not to be compelled to join any organization, but the full enjoyment of these rights is limited to organizations for

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lawful purposes which are carrying on their activities in a lawful manner. Further, the right of association, like the right of expression in general may not be used as a mere excuse for criminal conduct. *Eberhart v. Massell*, 311 F. Supp. 654 (N.D. Ga. 1970).

Right of association is protected by the first amendment. *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971).

In addition to protection of "pure" and "symbolic" speech, the first amendment protects the rights of assembly and association. *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972).

U.S. Const., amend. 1 has the effect of creating a constitutional right of free association. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

Only natural persons can maintain an action for interference with the right of association. *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D. Ga. 1983), *aff'd*, 746 F.2d 761 (11th Cir. 1984).

Exclusion from primary ballot. — The Republican Party enjoys a constitutionally protected right of freedom of association, which encompasses its decision to exclude a candidate for the Republican nomination for President of the United States as a candidate on the Republican Primary ballot because the candidate's political beliefs are inconsistent with those of the Republican Party. *Duke v. Cleland*, 954 F.2d 1526 (11th Cir.), *cert. denied*, 502 U.S. 1086, 112 S. Ct. 1152, 117 L. Ed. 2d 279 (1992).

First amendment to United States Constitution protects right to union organization and activity. *Hodges v. Tomberlin*, 510 F. Supp. 1287 (S.D. Ga. 1981).

Denial of use of campus facilities. — Primary impediment to free association flowing from nonrecognition of student organization is denial of use of campus facilities for meetings and other appropriate purposes. *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972).

The three circumstances under which university facilities may be denied to registered campus organization are: refusal to abide by reasonable regulations; a demonstrated danger of violence or disruption at the meeting; and that the meeting itself would violate either state or federal law. *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972).

Invoking of any justification for denial of university facilities to campus organization amounts to prior restraint on first amendment freedoms and places a heavy burden on the university to justify denial. *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972).

Denial of university recognition. — Denial of university recognition affected the first amendment rights of members of a student organization and recognition could be denied by a university only under narrowly limited circumstances. *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972).

Required showing to justify denial of recognition to campus homosexual organization. — Officials of a state-supported university may not deny use of university facilities to a campus homosexual organization without demonstrating the organization's refusal to abide by reasonable regulations, a clear and present danger of violence or disruption, or that holding the meeting itself would violate state or federal law. *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972).

Freedom to associate for advancement of beliefs and ideas. — Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause of the first amendment which embraces freedom of speech. *Stoner v. Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974).

Compelled disclosure of association as restraint on freedom to associate. — Where a group is engaged in advocacy of particular beliefs, whether they be political, economic, religious, or cultural, compelled disclosure of affiliation with such a group constitutes a restraint on one's freedom of association. *Stoner v. Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974).

There is no absolute right on part of individuals to bar disclosure which infringes on right of association. — Against any impediment to the first amendment right which a particular statute creates, there must be considered the importance and value to the public of the goal which the statute accomplishes. *Stoner v. Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974).

Restrictions on right of association of government employees in furtherance of significant interest. — The restrictions on the exercise of rights of political expression and association of government employees

must be in furtherance of a significant governmental interest. *Galer v. Board of Regents of Univ. Sys.*, 239 Ga. 268, 236 S.E.2d 617 (1977).

The Attorney General, that is, the State of Georgia's interest, as an employer in promoting the efficiency of the Attorney General's office's important public service outweighs plaintiff's personal associational interests in a lesbian marriage. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), cert. denied, 522 U.S. 1049, 118 S. Ct. 693, 139 L. Ed. 2d 638 (1998).

Government employees subject to greater restrictions on associational right than private citizens. — It is clear that government employees may be subject to restrictions on the exercise of their rights of political association and expression beyond that permissible if applied to private citizens. *Galer v. Board of Regents of Univ. Sys.*, 239 Ga. 268, 236 S.E.2d 617 (1977).

Retaliation against public employee for exercise of right. — As is the case with free speech, the fact that a public employee is retaliated against for exercising constitutionally protected associational rights does not automatically render the retaliatory action unconstitutional. *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546 (11th Cir. 1987).

Demotion of a county correctional officer under a regulation prohibiting correctional officers from associating, corresponding, or doing business with active probationers unless they first receive special permission did not violate the officer's right of free association. *Ross v. Clayton County*, 173 F.3d 1305 (11th Cir. 1999).

School principal's actions constituting protected activity. — Where a former school principal alleged: (1) that the principal was denied a comparable position because the principal associated with parents and others who protested a school board's plan to close several schools; and (2) that the principal was denied a comparable position because the principal brought the principal's minister and a school board member to a meeting with the assistant superintendent concerning the principal's job assignment, the principal sufficiently alleged constitutionally protected associational activity. *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546 (11th Cir. 1987).

Fact that an under-30 candidate may not run for Lieutenant Governor does not deny right of association to those voters who might wish to "associate" with such a candidate by voting for that candidate. *Traylor v. Democratic Party*, 241 Ga. 429, 246 S.E.2d 192 (1978).

Former Code 1933, § 91-134 (see O.C.G.A. § 50-16-11) was not facially overbroad nor so vague as to violate freedoms of assembly or speech. *State v. Boone*, 243 Ga. 416, 254 S.E.2d 367, cert. denied, 444 U.S. 898, 100 S. Ct. 206, 62 L. Ed. 2d 133 (1979).

Former Code 1933, §§ 91-134 (see O.C.G.A. § 50-16-11) and 91-9908 (see O.C.G.A. § 50-16-16) were not overbroad as sweeping within their prohibitions what may not be punished under U.S. Const., amends. 1 and 14. *State v. Boone*, 243 Ga. 416, 254 S.E.2d 367, cert. denied, 444 U.S. 898, 100 S. Ct. 206, 62 L. Ed. 2d 133 (1979).

O.C.G.A. §§ 50-16-14 and 50-16-16, allowing removal of persons who cause disruptions in state buildings, did not violate first amendment guarantees of freedom of speech and the right to assemble peaceably and petition the government for redress of their grievances. *State v. Storey*, 181 Ga. App. 161, 351 S.E.2d 502 (1986), cert. denied, 481 U.S. 1017, 107 S. Ct. 1895, 95 L. Ed. 2d 501 (1987).

Requirement that one judge of a court of limited jurisdiction be available on a 24-hour basis to issue warrants does not infringe on the right to assemble as guaranteed in the state and federal Constitutions. *McCrav v. Cobb County*, 251 Ga. 24, 302 S.E.2d 563 (1983).

Protection of right to discuss pros and cons of unions as part of free assembly. — The right to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but also as part of free assembly. *McCallum v. Hinson*, 489 F. Supp. 627 (M.D. Ga. 1980).

Unclear whether state must do business with contractor despite disapproval of associations. — Although there are limits placed on what adverse action a state may take against an employee who maintains associations thought undesirable by the state, it is not at all clear that the state may not refuse to do business with an independent contractor solely because it disapproves of the con-

Freedom of Association (Cont'd)

tractor's associations. *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D. Ga. 1983), *aff'd*, 746 F.2d 761 (11th Cir. 1984).

Termination of plaintiff's position as a parole review officer of the board of pardons and paroles after the plaintiff's election to county and state political party committees did not violate the plaintiff's constitutional rights of due process and equal protection or the plaintiff's constitutionally protected rights of political speech and association. *MacKenzie v. Snow*, 675 F. Supp. 1333 (N.D. Ga. 1987).

Required company affiliations for taxicab drivers. — A city ordinance that required all taxi drivers to be affiliated with a taxicab company and that required all taxicab companies formed after the ordinance's effective date to own or lease at least 25 vehicles did not violate the drivers' rights of association. *Airport Taxi Cab Advisory Comm. v. City of Atlanta*, 584 F. Supp. 961 (N.D. Ga. 1983).

Subpoena of brokerage records relating to association members upheld. — Neither the first amendment nor the fourth amendment required a federal district court to quash a subpoena to obtain a brokerage firm's records relating to members of an association, where the subpoena had been issued in connection with an investigation of possible criminal violations of the tax laws and the association's financial system may have been used to evade requirements for reporting taxable income. *In re Grand Jury Proceeding*, 842 F.2d 1229 (11th Cir. 1988).

Georgia "Anti-Mask Act", O.C.G.A. § 16-11-38, which proscribes intimidating or threatening mask-wearing behavior, does not violate the constitutional rights of freedom of speech, freedom of association, and equal protection of the law. *State v. Miller*, 260 Ga. 669, 398 S.E.2d 547 (1990).

Terminated state employees had no protected rights of association. — Plaintiffs, whose jobs were terminated when their department was eliminated, neither alleged in their complaint nor presented any evidence to establish the existence at any time of an association which was entitled to special constitutional protection. Consequently, defendants did not violate any "clearly established statutory or constitutional rights of which a

reasonable person would have known" with respect to plaintiffs and each was thus entitled to qualified immunity. *Cummings v. DeKalb County*, 24 F.3d 1349 (11th Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 901, 130 L. Ed. 2d 785 (1995).

State flag. — African-American citizen's argument that the state flag, incorporating the stars and bars of the Confederate flag, compelled the citizen to be the courier of an ideological message that the citizen found morally objectionable failed because the flag on its face did not promulgate a sufficiently clear message of discrimination and because the record contained no evidence that the citizen was forced to acknowledge the flag in any way. *Coleman v. Miller*, 885 F. Supp. 1561 (N.D. Ga. 1995), *aff'd*, 117 F.3d 527 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011, 118 S. Ct. 1199, 140 L. Ed. 2d 328 (1998); *Coleman v. Miller*, 912 F. Supp. 522 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011, 118 S. Ct. 1199, 140 L. Ed. 2d 328 (1998).

Redress of Grievances

Amendment extends to petitions for redress of grievances. — The first amendment, which protects controversial as well as conventional dialogue, extends to petitions for redress of grievances as well as to advocacy and debate. *United States v. Northside Realty Assocs.*, 474 F.2d 1164 (5th Cir. 1973), *cert. denied*, 424 U.S. 977, 96 S. Ct. 1483, 47 L. Ed. 2d 747 (1976).

No governmental duty of action created by right of petition to redress grievances. — Plaintiff's freely exercised first amendment right to petition various federal agencies for redress of grievances does not create in the government a corresponding duty to act. *Gordon v. Heimann*, 514 F. Supp. 659 (N.D. Ga. 1980).

Congressional power to require disclosures of lobbying activities not prohibited by right of redress of grievances. — Congress is not prohibited by the first amendment guaranty of the right to petition the government for redress of grievances from exercising measures of self-protection in requiring disclosures of lobbying activities; and since legislation in the area may be enacted, investigation by legislative agencies is authorized. *Wilkinson v. United States*, 272 F.2d 783 (5th

Cir. 1959), *aff'd*, 365 U.S. 399, 81 S. Ct. 567, 5 L. Ed. 2d 633 (1961).

Use of agent or attorney to gain access to public official. — In order to petition the government for redress of grievances, one may employ an agent or attorney to use their influence to gain access to a public official. Moreover, once having obtained an audience, the attorney may fairly present to the official the merits of the client's case and urge the official's support for that position. *Troutman v. Southern Ry.*, 441 F.2d 586 (5th Cir. 1971), *cert. denied*, 404 U.S. 871, 92 S. Ct. 81, 30 L. Ed. 2d 115 (1971).

Right of farmer to preejectment hearing absent state statute so providing. — Plaintiff, as a Georgia farmer, has a property interest in the farmer's business, i.e., selling merchandise at a public market, and could not be deprived of that interest without a due

process preejectment hearing even in the absence of a state statute providing for such a hearing. *Wilder v. Irvin*, 423 F. Supp. 639 (N.D. Ga. 1976).

Collaborative effort to obtain grant for medical study not immune from antitrust litigation. — The decision by the National Eye Institute to financially underwrite a medical research study hardly constitutes the type of governmental decision making and policymaking that the Noerr-Pennington doctrine was designed to protect; it is thus unlikely that collaborative efforts to obtain federal grant money and to act pursuant to the protocol outlined in such a study is covered by Noerr-Pennington immunity from antitrust liability, which is rooted in the first amendment protection of the right to petition the government. *Vest v. Waring*, 565 F. Supp. 674 (N.D. Ga. 1983).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

FREE EXERCISE OF RELIGION

FREEDOM OF SPEECH AND PRESS

FREEDOM OF ASSEMBLY

FREEDOM OF ASSOCIATION

General Consideration

Validity of regulatory levy of license tax on newspapers absent statute. — While there is no statute dealing specifically with the question of prohibition against the levying of a license tax on newspapers by a municipality, if such a levy is determined to be regulatory in nature it would be in contravention to U.S. Const., amend. 1 and U.S. Const., amend. 14 and would therefore be null and void. 1950-51 Op. Att'y Gen. p. 115.

Constitutional guarantee of free press prohibits municipality from levying regulatory license tax on newspapers where such a levy subjects the newspaper to operational and expressional control by the municipality. 1950-51 Op. Att'y Gen. p. 115.

Statutes regulating amendment freedoms should be narrowly construed. — Statutes which possibly infringe on amendment rights under U.S. Const., amend. 1 and U.S. Const., amend. 14, should be narrowly construed, and construed as explicit, not vague, so as to avoid the question of the statute's

constitutionality whenever possible. 1977 Op. Att'y Gen. No. 77-15.

Requirement that student undergo physical before athletic participation not infringement on parental rights. — State Board of Education policy or standard requiring physical examination of student prior to participation in interscholastic athletic activities does not infringe upon parental rights under U.S. Const., amend. 1. 1977 Op. Att'y Gen. No. 77-78.

Free Exercise of Religion

Freedom of religion protected against state encroachment. — Freedom of religion constitutes one of those fundamental principles of liberty and justice embraced within the concept of substantive due process and hence guaranteed against state encroachment by U.S. Const., amend. 14. 1960-61 Op. Att'y Gen. p. 349.

Use of prison labor to clear church grounds. — Use of prison labor gratuitously to clear and maintain church grounds and cemeteries violates constitutional limitations

Free Exercise of Religion (Cont'd)

on separation of church and state. 1960-61 Op. Att'y Gen. p. 349.

Use of state funds by Department of Offender Rehabilitation for prison chaplains. — State Board of Corrections (now Department of Offender Rehabilitation) can expend state funds for employment of chaplains and construction and maintenance of chapels in the various prison branches and can legally permit religious organizations to conduct services in such chapels. 1960-61 Op. Att'y Gen. p. 361.

State may hire staff of prison chaplains whose duties are nonsectarian without violating establishment clause of U.S. Const., amend. 1. If the hiring of prison chaplains did infringe upon the establishment clause of U.S. Const., amend. 1, it would be sustained on constitutional grounds as necessary to secure the prisoner's right of worship as guaranteed under the free exercise clause of U.S. Const., amend. 1. 1974 Op. Att'y Gen. No. 74-3.

Position of religious therapy program director constitutional if duties nonsectarian. — State Merit System's creation of the position of religious therapy program director in the Department of Offender Rehabilitation is not in violation of U.S. Const., amend. 1 so long as his duties are nonsectarian. 1974 Op. Att'y Gen. No. 74-3.

Employment of religious therapy program director. — Employment of religious therapy program director for state prisons does not violate the establishment clause of U.S. Const., amend. 1. 1974 Op. Att'y Gen. No. 74-3.

Georgia Residential Finance Authority may lend general reserve funds to religiously-motivated housing sponsor which charges in-kind interest, provided the funds are not encumbered or derived from the public treasury, the authority's own purpose is secular and nondiscriminatory, the program in fact is financially sound and secular, and it can be monitored without entanglement. 1988 Op. Att'y Gen. No. 88-15.

Christmas displays at capitol rotunda. — Georgia Building Authority's presentation of a nativity scene as a part of a planned Christmas program in the capitol rotunda would be in violation of both the Georgia and United States Constitutions. Addition-

ally, the unattended display of a Menorah in front of the capitol would be in violation of the establishment clause of the United States Constitution. However, a Menorah candle-lighting ceremony conducted by private citizens in front of the capitol would not violate the Constitution of the United States or the Georgia Constitution. 1990 Op. Att'y Gen. No. 90-38.

University's recognition of a student organization that requires its voting members to profess its religious beliefs would not violate U.S. Const., amend. 1. 1997 Op. Att'y Gen. No. 97-32.

University student internship at sectarian facility. — There is no legal impediment to a university system institution's allowing a student to satisfy an internship at a sectarian facility which limits employment to persons of its particular religious faith or persuasion. 2001 Op. Att'y Gen. No. 2001-01.

Teaching about Bible in public schools. — Public school courses that include references to the Bible may survive first amendment scrutiny only if their content is determined to be secular and they are taught in a secular, objective manner. 1999 Op. Att'y Gen. No. 99-16.

Law regulating used motor vehicle dealers. — The failure of the Used Motor Vehicle Dealers' and Used Motor Vehicle Parts Dealers' Registration Act (§ 43-47-1 et seq.) to include an exemption for religious organizations does not violate U.S. Const., amend. 1. 1999 Op. Att'y Gen. No. 99-8.

Statutory provisions deemed constitutional. — The "respect for the creator" portion of the character education program authorized by O.C.G.A. § 20-2-145 and the provision of O.C.G.A. § 50-3-4.1 allowing display of the motto "In God We Trust" in public do not violate the separation of church and state provisions of either the state or federal constitution. 2000 Op. Att'y Gen. No. 2000-9.

Freedom of Speech and Press

Media access to prisons and inmates. — Media possess no constitutional or statutory rights of access to prisons or inmates above those possessed by general public, i.e., media access to prisons and inmates is in the discretion of the warden. 1980 Op. Att'y Gen. No. 80-151.

As to censoring state prison inmate's newspaper, see 1980 Op. Att'y Gen. No. 80-70.

As to introduction of obscene publications into state prison, see 1980 Op. Att'y Gen. No. 80-70.

Political contributions by public utilities. — Statute prohibiting contributions to a political campaign by a person acting on behalf of a public utility corporation regulated by the Public Service Commission does not unconstitutionally infringe guarantees of freedom of speech and association. 1982 Op. Att'y Gen. No. 82-56.

Student-run newspaper. — Where there is governmental oversight or involvement, a student-run newspaper at a state educational institution is subject to free speech requirements of the first amendment. 1996 Op. Att'y Gen. No. 96-7.

A condition-of-entry rule of the Atlanta Committee for the Olympic Games prohibiting spectators from carrying flags "other than those of participating countries" was questionable under the Constitution. 1996 Op. Att'y Gen. No. U96-13.

Freedom of Assembly

As to use of bullhorns and camping overnight by demonstrators on state prison grounds, see 1980 Op. Att'y Gen. No. 80-70.

Freedom of Association

State loyalty oath. — The portion of the Georgia loyalty oath which requires one to swear to support the Constitutions of Georgia and the United States is constitutional and valid, but the portion of the Georgia loyalty oath which requires one to disavow membership in the Communist Party is violative of the first and fourteenth amendments of the United States Constitution and should not be administered. 1985 Op. Att'y Gen. No. 85-19.

University's refusal to recognize a student organization that requires its voting members to profess its religious beliefs would violate the first amendment rights of expressive association. 1997 Op. Att'y Gen. No. 97-32.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Interference With Right to Free Exercise of Religion, 63 POF3d 195.

Am. Jur. Trials. — Controlling Trial Publicity, 1 Am. Jur. Trials 303.

Homeowners' Association Defense: Free Speech, 93 Am. Jur. Trials 293.

ALR. — Validity of legislation directed against social or industrial propaganda deemed to be of a dangerous tendency, 1 ALR 336; 20 ALR 1535; 73 ALR 1494.

Right of association to expel or discipline member for exercising a right, or performing duty, as a citizen, 14 ALR 1446.

What amounts to vagrancy, 14 ALR 1482.

Contract to pay for services or reimburse expenditures as within constitutional inhibition of aid to sectarian institutions, 22 ALR 1319; 55 ALR 320.

Validity and construction of statute or ordinance relating to distribution of advertising matter, 22 ALR 1484; 114 ALR 1446.

Constitutionality, construction, and effect of censorship laws, 64 ALR 505.

Validity of statute or ordinance against picketing, 108 ALR 1119; 122 ALR 1043; 125 ALR 963; 130 ALR 1303.

Constitutionality of statute regulating or imposing tax or license fee upon newspapers or magazines, 110 ALR 327.

Power of Legislature or school authorities to prescribe and enforce oath of allegiance, "salute to flag," or other ritual of a patriotic character, 110 ALR 383; 120 ALR 655; 127 ALR 1502; 141 ALR 1030; 147 ALR 698.

Validity of statutory or municipal regulation of soliciting of alms or contributions for charitable, religious, or individual purposes, 128 ALR 1361; 130 ALR 1504.

Injunction against picketing per se, where past picketing has been accompanied by violence or other improper conduct, 132 ALR 1218.

Use of streets or parks for religious purposes, 133 ALR 1402.

Right of privacy, 138 ALR 22; 57 ALR3d 16.

Validity, construction, and application of statute or ordinance prohibiting solicitation of passers-by in street in front of place of business, 139 ALR 1197.

Constitutional guaranty of freedom of religion as applied to license taxes or regula-

tions, 141 ALR 538; 146 ALR 109; 152 ALR 322.

Sectarianism in schools, 141 ALR 1144.

Unfair labor practice, within National Labor Relations Act or similar state statute, predicated upon expressions of opinion or statements by employer concerning labor unions, 146 ALR 1024.

Freedom of speech and press as limitation on power to punish for contempt, 159 ALR 1379.

Governmental control of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties, 163 ALR 1358.

Constitutionality of statute respecting employer's control of or interference with political affiliations or activities of employees, 166 ALR 707.

Validity, construction, and application of statute or ordinance regarding solicitation of persons to join an organization or society or to pay membership fees or dues, 167 ALR 697.

Right of school authorities to release pupils during school hours for purpose of attending religious education classes, 2 ALR2d 1371.

Religious beliefs of parents as defense to prosecution for failure to comply with compulsory education law, 3 ALR2d 1401.

Public regulation and prohibition of sound amplifiers or loud-speaker broadcasts in streets and other public places, 10 ALR2d 627.

Picketing of place of business by persons not employed therein, 11 ALR2d 1274.

Suspension or expulsion from church or religious society and the remedies therefor, 20 ALR2d 421.

Bible distribution or reading in public schools, 45 ALR2d 742.

Wearing of religious garb by public-school teachers, 60 ALR2d 300.

Zoning regulations as affecting churches, 74 ALR2d 377; 62 ALR3d 197.

Public payment of tuition, scholarship, or the like, as respects sectarian school, 81 ALR2d 1309.

Prayers in public schools, 86 ALR2d 1304.

Defamatory nature of statements reflecting on plaintiff's religious beliefs, standing, or activities, 87 ALR2d 453.

Validity and construction of statute or ordinance requiring or prohibiting posting

or other publication of price of commodity or services, 89 ALR2d 901; 80 ALR3d 740.

Furnishing free textbooks to sectarian school or student therein, 93 ALR2d 986.

Nonlabor picketing or boycott, 93 ALR2d 1284.

Modern concept of obscenity, 5 ALR3d 1158.

Validity of procedures designed to protect the public against obscenity, 5 ALR3d 1214; 93 ALR3d 297.

Scope and extent and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 ALR3d 1360.

Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adult, 9 ALR3d 1391.

Legality of peaceful labor picketing on private property, 10 ALR3d 846.

Maintenance of lawyer reference system by organization having no legal interest in proceedings, 11 ALR3d 1206.

Provision of religious facilities for prisoners, 12 ALR3d 1276.

Invasion of privacy by publication dealing with one other than plaintiff, 18 ALR3d 873.

Right of publisher of newspaper or magazine, in absence of contractual obligation, to refuse publication of advertisement, 18 ALR3d 1286.

Validity and effect of gift for charitable purposes which excludes otherwise qualified beneficiaries because of their race or religion, 25 ALR3d 736.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 ALR3d 551.

Participation of student in demonstration on or near campus as warranting expulsion or suspension from school or college, 32 ALR3d 864.

Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 35 ALR3d 939.

Validity and construction of statutes or ordinances regulating telephone answering services, 35 ALR3d 1430.

Erection, maintenance, or display of religious structures or symbols on public property as violation of religious freedom, 36 ALR3d 1256.

Student organization registration state-

ment, filed with public school or state university or college, as open to inspection by public, 37 ALR3d 1311.

Validity of blasphemy statutes or ordinances, 41 ALR3d 519.

Validity of statute or ordinance forbidding pharmacist to advertise prices of drugs or medicines, 44 ALR3d 1301.

Censorship of convicted prisoners' "legal" mail, 47 ALR3d 1150.

Censorship of convicted prisoners' "non-legal" mail, 47 ALR3d 1192.

Religion as factor in adoption proceedings, 48 ALR3d 383.

Validity, construction, and application of statute prohibiting loitering for the purpose of using or possessing dangerous drugs, 48 ALR3d 1271.

Operation of nude-model photographic studio as offense, 48 ALR3d 1313.

Right of accused to have press or other media representatives excluded from criminal trial, 49 ALR3d 1007.

Libel and slander: charges of slumlordism or the like as actionable, 49 ALR3d 1074.

Topless or bottomless dancing or similar conduct as offense, 49 ALR3d 1084.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Determination of property rights between local church and parent church body: modern view, 52 ALR3d 324.

Right to discipline pupil for conduct away from school grounds or not immediately connected with school activities, 53 ALR3d 1124.

Invasion of privacy by radio or television, 56 ALR3d 386.

Waiver or loss of right of privacy, 57 ALR3d 16.

Consumer picketing to protest products, prices, or services, 62 ALR3d 227.

Application of state law to sex discrimination in employment advertising, 66 ALR3d 1237.

Criminal offenses under statutes and ordinances regulating charitable solicitations, 76 ALR3d 924.

Validity of regulation of college or university denying or restricting right of student to receive visitors in dormitory, 78 ALR3d 1109.

Power of corporation to make political contribution or expenditure under state law, 79 ALR3d 491.

Validity and construction of state or local regulation prohibiting off-premises advertising structures, 81 ALR3d 486.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR3d 564.

Validity of sex education programs in public schools, 82 ALR3d 579.

Unemployment compensation: eligibility as affected by claimant's refusal to comply with requirements as to dress, grooming, or hygiene, 88 ALR3d 150.

Wills: condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 89 ALR3d 984.

Validity, under establishment of religion clause of federal or state constitution, of provision making day of religious observance a legal holiday, 90 ALR3d 752.

State regulation of the giving or making of political contributions or expenditures by private individuals, 94 ALR3d 944.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 ALR3d 225.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 ALR3d 37.

Identification of jobseeker by race, religion, national origin, sex, or age, in "Situation Wanted" employment advertising as violation of state civil rights laws, 99 ALR3d 154.

Defamation: publication of "Letter to Editor" in newspaper as actionable, 99 ALR3d 573.

Validity of "war zone" ordinances restricting location of sex-oriented businesses, 1 ALR4th 1297.

Validity and construction of state statute or ordinance prohibiting picketing, parading, demonstrating, or appearing in public while masked or disguised, 2 ALR4th 1241.

Validity and construction of statute or ordinance prohibiting use of "obscene" language in public, 2 ALR4th 1331.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented business, 10 ALR4th 524; 10 ALR5th 538.

Religion as factor in child custody and visitation cases, 22 ALR4th 971.

Validity, under federal and state establishment of religion provisions, of prohibition of sale of intoxicating liquors on specific religious holidays, 27 ALR4th 1155.

Discharge from employment on ground of political views or conduct as affecting right to unemployment compensation, 29 ALR4th 287.

Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt, 30 ALR4th 155.

Advertising as ground for disciplining attorney, 30 ALR4th 742.

Judicial review of termination of pastor's employment by local church or temple, 31 ALR4th 851.

Validity of state judicial or bar association rule forbidding use of law firm name unless it contains exclusively names of persons who are or were members of that state's bar, as it applies to out-of-state law firm, 33 ALR4th 404.

Libel and slander: privileged nature of statements or utterances by members of governing body of public institution of higher learning in course of official proceedings, 33 ALR4th 632.

Validity of local or state denial of public school courses or activities to private or parochial school students, 43 ALR4th 776.

Validity and construction of terroristic threat statutes, 45 ALR4th 949.

Judicial power to order discontinuance of life-sustaining treatment, 48 ALR4th 67.

Validity, construction, and effect of state statutes restricting political activities of public officers or employees, 51 ALR4th 702.

Validity and construction of state court's order precluding publicity or comment about pending civil case by counsel, parties, or witnesses, 56 ALR4th 1214.

Tax on hotel-motel room occupancy, 58 ALR4th 274.

Validity and construction of prison regulation of inmates' possession of personal property, 66 ALR4th 800.

Invasion of privacy by a clergyman, church, or religious group, 67 ALR4th 1086.

Intrusion by news-gathering entity as invasion of right of privacy, 69 ALR4th 1059.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 ALR4th 536.

Bank's liability, under state law, for disclosing financial information concerning depositor or customer, 81 ALR4th 377.

Validity of state or local government regulation requiring private school to report attendance and similar information to government—post-Yoder cases, 8 ALR5th 875.

Obscenity prosecution: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials, 13 ALR5th 567.

Validity and construction of statutes prohibiting harassment of hunters, fishermen, or trappers, 17 ALR5th 837.

Who is "public figure" for purposes of defamation action, 19 ALR5th 1.

Power of court or other public agency to order medical treatment over parental religious objections for child whose life is not immediately endangered, 21 ALR5th 248.

Musical sound recording as punishable obscenity, 30 ALR5th 718.

Liability for discharge of employee from private employment on ground of political views or conduct, 38 ALR5th 39.

Propriety of exclusion of press or other media representatives from civil trial, 39 ALR5th 103.

Propriety of publishing identity of sexual assault victim, 40 ALR5th 787.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 ALR5th 291.

Free exercise of religion as applied to individual's objection to obtaining or disclosing social security number, 93 ALR5th 1.

Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution, 98 ALR5th 167.

First Amendment protection afforded to commercial and home video games, 106 ALR5th 337.

First amendment challenges to display of religious symbols on public property, 107 ALR5th 1.

First Amendment protection afforded to comic books, comic strips, and cartoons, 118 ALR5th 213.

Landlord's refusal to rent to unmarried couple as protected by landlord's religious beliefs, 10 ALR6th 513.

Free exercise of religion clause of federal constitution as applied to individual's objection to obtaining or disclosing Social Security number, 87 ALR Fed. 908.

Validity of union procedures for fixing and reviewing agency fees of nonunion employees under public employees representation contract — post-Hudson cases, 92 ALR Fed. 894.

Validity and effect of restraints on postverdict communication between news media and jurors in federal case, 93 ALR Fed. 415.

Free exercise of religion clause of first amendment as defense to tort liability, 93 ALR Fed. 754.

Artist's speech and due process rights in artistic production which has been sold to another, 93 ALR Fed. 912.

First amendment guaranty of freedom of speech or press as defense to liability stemming from speech allegedly causing bodily injury, 94 ALR Fed. 26.

Giving of invocation with religious content at public-school-sponsored events to which public is invited or admitted as violation of establishment clause of first amendment, 98 ALR Fed. 206.

Validity, construction, and application of § 504 of Labor-Management Reporting and Disclosure Act (29 USCS § 504), precluding certain convicted persons from serving in union office for specified period, 98 ALR Fed. 481.

Excessiveness or adequacy of awards of compensatory damages in civil actions for deprivation of rights under 42 USCS § 1983 — modern cases, 99 ALR Fed. 501.

Validity, construction, and application of 18 USCS § 2251, penalizing sexual exploitation of children, 99 ALR Fed. 643.

Immunity of federal tax agent from suit based upon agent's effort to enforce or collect tax, 99 ALR Fed. 700.

Constitutionality of teaching or suppress-

ing teaching of Biblical creationism or Darwinian evolution theory in public schools, 102 ALR Fed. 537.

Constitutionality of teaching or otherwise promoting secular humanism in public schools, 103 ALR Fed. 538.

First amendment protection for publicly employed firefighters subjected to discharge, transfer, or discipline because of speech, 106 ALR Fed. 396.

First amendment protection for public hospital or health employees subjected to discharge, transfer, or discipline because of speech, 107 ALR Fed. 21.

First amendment protection for judges or government attorneys subjected to discharge, transfer, or discipline because of speech, 108 ALR Fed. 117.

First amendment protection for law enforcement employees subjected to discharge, transfer, or discipline because of speech, 109 ALR Fed. 9.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 ALR Fed. 211.

Bible distribution or use in public schools — modern cases, 111 ALR Fed. 121.

Right of access to federal district court guilty plea proceeding or records pertaining to entry or acceptance of guilty plea in criminal prosecution, 118 ALR Fed. 621.

Construction and application of 18 USCS § 922(e), prohibiting delivery of firearms to common carrier, 125 ALR Fed. 613.

Propriety and Scope of Protective Order Against Disclosure of Material Already Entered into Evidence in Federal Court Trial, 138 ALR Fed. 153.

What constitutes "hybrid rights" claim under Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 163 ALR Fed. 493.

Protection of commercial speech under first amendment — Supreme Court Cases, 164 ALR Fed. 1.

[AMENDMENT II]

[Right to Keep and Bear Arms]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Cross references. — Right to bear arms, Ga. Const. 1983, Art. I, Sec. I, Para. VIII.

Law reviews. — For article on the judicial development of the due process clause of U.S. Const., amend. 14 and the selective incorporation of the Bill of Rights, see 22 Mercer L. Rev. 533 (1971). For article discussing the basis of this amendment, see 13 Ga. L. Rev. 1447 (1979). For article, "The Past and Future of the Individual's Right to Bear Arms," see 31 Ga. L. Rev. 1 (1996).

For comment discussing limits on the military's jurisdiction and the constitutional rights of servicemen in light of *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), see 21 Mercer L. Rev. 311 (1969). For comment on *Burger v. State*, 118 Ga. App. 328, 163 S.E.2d 333 (1968), see 5 Ga. St. B.J. 384 (1969).

JUDICIAL DECISIONS

Amendment applies to federal, not state, legislative efforts. — Second amendment's right to keep and bear arms imposes a

limitation on only federal, not state, legislative efforts. *Brewer v. State of Ga.*, 281 Ga. 283, 637 S.E.2d 677 (2006).

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possession, or transfer of "assault weapon," 29 ALR5th 664.

Validity, construction, and application of provisions of National Firearms Act (26 USCS § 5845(f)) and Omnibus Crime Control and Safe Streets Act (18 USCS § 921(A)(4)) defining "destructive device," 126 ALR Fed. 597.

[AMENDMENT III]

[Quartering of Soldiers]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

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JUDICIAL DECISIONS

U.S. Const., amend. 3 is a facet of right to privacy. — U.S. Const., amend. 3, in its

prohibition against the quartering of soldiers in any house in time of peace without

the consent of the owner, is a facet of the right to privacy. *Smith v. Price*, 446 F. Supp. 828 (M.D. Ga. 1977), rev'd on other grounds, 616 F.2d 1371 (5th Cir. 1980).

Cited in *Handsford v. United States*, 410 F.2d 733 (5th Cir. 1969).

[AMENDMENT IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Cross references. — Security from unreasonable search and seizure, Ga. Const. 1983, Art. I, Sec. I, Para. XIII and § 1-2-6. Emergency situation; application for an investigative warrant, § 16-11-64.3. Searches and seizures generally, Ch. 5, T. 17.

Editor's notes. — The Supreme Court has declared that the due process clause of U.S. Const., amend. 14, protects the personal right of privacy from state, as well as federal, action. See *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 61 L. Ed. 2d 1081 (1961).

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evidence, see 23 Emory L.J. 111 (1974). For article discussing the problem of handling hearsay information in determining probable cause for issuance of a search warrant, see 25 Mercer L. Rev. 741 (1974). For article, "The Supreme Court and Civil Liberties: 1974-1975," see 24 Emory L.J. 937 (1975). For article advocating a sliding scale approach to deal with governmental investigative techniques intruding on privacy interests under the fourth amendment, see 11 Ga. L. Rev. 75 (1976). For article discussing past and present trends in the admissibility of illegally obtained evidence in Georgia criminal trials and advocating a state exclusionary rule, see 11 Ga. L. Rev. 105 (1976). For article discussing meaning and applicability of the automobile exception to the warrant requirement of the fourth amendment, see 27 Mercer L. Rev. 987 (1976). For article, "Federal Antibias Legislation and Academic Freedom: Some Problems with Enforcement Procedures," see 27 Emory L.J. 609 (1978). For article surveying cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978). For article surveying judicial developments in Georgia criminal law, see 31 Mercer L. Rev. 59 (1979). For article, "Stop and Frisk," see 17 Ga. St. B.J. 6 (1980). For article, "Constitutional Criminal Litigation," see 32 Mercer L. Rev. 993 (1981). For article discussing eleventh circuit court cases in the year 1981 dealing with constitutional criminal procedure, see 33 Mercer L. Rev. 1083 (1982). For article, "Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice," see 32

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ANALYSIS

GENERAL CONSIDERATION

EXPECTATION OF PRIVACY

PLACES AND THINGS TO WHICH RIGHT EXTENDS

PRISONS

PROBABLE CAUSE

- 1. IN GENERAL
- 2. AFFIDAVITS
- 3. INFORMANTS
- 4. HEARSAY
- 5. PROBABLE CAUSE FOUND
- 6. PROBABLE CAUSE NOT FOUND
- REASONABLENESS
- SEARCHES
 - 1. IN GENERAL
 - 2. WARRANTLESS SEARCHES
 - 3. VEHICLES
- SEIZURES
- ARRESTS
 - 1. IN GENERAL
 - 2. WARRANTLESS ARREST
- WARRANTS
 - 1. IN GENERAL
 - 2. WHO MAY ISSUE
 - 3. PARTICULARITY OF DESCRIPTION
- INVESTIGATIVE STOPS
 - 1. IN GENERAL
 - 2. VEHICLE STOPS
- SEARCH AND SEIZURE INCIDENT TO LAWFUL ARREST
- INVENTORY SEARCHES
- CONSENT SEARCHES
 - 1. IN GENERAL
 - 2. WHO MAY CONSENT
 - 3. VOLUNTARINESS
- PLAIN VIEW
- CUSTODIAL SEARCHES
- FINGERPRINTS, BLOOD, URINE AND OTHER MEDICAL TESTS
- EXIGENT CIRCUMSTANCES
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- STANDING
- ADMISSIBILITY OF EVIDENCE; EXCLUSIONARY RULE
 - 1. IN GENERAL
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General Consideration

Purpose. — Origin and history of U.S. Const., amend. 4 clearly shows that it was intended only as a restraint upon activities of sovereign authority, and that a contrary ruling would have no deterrent effect since private persons would be unaware of the rule. *Moye v. Hopper*, 234 Ga. 230, 214 S.E.2d 920 (1975).

A fundamental purpose of U.S. Const., amend. 4 is to safeguard individuals from unreasonable government invasion of legitimate privacy interests. *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980).

The essential purpose of proscriptions in U.S. Const., amend. 4 is to impose standard

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of "reasonableness" upon the exercise of discretion by government officials, including law-enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasion. *Bowers v. State*, 151 Ga. App. 46, 258 S.E.2d 623 (1979), aff'd, 245 Ga. 367, 265 S.E.2d 57 (1980).

Hostility to seizures based on mere suspicion was prime motivation for adoption of U.S. Const., amend. 4, and common rumor or report, suspicion, or even "strong reason to suspect" is not adequate to support a warrant for arrest. *Bowers v. State*, 151 Ga. App. 46, 258 S.E.2d 623 (1979), aff'd, 245 Ga. 367, 265 S.E.2d 57 (1980).

U.S. Const., amend. 4 was intended partly to protect against the abuses of the general warrants that had occurred in England and of the writs of assistance used in the colonies. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Primary object is protection of privacy. — Rather than property rights, primary object of U.S. Const., amend. 4 is protection of privacy. *United States v. Roach*, 590 F.2d 181 (5th Cir. 1979).

Nature of rights under fourth amendment. — The rights guaranteed by U.S. Const., amend. 4 are regarded as of the very essence of constitutional liberty. *United States v. Hall*, 587 F.2d 177 (5th Cir.), cert. denied, 441 U.S. 961, 99 S. Ct. 2405, 60 L. Ed. 2d 1065 (1979).

Intrusions by governmental investigations into zone of privacy. — No interest legitimately protected by the fourth amendment is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into the security a person relies upon when the person places the person or the person's property within a constitutionally protected area. *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (decided prior to passage of Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq.).

Applicable to seizures of persons and property. — The simple language of U.S. Const., amend. 4 applies equally to seizures of persons and property. *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

U.S. Const., amend. 4 protects persons, not just places. *State v. Cochran*, 135 Ga.

App. 47, 217 S.E.2d 181 (1975).

Property rights. — Property rights are neither the beginning nor the end of the fourth amendment inquiry. Other factors enter into the calculus, no single integrant being determinative. The additional circumstances to be considered include whether the property owners enjoyed the right to exclude others from the property, or whether they had a possessory interest in the articles seized, and what precautions were taken to assure their privacy. *State v. Jackson*, 201 Ga. App. 810, 412 S.E.2d 593 (1991).

Although property concepts are no longer controlling in application of fourth amendment rights, they should be considered in conjunction with the totality of all the circumstances surrounding claimed violations of fourth amendment rights. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Invocation of fourth amendment rights not to be used as evidence. — A defendant's refusal of permission to search is analogous to the assertion of the privilege against self-incrimination, and as it is forbidden to "parade" a witness in front of a jury for the sole purpose of having the witness invoke the fifth amendment, an individual should be able to invoke fourth amendment rights without having the refusal used against the defendant at trial. *Mackey v. State*, 234 Ga. App. 554, 507 S.E.2d 482 (1998).

Common sense application. — U.S. Const., amend. 4 is not to be applied to searches and seizures in a hypertechnical manner but with a common sense approach. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Negligent or innocent mistakes do not violate the fourth amendment. *Maughon v. Bibb County*, 160 F.3d 658 (11th Cir. 1998).

Fundamental inquiry is whether search or seizure is reasonable under circumstances, remembering that U.S. Const., amend. 4 protects people, not places. *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980).

Only unreasonable searches and seizures prohibited. — Only unreasonable searches and seizures come within the interdiction of U.S. Const., amend. 4, and what is reasonable depends on the facts and circumstances of each case. *Bartlett v. United States*, 232 F.2d 135 (5th Cir. 1956).

It is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. Each case is to be decided on its own facts and circumstances. *Cash v. State*, 222 Ga. 55, 148 S.E.2d 420 (1966); *United States v. Nooks*, 446 F.2d 1283 (5th Cir.), cert. denied, 404 U.S. 945, 92 S. Ct. 299, 30 L. Ed. 2d 261 (1971).

The Constitution prohibits only searches which are unreasonable, and reasonableness is to be decided on its own facts and circumstances. *Gugliotta v. State*, 117 Ga. App. 212, 160 S.E.2d 266 (1968).

It is only unreasonable searches and seizures which come within the constitutional interdict. *Watts v. Cannon*, 224 Ga. 797, 164 S.E.2d 780 (1968).

U.S. Const., amend. 4 protects privacy only to extent that it prohibits unreasonable searches and seizures of “persons, houses, papers, and effects.” No general right is created by the amendment so as to hold unconstitutional everything which affects privacy. *Patterson v. State*, 133 Ga. App. 742, 212 S.E.2d 858 (1975).

Protections of U.S. Const., amend. 4 apply only to unreasonable searches and seizures of governmental agents. *Gasaway v. State*, 137 Ga. App. 653, 224 S.E.2d 772, cert. denied, 429 U.S. 865, 97 S. Ct. 172, 50 L. Ed. 2d 144 (1976).

Balancing implied consent with constitutional rights. — Stated purpose of O.C.G.A. § 40-5-55 to protect the citizens of this state from individuals driving under the influence because these drivers constitute “a direct and immediate threat to the welfare and safety of the general public” must be balanced against the intrusion created by chemical testing on the individual’s fourth amendment rights where the individual has been involved in a traffic accident involving serious injuries or fatalities and the investigating officer has probable cause to believe that the individual was driving under the influence if the driver/defendant is seriously injured in an automobile accident, given the presence of probable cause, the requirement that a person submit to a chemical test is inherently reasonable in the balance, and the fourth amendment’s “probable cause yardstick” measures up to be constitutionally sound. *Hough v. State*, 279 Ga. 711, 620 S.E.2d 380 (2005).

Something less than full scale arrest and search will trigger fourth amendment scrutiny. On the other hand, it equally is clear that certain encounters between law enforcement officers and citizens, even for investigative purposes, are not encompassed by U.S. Const., amend. 4. *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910, 100 S. Ct. 2998, 64 L. Ed. 2d 861 (1980).

Privacy yields to protection from crime. — Privacy argument has yielded to proposition that public has right to expect state to protect its citizens from flow of illicit drugs and to enforce criminal law so long as there is no more than a minimal intrusion in right of privacy enjoyed by the individual. *Dunivant v. State*, 155 Ga. App. 884, 273 S.E.2d 621 (1980), cert. denied, 450 U.S. 998, 101 S. Ct. 1703, 68 L. Ed. 2d 199 (1981).

Balance of privacy interests and interest in deterring crime. — The governmental interest in deterring criminal conduct may properly be balanced against an individual’s privacy interests in cases under U.S. Const., amend. 4. Reasonableness in the sense of U.S. Const., amend. 4 always depends upon a balance which must be struck between, on the one hand, the level of official intrusion into an individual privacy and, on the other hand, the public interest to be served by such an intrusion. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Fourth amendment right of the victim of a crime to be secure against unreasonable search must prevail over the right of the accused to obtain evidence for the accused’s defense. To require the victim of a crime to undergo surgery against the victim’s will to remove a bullet lodged an inch from the victim’s spine, even if medical testimony could be produced that the operation would not be dangerous to the victim’s health, is an unreasonable search and seizure, and violates the victim’s rights under U.S. Const., amend. 4. *State v. Haynie*, 240 Ga. 866, 242 S.E.2d 713 (1978).

Assurance that a person’s fifth amendment right against compelled self-incrimination was not violated does not necessarily overcome a failure to protect the person’s right under the fourth amendment against unreasonable search and seizure.

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State v. Guillory, 236 Ga. App. 230, 511 S.E.2d 591 (1999).

An unlawful arrest or seizure does not bar a criminal prosecution. Neither does suppression of evidence. State v. Brown, 198 Ga. App. 239, 401 S.E.2d 295 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 295 (1991).

Three tiers of police-citizen encounters. — The three tiers of police-citizen encounters are: (1) communication between police and citizens involving no coercion or detention and therefore without the compass of the fourth amendment; (2) brief seizures that must be supported by reasonable suspicion; and (3) full-scale arrests that must be supported by probable cause. Gonzalez v. State, 235 Ga. App. 253, 509 S.E.2d 144 (1998).

First level police-citizen encounters. — Because there was no evidence of threats, coercion, or restraint, a police officer's actions of approaching defendant's parked car outside a convenience store, asking for proof of car ownership, and asking about defendant's knowledge of the men who were with defendant, fell within the realm of a first-level police-citizen encounter which carried no fourth amendment protection and did not require any articulable suspicion of criminal activity in order to allow the officer to ask defendant for permission to search defendant's car; therefore, the trial court erred in suppressing cocaine that was found in the car during the search which followed on the ground that the officer lacked articulable suspicion that illegal drugs were in the car. State v. Cates, 258 Ga. App. 673, 574 S.E.2d 868 (2002).

Questioning outside the scope of a valid traffic stop. — A law enforcement officer's continued questioning of a vehicle's driver and passengers outside the scope of a valid traffic stop passes muster under the fourth amendment either when the officer has a reasonable articulable suspicion of other illegal activity or when the valid traffic stop has de-escalated into a consensual encounter. Daniel v. State, 277 Ga. 840, 597 S.E.2d 116 (2004).

Searches conducted outside judicial process without prior approval by judge or magistrate are per se unreasonable under

U.S. Const., amend. 4 — subject only to a few specifically established and well-delineated exceptions. United States v. Bright, 471 F.2d 723 (5th Cir.), cert. denied, 412 U.S. 921, 93 S. Ct. 2742, 37 L. Ed. 2d 148 (1973).

Private searches. — Where shipping company employees discovered crates containing contraband and notified law enforcement authorities, the subsequent search of the crates by law enforcement officers did not exceed the scope of the private search in violation of the fourth amendment. Hyatt v. State, 210 Ga. App. 425, 436 S.E.2d 540 (1993).

Search by private individuals. — Upon a de novo review of the trial court's application of the law to the facts, became a warrantless search of defendant's gym locker was conducted by private citizens, and not by law enforcement, said acts did not implicate the fourth amendment; hence, the trial court did not err in denying defendant's motion to suppress the evidence seized as a result of said search. Hobbs v. State, 272 Ga. App. 148, 611 S.E.2d 775 (2005).

Searches by shipping company employees. — Shipping company employees did not act as instruments or agents of the government in their searches of a parcel, although they had received training by government law enforcement officers on when to contact government agents after contraband was discovered. United States v. Simpson, 904 F.2d 607 (11th Cir. 1990).

Federal court precedents. — The Court of Appeals is not bound by the rulings of the Federal Court of Appeals for its circuit concerning when a search and seizure violates the fourth amendment. State v. McCloud, 187 Ga. App. 580, 370 S.E.2d 831 (1988).

Inadvertence does not make proper an otherwise violative act. — An act may have been "inadvertent" in the sense that it was normal or habitual or even that it was the result of ordinary curiosity, but none of these motives would render proper an act otherwise a violation of constitutional requirements. Williams v. State, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Where formal arrest followed quickly on heels of challenged search of defendant's person, it is not particularly important that the search preceded the arrest, rather than vice versa. Collier v. State, 177 Ga. App. 217, 338 S.E.2d 724 (1985).

Custodial questioning after arrest following lawful discovery of stolen goods constitutional. — If an arrest following discovery of stolen goods in a lawful search of a stolen car is based upon probable cause, custodial questioning after the accused is given Miranda warnings does not offend the fourth amendment protection against custodial interrogation following arrest on less than probable cause. *Sanborn v. State*, 251 Ga. 169, 304 S.E.2d 377 (1983).

Police surveillant's deceptive telephone call to defendant, telling the defendant "you've got to get the stuff out of there," did not require suppression of marijuana which police seized from the defendant's automobile after watching the defendant take the marijuana from the defendant's house and place it in the vehicle. *Saylor v. State*, 185 Ga. App. 634, 365 S.E.2d 493 (1988).

Effect of deception by governmental agents on amendment's protection. — Although U.S. Const., amend. 4 protects reasonable expectations of privacy, and although the use of deception by a government agent to gain access to a protected area may certainly result in an unlawful invasion of that privacy, the Constitution does not protect persons who engage in criminal transactions from the risk that those with whom they choose to do business may be government agents or informants. *Shuman v. State*, 155 Ga. App. 300, 271 S.E.2d 18 (1980).

Transactions of unlawful business with government agents. — If the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. *Shuman v. State*, 155 Ga. App. 300, 271 S.E.2d 18 (1980).

Business records turned over to government agents in disguise not protected. — Plaintiffs' fourth amendment right to be free from unreasonable searches and seizures was not violated when in November 1980 plaintiffs engaged a broker to arrange the sale of either of two restaurants owned by plaintiffs;

the broker arranged a meeting with two persons who represented themselves as agents of a prospective purchaser; in reliance on their representations, plaintiffs made available to the persons the business records of one of plaintiffs' restaurants with the express understanding that such information was confidential; these persons were, in fact, special agents of the Criminal Investigation Division of IRS; in June 1981, based on information garnered from plaintiffs' records, the IRS obtained a search warrant from a United States magistrate, searched the premises of plaintiffs' restaurant, and seized certain business records; and in November 1982 the IRS informed plaintiffs they were under investigation for possible violations of the federal tax laws. *Hiller v. Murphy*, 600 F. Supp. 14 (N.D. Ga. 1984).

Offensive statements by a law enforcement officer, whether they are unsupported, outright accusations of criminal activity or suggestions that an innocent person would be willing to relinquish constitutional rights, are not irrelevant to a police-citizen encounter analysis. *United States v. Setzer*, 654 F.2d 354 (5th Cir. 1981), cert. denied, 459 U.S. 1041, 103 S. Ct. 457, 74 L. Ed. 2d 609 (1982).

No fourth amendment violation merely because informant obtained information by trespassing. — Defendant's fourth amendment rights were not violated because the informant obtained defendant's information by trespassing on defendant's property. *Mosley v. State*, 180 Ga. App. 30, 348 S.E.2d 555 (1986).

Protection against subpoena too sweeping in its terms. — U.S. Const., amend. 4 provides protection against grand jury subpoena duces tecum too sweeping in its terms to be regarded as reasonable. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980).

Grand jury subpoena. — U.S. Const., amend. 4 does not require any preliminary showing for issuance of grand jury subpoena, either to compel testimony or to compel production of voice or handwriting exemplars. *United States v. McLean*, 565 F.2d 318 (5th Cir. 1977).

Subpoena duces tecum issued to obtain records is subject to no more stringent fourth amendment requirements than is the ordinary subpoena. *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (decided prior to passage of Right to

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Financial Privacy Act, 12 U.S.C. § 3401 et seq.).

Issuance of subpoena to third party to obtain records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (decided prior to passage of Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq.).

Administrative searches are governmental action and fall within protection of U.S. Const., amend. 4. *Braddock v. State*, 127 Ga. App. 513, 194 S.E.2d 317 (1972).

Fourth amendment claims should not be used to prevent investigative institutions from determining whether there is cause to believe that violations of the law have occurred. *Kelley v. Godbout*, 379 F. Supp. 532 (N.D. Ga. 1974); *FTC v. Page*, 378 F. Supp. 1052 (N.D. Ga. 1974).

There was no constitutional offense in a state revenue agent and local law enforcement officers coordinating and consolidating their efforts to enforce O.C.G.A. § 3-2-31 which authorizes such cooperation to conduct an administrative search for violations of the Georgia Alcoholic Beverage Code in conjunction with executing arrest warrants for previously observed violations of these laws. *Crosby v. Paulk*, 187 F.3d 1339 (11th Cir. 1999).

Civil procedure for recovery of debts. — U.S. Const., amend. 4 has no reference to civil procedure for the recovery of debts. *Jernigan v. Economy Exterminating Co.*, 327 F. Supp. 24 (N.D. Ga. 1971), appeal dismissed, 407 U.S. 934, 92 S. Ct. 2474, 32 L. Ed. 2d 818 (1972).

Miranda warnings in no way inform a person of that person's rights under U.S. Const., amend. 4, including that person's right to be released from unlawful custody following an arrest without a warrant or without probable cause. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, requires not merely that the statement meet the standard of U.S. Const., amend. 5 of voluntariness but that it be sufficiently an act of free will to purge the primary taint. Consideration of a statement's

admissibility must be made in light of the distinct policies and interests of U.S. Const., amend. 4. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Fourth amendment rights are generally inapplicable to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American officials are present and cooperate in some degree. Before U.S. Const., amend. 4 applies, the participation of federal agents must be so substantial as to convert the search into a joint venture. *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986), cert. denied, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987).

Evidence obtained by foreign police officers from searches carried out in their countries is generally admissible in American courts regardless of whether the search complied with U.S. Const., amend. 4. *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986), cert. denied, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987).

Evidence obtained by foreign police officers from searches conducted in their countries may be excluded if the conduct of the foreign officers shocks the conscience of the American court. *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986), cert. denied, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987).

Invocation of one's constitutional rights gives rise to no inference that criminal activity is afoot. *United States v. Setzer*, 654 F.2d 354 (5th Cir. 1981), cert. denied, 459 U.S. 1041, 103 S. Ct. 457, 74 L. Ed. 2d 609 (1982).

Initial stages of contact between police officer and citizen are not to be isolated from scrutiny of U.S. Const., amend. 4. *United States v. Gazaway*, 297 F. Supp. 67 (N.D. Ga. 1969).

Although the defendant was merely approached while voluntarily stopped in a parking lot and, only after defendant started behaving in a furtive or bizarre manner, did another officer draw a gun and issue a command, the trial court's denial of a motion to suppress was supported by the evidence and was not clearly erroneous. *Molaro v. State*, 236 Ga. App. 35, 510 S.E.2d 886 (1999).

Decision whether U.S. Const., amend. 4 is implicated by particular police-citizen contact is legal conclusion to be based on the facts appearing on the record. *United States*

v. Berd, 634 F.2d 979 (5th Cir. 1981).

Unless the delay is unreasonable, the police may wait and delay search and seizure in hope of increasing the quantum of evidence which they can present to the magistrate to obtain a warrant. *Hall v. State*, 176 Ga. App. 428, 336 S.E.2d 291 (1985).

Pretrial detainees. — Whether a pretrial detainee may press a claim of excessive force under the fourth amendment remains open. It is clear, however, that the due process clause protects a pretrial detainee from the use of excessive force that amounts to punishment. *Wright v. Whiddon*, 951 F.2d 297 (11th Cir. 1992).

If the search of a pretrial detainee's cell is instigated or conducted by the prosecution solely for the purpose of uncovering incriminating evidence which could be used against the detainee at trial, rather than out of concern for any legitimate prison objectives, the detainee retains a limited but legitimate expectation of privacy that the detainee would be protected in such circumstances from an unreasonable search. *State v. Henderson*, 271 Ga. 264, 517 S.E.2d 61 (1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680 (2000).

Rights may not be waived as condition of probation. — Defendant's contention that the trial court erred in imposing a waiver of defendant's fourth amendment rights was correct in that a waiver of defendant's fourth amendment rights should not have been imposed absent a negotiated plea or waiver of such right. However, any error that might have taken place at sentencing was harmless as no warrantless search had taken place in assertion of defendant's fourth amendment waiver. Furthermore, the court will not presume that any search that might take place in the future under the authority of a probation officer will be unreasonable. *Millsap v. State*, 261 Ga. App. 427, 582 S.E.2d 568 (2003).

Waiver of fourth amendment rights constitutional. — Investigators and the officers did not violate a defendant's rights when investigating information that the defendant was still involved in drug activity; because the defendant, while free on bond for drug offenses, waived the rights U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII as a bond condition, the waiver was constitutional under U.S. Const.,

amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII. *Rocco v. State*, 267 Ga. App. 900, 601 S.E.2d 189 (2004).

Defendant waived fourth amendment rights through plea bargaining process, because the defendant agreed to a special condition of probation in the sentence which provided that the defendant would "waive all Fourth Amendment rights and submit to random searches" *Allen v. State*, 258 Ga. 424, 369 S.E.2d 909 (1988).

Probationers. — Right to be free from unreasonable searches and seizures extends to all persons, including probationers. A defendant's status as a probationer, however, is a factor to be considered in determining whether a search and seizure by a probation officer is unreasonable. *Hunter v. State*, 139 Ga. App. 676, 229 S.E.2d 505 (1976).

Right to be free from unreasonable searches and seizures extends to all persons, including probationers. A defendant's status as a probationer, however, is a factor to be considered in determining whether a search and seizure by a probation officer is unreasonable. *Austin v. State*, 148 Ga. App. 784, 252 S.E.2d 696 (1979).

Right to be free from unreasonable searches and seizures extends to all persons, including probationers. *Adams v. State*, 153 Ga. App. 41, 264 S.E.2d 532 (1980); *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982).

Search by probation officer. — The search by a probation officer is reasonable if, under all the circumstances, it is actuated by the legitimate operation of the probation supervision process and the probation officer acts reasonably in performing those duties. *Hunter v. State*, 139 Ga. App. 676, 229 S.E.2d 505 (1976); *Austin v. State*, 148 Ga. App. 784, 252 S.E.2d 696 (1979).

Revocation of probation based on illegally seized evidence. — A defendant's probation may not be revoked on the basis of illegally seized evidence. Furthermore, a probation revocation hearing, however, is not a criminal trial, and the same rules of procedure do not apply. *Austin v. State*, 148 Ga. App. 784, 252 S.E.2d 696 (1979).

Probation condition permitting warrantless searches. — A probationer's fourth amendment right to be free from unreasonable searches and seizures is not violated by a condition of probation that permits warrantless searches of the probationer's person

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and property by probation supervisors and law enforcement officers. *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982).

Probation condition allowing law enforcement officers to make warrantless searches without "reasonable cause" is not violative of fourth amendment. *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982).

For probation conditions to be free of intrusion on constitutionally protected freedoms, the conditions must be "reasonably related" to the purposes of the Federal Probation Act (18 U.S.C. § 3651). Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement. *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982).

Any search conducted pursuant to the search condition of probation must be carried out in a reasonable manner and only in furtherance of the purposes of probation. *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982).

While a probationer's consent to search may relax the fourth amendment standard for a search of the probationer, probationer does not waive all fourth amendment rights by agreeing to submit to a search at the request of a probation or law enforcement officer. Thus, a probationer did not relinquish fourth amendment rights by consenting to the conditions of probationer's probation. *Anderson v. State*, 209 Ga. App. 676, 434 S.E.2d 122 (1993).

The waiver of defendant's fourth amendment rights as a condition of probation was not valid because defendant did not give it as part of the plea bargain agreement, and defendant was not given the option to consider whether prison was an acceptable alternative in light of this condition of probation. *Fox v. State*, 272 Ga. 163, 527 S.E.2d 847 (2000).

Whether defendant agreed to waive fourth amendment rights as a condition of probation was a factor properly considered by the trial court in its decision to impose probation or imprisonment. Because the

record shows defendant conferred with counsel and consented to the waiver, it was a valid condition of the probation. *Shannon v. State*, 258 Ga. App. 689, 574 S.E.2d 889 (2002).

Officers' reliance on a search authorization appearing in defendant's spouse's probation order was justified, where the search of the marital residence was actuated by the legitimate operation of the probation supervision process rather than by some other, more nefarious motive. *Luke v. State*, 178 Ga. App. 614, 344 S.E.2d 452 (1986).

Prisoners. — The ruling in *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), making U.S. Const., amend. 4 inapplicable to searches of convicted prisoners' cells, reflects the proper interpretation of Ga. Const. 1983, Art. I, Sec. I, Para. XIII. *State v. Henderson*, 271 Ga. 264, 517 S.E.2d 61 (1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680 (2000).

Warrantless search of a county jail inmate's rectal cavity, from which a balloon containing marijuana was removed, violated the inmate's fourth amendment right to be free from unreasonable searches and seizures, where the state failed to establish any legitimate penological necessity for the degree of the intrusion employed in conducting the search. *McCullough v. State*, 177 Ga. App. 741, 341 S.E.2d 241 (1986).

Right to wear one's hair as one sees fit, has not been found to be within the periphery of any of the specific constitutional rights. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), aff'd, 505 F.2d 868 (5th Cir. 1975).

Searches of students directed to end of providing students a safe and secure environment are reasonable under U.S. Const., amend. 4 on considerably less than probable cause. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975).

Recovering stolen property by victim of theft. — A trial court is fully authorized to conclude, even assuming that a defendant's spouse's invitation is not extended freely and voluntarily, that a victim of theft is motivated by the victim's own personal interest in recovering the victim's property when the victim enters the house and identifies property as the victim's, since the victim is not acting on behalf of law enforcement author-

ities and, consequently, no violation of U.S. Const., amend. 4 results. *Carroll v. State*, 147 Ga. App. 332, 248 S.E.2d 702 (1978).

Person's presence at suspect place. — A citizen does not, by mere presence at a suspect place, lose the constitutional right from unreasonable search of one's person and property to which one otherwise would be entitled. *Collins v. State*, 187 Ga. App. 430, 370 S.E.2d 648 (1988).

Attempts to locate missing persons by means of knocking on outer doors. — When police respond to requests to locate missing persons by entering private property only to the extent of knocking on outer doors, U.S. Const., amend. 4 has not been violated. *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Stopping vessel in open waters. — Law enforcement officers, having developed reasonable suspicion of illegal activity, could then identify themselves by whatever means were appropriate under the circumstances, such as stopping a vessel in open waters. *United States v. Albano*, 722 F.2d 690 (11th Cir. 1984).

No federal question in action by dismissed federal employee. — Where plaintiff, a dismissed federal employee, asserted various fourth, fifth, and sixth amendment claims against the plaintiff's superiors under the Bivens theory (see *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)), court found no federal question because Congress had established elaborate remedial scheme for dismissed federal employees. *Metz v. McKinley*, 583 F. Supp. 683 (S.D. Ga.), aff'd, 747 F.2d 709 (11th Cir. 1984).

It is often necessary for the police to approach a person with a drawn weapon in a suspiciously dangerous situation in order to protect the physical well-being of both police officers and the public. *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

Appropriate enforcement of IRS summons. — The enforcement of a summons by the IRS, requiring a taxpayer to testify and to produce certain designated records, did not violate U.S. Const., amend. 4, as the government made a preliminary showing that the summons was issued for a legitimate pur-

pose, that the information sought was relevant to that purpose and not already in the commissioner's possession and that the appropriate administrative steps were followed. *United States v. Reis*, 765 F.2d 1094 (11th Cir. 1985).

View through garage window by police officer of defendant's activities did not violate defendant's rights under U.S. Const., amend. 4. *United States v. Crane*, 445 F.2d 509 (5th Cir. 1971).

Information revealed to third party. — U.S. Const., amend. 4 does not prohibit the obtaining of information revealed to a third party and conveyed by the third party to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (decided prior to passage of Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq.).

Distributing photo of student with sexual organ exposed not constitutional deprivation. — The conduct of school officials in participating in the distribution of a photograph of a student in which the student's sexual organ was accidentally exposed, and their refusal to halt distribution of the photograph, while deplorable, reprehensible, and insensitive, was not a constitutional deprivation. *Carroll v. Parks*, 755 F.2d 1455 (11th Cir. 1985).

Effect of failure to give defendant inventory of seized articles. — The failure to give a defendant an inventory of the articles obtained by a search and seizure does not void the search and seizure. *Merrill v. State*, 130 Ga. App. 745, 204 S.E.2d 632 (1974).

There is no constitutional right to bond pending appeal, but once a state undertakes to establish a system for prisoners to be released on bail pending appeal, it must not violate equal protection or due process guarantees. *Browning v. State*, 254 Ga. 478, 330 S.E.2d 879 (1985).

Cited in *Thompson v. United States*, 44 F.2d 165 (5th Cir. 1930); *Schroder v. United States*, 53 F.2d 6 (5th Cir. 1931); *City of Newnan v. Atlanta Laundries, Inc.*, 174 Ga. 99, 162 S.E. 497 (1932); *Thompson v. State*, 174 Ga. 804, 164 S.E. 202 (1932); *Turner v. State*, 176 Ga. 823, 169 S.E. 21 (1933); *Parks v. United States*, 76 F.2d 709 (5th Cir. 1935);

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- McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5 (1940); Turner v. Camp, 123 F.2d 840 (5th Cir. 1941); Davis v. United States, 138 F.2d 406 (5th Cir. 1943); United States v. One 1936 Model Ford Coach Auto., 58 F. Supp. 802 (M.D. Ga. 1944); Cannon v. United States, 166 F.2d 85 (5th Cir. 1948); United States v. Lynch, 94 F. Supp. 1011 (N.D. Ga. 1950); Walker v. Whittle, 83 Ga. App. 445, 64 S.E.2d 87 (1951); Notis v. State, 84 Ga. App. 199, 65 S.E.2d 622 (1951); Sideh v. State, 91 Ga. App. 387, 85 S.E.2d 610 (1955); United States v. 342.81 Acres of Land, 134 F. Supp. 430 (N.D. Ga. 1955); Carter v. United States, 231 F.2d 232 (5th Cir. 1956); Gregory v. United States, 237 F.2d 727 (5th Cir. 1956); Deloach v. Rogers, 268 F.2d 928 (5th Cir. 1959); Carnes v. United States, 295 F.2d 598 (5th Cir. 1961); Pistor v. State, 219 Ga. 161, 132 S.E.2d 183 (1963); Pugh v. State, 219 Ga. 166, 132 S.E.2d 203 (1963); Green v. State, 110 Ga. App. 346, 138 S.E.2d 589 (1964); Chester v. Ross, 231 F. Supp. 23 (N.D. Ga. 1964); Paige v. Potts, 354 F.2d 212 (5th Cir. 1965); Roach v. State, 221 Ga. 783, 147 S.E.2d 299 (1966); Ellenburg v. State, 113 Ga. App. 585, 149 S.E.2d 173 (1966); Nicholson v. United States, 355 F.2d 80 (5th Cir. 1966); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966); Gilmore v. State, 117 Ga. App. 67, 159 S.E.2d 474 (1967); Hurst v. United States, 370 F.2d 161 (5th Cir. 1967); Weaver v. United States, 374 F.2d 878 (5th Cir. 1967); Harris v. United States, 389 F.2d 727 (5th Cir. 1968); Handsford v. United States, 390 F.2d 373 (5th Cir. 1968); Whippler v. Dutton, 391 F.2d 425 (5th Cir. 1968); Peters v. Rutledge, 397 F.2d 731 (5th Cir. 1968); Carroway v. Stynchcombe, 225 Ga. 586, 170 S.E.2d 396 (1969); Henderson v. United States, 405 F.2d 874 (5th Cir. 1968); Handsford v. United States, 410 F.2d 733 (5th Cir. 1969); Cagle v. Scroggins, 410 F.2d 741 (5th Cir. 1969); Cato v. Georgia, 302 F. Supp. 1143 (N.D. Ga. 1969); Cook v. Smith, 427 F.2d 1172 (5th Cir. 1970); Huftstetler v. Davies, 309 F. Supp. 1372 (N.D. Ga. 1970); Dudley v. State, 228 Ga. 551, 186 S.E.2d 875 (1972); Fryer v. Stynchcombe, 228 Ga. 576, 186 S.E.2d 885 (1972); United States v. Dyson, 469 F.2d 735 (5th Cir. 1972); Jones v. Bales, 58 F.R.D. 453 (N.D. Ga. 1972); Underhill v. State, 129 Ga. App. 65, 198 S.E.2d 703 (1973); Currington v. State, 129 Ga. App. 161, 199 S.E.2d 268 (1973); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973); Strong v. State, 231 Ga. 514, 202 S.E.2d 428 (1973); Moore v. State, 130 Ga. App. 184, 202 S.E.2d 555 (1973); Jones v. Georgia, 475 F.2d 1141 (5th Cir. 1973); United States v. Best, 363 F. Supp. 11 (S.D. Ga. 1973); Wynn v. Caldwell, 231 Ga. 763, 204 S.E.2d 143 (1974); Bradley v. State, 131 Ga. App. 271, 205 S.E.2d 463 (1974); Granese v. State, 232 Ga. 193, 206 S.E.2d 26 (1974); Walter v. State, 131 Ga. App. 667, 206 S.E.2d 662 (1974); Lowe v. Hopper, 501 F.2d 952 (5th Cir. 1974); Jones v. Ault, 67 F.R.D. 124 (S.D. Ga. 1974); Phillips v. State, 233 Ga. 800, 213 S.E.2d 664 (1975); Cross v. State, 233 Ga. 960, 214 S.E.2d 374 (1975); Johnson v. Wright, 509 F.2d 828 (5th Cir. 1975); United States v. Ransom, 515 F.2d 885 (5th Cir. 1975); Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975); Ward v. State, 137 Ga. App. 462, 224 S.E.2d 96 (1976); LaRue v. State, 137 Ga. App. 762, 224 S.E.2d 837 (1976); Lawson v. State, 236 Ga. 770, 225 S.E.2d 258 (1976); Garrett v. Department of Pub. Safety, 237 Ga. 413, 228 S.E.2d 812 (1976); United States v. Boyd, 530 F.2d 1269 (5th Cir. 1976); United States v. Bagley, 537 F.2d 162 (5th Cir. 1976); Nelson v. Rosenthal, 539 F.2d 1034 (5th Cir. 1976); State v. Robinson, 142 Ga. App. 705, 237 S.E.2d 1 (1977); Williams v. State, 143 Ga. App. 210, 237 S.E.2d 693 (1977); Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395 (1977); Seabolt v. Hopper, 240 Ga. 171, 240 S.E.2d 57 (1977); United States v. Puckett, 551 F.2d 59 (5th Cir. 1977); Highland v. State, 144 Ga. App. 594, 241 S.E.2d 477 (1978); State v. Andrews, 240 Ga. 531, 242 S.E.2d 153 (1978); Simpson v. State, 144 Ga. App. 657, 242 S.E.2d 265 (1978); Underwood v. State, 144 Ga. App. 684, 242 S.E.2d 339 (1978); State v. Bass, 144 Ga. App. 834, 243 S.E.2d 87 (1978); Lester v. State, 145 Ga. App. 847, 244 S.E.2d 880 (1978); State v. Trippe, 146 Ga. App. 210, 246 S.E.2d 122 (1978); State v. McNutt, 146 Ga. App. 369, 246 S.E.2d 402 (1978); McCarty v. State, 146 Ga. App. 389, 246 S.E.2d 416 (1978); Key v. State, 146 Ga. App. 536, 246 S.E.2d 723 (1978); Contreras v. State, 242 Ga. 369, 249 S.E.2d 56 (1978); Morrow v. State, 147 Ga. App. 395, 249 S.E.2d 110 (1978); Souder v. State, 147 Ga. App. 431, 249 S.E.2d 146 (1978); Stephenson Enters., Inc. v. Marshall,

578 F.2d 1021 (5th Cir. 1978); *High Oil Times, Inc. v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978); *United States v. Axtman*, 589 F.2d 196 (5th Cir. 1979); *Doe v. Busbee*, 471 F. Supp. 1326 (N.D. Ga. 1979); *Playmate Cinema, Inc. v. State*, 154 Ga. App. 871, 269 S.E.2d 883 (1980); *Davis v. State*, 155 Ga. App. 146, 270 S.E.2d 343 (1980); *Speight v. Whiddon*, 516 F. Supp. 905 (M.D. Ga. 1980); *Harris v. State*, 157 Ga. App. 367, 278 S.E.2d 52 (1981); *Gaylor v. State*, 247 Ga. 759, 279 S.E.2d 207 (1981); *Wood v. State*, 159 Ga. App. 221, 283 S.E.2d 79 (1981); *Thompson v. State*, 248 Ga. 343, 285 S.E.2d 685 (1981); *Littles v. DeFrancis*, 517 F. Supp. 1137 (M.D. Ga. 1981); *Zant v. Prevatte*, 248 Ga. 832, 286 S.E.2d 715 (1982); *Bradshaw v. State*, 163 Ga. App. 819, 296 S.E.2d 119 (1982); *Armstrong v. Mayor of Savannah*, 250 Ga. 121, 296 S.E.2d 690 (1982); *Ellis v. State*, 164 Ga. App. 366, 296 S.E.2d 726 (1982); *Staton v. State*, 164 Ga. App. 464, 297 S.E.2d 375 (1982); *LoGiudice v. State*, 164 Ga. App. 709, 297 S.E.2d 499 (1982); *Rasnake v. State*, 164 Ga. App. 765, 298 S.E.2d 42 (1982); *Green v. State*, 250 Ga. 610, 299 S.E.2d 544 (1983); *State v. Chumley*, 164 Ga. App. 828, 299 S.E.2d 564 (1982); *Baranan v. Fulton County*, 250 Ga. 531, 299 S.E.2d 722 (1983); *Lang v. State*, 168 Ga. App. 693, 300 S.E.2d 220 (1983); *Karlovich v. State*, 165 Ga. App. 761, 302 S.E.2d 396 (1983); *Matthews v. State*, 167 Ga. App. 28, 305 S.E.2d 846 (1983); *Palmer v. State*, 167 Ga. App. 705, 307 S.E.2d 275 (1983); *Chester v. State*, 168 Ga. App. 618, 309 S.E.2d 897 (1983); *Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983); *United States v. Fazio*, 706 F.2d 1115 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983); *Moore v. Zant*, 722 F.2d 640 (11th Cir. 1983); *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D. Ga. 1983); *Scott v. State*, 253 Ga. 147, 317 S.E.2d 830 (1984); *State v. Turntime*, 170 Ga. App. 740, 318 S.E.2d 157 (1984); *United States v. Snowden*, 735 F.2d 1310 (11th Cir. 1984); *Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir. 1984); *United States v. Haley*, 743 F.2d 862 (11th Cir. 1984); *United States v. Carpenter*, 611 F. Supp. 768 (N.D. Ga. 1985); *Goodman v. State*, 255 Ga. 226, 336 S.E.2d 757 (1985); *Nixon v. State*, 256 Ga. 261, 347 S.E.2d 592 (1986); *Bell v. State*, 179 Ga. App. 790, 347 S.E.2d 725 (1986); *Shaw v. State*, 179 Ga. App. 807, 348 S.E.2d 132 (1986);

Hunt v. State, 180 Ga. App. 103, 348 S.E.2d 467 (1986); *Alewine v. State*, 180 Ga. App. 679, 350 S.E.2d 46 (1986); *Watson v. State*, 181 Ga. App. 512, 352 S.E.2d 828 (1987); *United States v. One 1984 Chevrolet Truck*, 682 F. Supp. 1221 (N.D. Ga. 1988); *Herren v. Bowyer*, 850 F.2d 1543 (11th Cir. 1988); *Clark v. State*, 189 Ga. App. 124, 375 S.E.2d 783 (1988); *Exposito v. State*, 191 Ga. App. 761, 382 S.E.2d 412 (1989); *Newsome v. State*, 189 Ga. App. 329, 386 S.E.2d 887 (1989); *Greenwood v. State*, 203 Ga. App. 901, 418 S.E.2d 160 (1992); *Lowe v. Aldridge*, 958 F.2d 1565 (11th Cir. 1992); *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992); *Felts v. State*, 207 Ga. App. 31, 427 S.E.2d 25 (1993); *Campbell v. State*, 207 Ga. App. 366, 428 S.E.2d 111 (1993); *Smith v. Deering*, 880 F. Supp. 816 (S.D. Ga. 1994); *Strickland v. Linahan*, 72 F.3d 1531 (11th Cir. 1996); *Miller v. State*, 221 Ga. App. 494, 471 S.E.2d 565 (1996); *Taylor v. State*, 230 Ga. App. 749, 498 S.E.2d 113 (1998); *Buchnowski v. State*, 233 Ga. App. 766, 505 S.E.2d 263 (1998); *Willis v. State*, 234 Ga. App. 135, 505 S.E.2d 570 (1998); *In re B.C.G.*, 235 Ga. App. 1, 508 S.E.2d 239 (1998); *Edgell v. State*, 253 Ga. App. 775, 560 S.E.2d 532 (2002); *Binkley v. State*, 255 Ga. App. 313, 566 S.E.2d 31 (2002); *State v. Simmons*, 255 Ga. App. 336, 565 S.E.2d 549 (2002); *State v. Rocco*, 255 Ga. App. 565, 566 S.E.2d 365 (2002).

Expectation of Privacy

Privacy standard for testing fourth amendment violations contains a two-fold requirement: first, that a person has exhibited an actual subjective expectation of privacy; and second, that the expectation be one that society is prepared to recognize as reasonable. *United States v. Michael*, 622 F.2d 744 (5th Cir. 1980), *rev'd on other grounds*, 645 F.2d 252, (5th Cir.), *cert. denied*, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

A fourth amendment violation occurs only if a defendant manifests a subjective expectation of privacy in a class of property protected by U.S. Const., amend. 4 that society accepts as objectively reasonable. *Perry v. State*, 204 Ga. App. 643, 419 S.E.2d 922 (1992).

Reasonable expectation of privacy protected. — U.S. Const., amend. 4 protects individuals from violations of their legiti-

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mate or reasonable expectations of privacy. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Fourth amendment protection is primarily directed to one's own home, person, papers, and effects, and to one's own reasonable expectation of privacy. *Dunbar v. State*, 163 Ga. App. 243, 292 S.E.2d 897 (1982).

Protected expectations of privacy must be reasonable. *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026, 101 S. Ct. 1733, 68 L. Ed. 2d 220 (1981).

Legitimate expectation of privacy must exist. — An illegal search violates rights under U.S. Const., amend. 4 only of those persons who have a legitimate expectation of privacy in the invaded place. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

As defendant claimed no ownership interest in a backpack that was seized from the defendant's friend's apartment and which contained materials for a methamphetamine manufacturing lab, the defendant had no reasonable expectation of privacy and could not assert that denial of suppression of the contents thereof was error. *Lough v. State*, 276 Ga. App. 495, 623 S.E.2d 688 (2005).

Standing. — If the owner of an automobile relinquishes actual possession to a third party, the owner thereby abandons any expectation of privacy in the automobile, and owner therefore lacks standing to contest the legality of the search and seizure of the vehicle. *Gresham v. State*, 204 Ga. App. 540, 420 S.E.2d 71 (1992).

Persons aggrieved by a purportedly illegal search solely through the introduction of evidence seized from a third person's premises or property lack standing to assert a fourth amendment violation. *Duque v. State*, 228 Ga. App. 391, 491 S.E.2d 841 (1997).

Because the defendant did not have any ownership interest, possessory interest or expectation of privacy in a passenger's purse, the trial court erred in granting the defendant's motion to suppress evidence found in the purse as to charges pending against the defendant. *State v. Harris*, 236 Ga. App. 525, 513 S.E.2d 1 (1999).

Defendant, as a mere passenger who did

not assert an interest in either the driver's car or the property found in it, lacked standing to object to a search of the car. *State v. Saia*, 249 Ga. App. 69, 547 S.E.2d 407 (2001).

Property law analysis replaced by privacy analysis. — Analysis of search and seizure cases in terms of property law has now been replaced by reasonable expectation of privacy analysis. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Capacity to claim protection of U.S. Const., amend. 4 depends not upon property right in the invaded place but upon whether the person who claims the protection of the fourth amendment has a legitimate expectation of privacy in the invaded place. *Cuevas v. State*, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980); *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

What a person knowingly exposes to public is not subject of fourth amendment protection. *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (decided prior to passage of Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq.); *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980).

Loss of government's right to challenge expectation of privacy. — The government, through its assertions, concessions, and acquiescence, may lose its right to challenge the petitioner's assertion that the petitioner possessed a legitimate expectation of privacy in a searched home. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Wrongdoer's expectation of privacy regarding confidence. — U.S. Const., amend. 4 affords no protection to a wrongdoer's misplaced belief that person to whom the wrongdoer voluntarily confides the wrongdoing will not reveal it. *Goodwin v. State*, 154 Ga. App. 46, 267 S.E.2d 488 (1980).

Conversations with accomplice. — Whether the conversation be face-to-face, or via telephone, expectations of privacy of defendant's accomplice are the same. The accomplice has no right under U.S. Const., amend. 4 to silence detectives or to exclude recordings of conversations the accomplice

had with them and which they could relate in their testimony. *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

However strongly defendant may trust apparent colleague, the defendant's expectations in this respect are not protected by U.S. Const., amend. 4 when it turns out that the colleague is a government agent regularly communicating with the authorities. For constitutional purposes, no different result is required if the agent, instead of immediately reporting and transcribing the conversations with defendant, either: (1) simultaneously records them with electronic equipment which the agent is carrying on the agent's person; or (2) carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

Defendant conducting illegal activity in sister's apartment. — Defendant's sibling, who was lessee of an apartment, could consent to a search of the entire apartment, including the bedroom where the defendant's brother was staying, and defendant had no legitimate or reasonable expectation of privacy in conducting criminal business in the sibling's home. *Ford v. State*, 214 Ga. App. 284, 447 S.E.2d 334 (1994).

Privacy expectation as not extending to another's abode. — Although the defendant claimed that the defendant lived with the defendant's friend in the apartment searched, where illegal drugs were found, the records of the apartment complex showed that only the friend's family lived in the apartment searched and that the defendant lived in a different apartment and, therefore, the defendant had no proprietary interest nor expectation of privacy in the apartment and no standing to object to the search. *Moss v. State*, 171 Ga. App. 571, 320 S.E.2d 553 (1984).

Defendant lacked standing to challenge warrantless search of victim's condo where defendant's father testified that defendant lived with defendant's parents, which controverted defendant's assertion that defendant was more than a mere overnight guest at victim's condo. *White v. State*, 263 Ga. 94, 428 S.E.2d 789 (1993).

Privacy expectation does not extend to clothing worn by another. — Defendant did

not have standing to claim a violation of the defendant's own constitutional rights in connection with the recovery of drugs in the course of a pat-down of another person and the search of defendant's jacket which was being worn by that person. *Robinson v. State*, 226 Ga. App. 406, 486 S.E.2d 667 (1997).

Apartment tenant who requested repair service for a plumbing leak had no reasonable expectation of privacy in the tenant's apartment to the extent it was invaded by an off-duty police officer who responded in the officer's capacity as a maintenance supervisor after being advised by another officer that there were suspected illicit activities going on at the apartment. *State v. Almand*, 196 Ga. App. 40, 395 S.E.2d 609 (1990).

Motel room. — Defendant who was not present in a motel room when police officers entered it and had neither a proprietary nor a possessory interest in the room could not claim a reasonable expectation of privacy in the contents of the room, with the result that the defendant had no standing to assert a fourth amendment violation. *Rutherford v. State*, 191 Ga. App. 505, 382 S.E.2d 205 (1989).

Lack of right of ownership or possession. — Defendant had no reasonable expectation of privacy in the premises searched, and did not assert any valid right of ownership or possession in the property seized, where the defendant did not reside on the premises, apparently was not present when the materials were seized, and did not claim any right of ownership or possession of the evidence. *Boatright v. State*, 192 Ga. App. 112, 385 S.E.2d 298 (1989).

Search of rubble of burned building. — Defendant, who was charged with arson after the defendant's home and office were totally consumed by a fire, had no reasonable objective expectation of privacy in the structure, and the seizure of items exhumed from openly visible ashes and rubble did not violate the defendant's fourth amendment rights. *Pervis v. State*, 181 Ga. App. 613, 353 S.E.2d 200 (1987).

Expectation of privacy in open field. — Defendant could not claim a legitimate expectation of privacy that the defendant's conduct in the open field would be free from observation from the easement area, as those persons granted the easement were

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likely to be found within that area. *Perry v. State*, 204 Ga. App. 643, 419 S.E.2d 922 (1992); *Manley v. State*, 217 Ga. App. 556, 458 S.E.2d 179 (1995).

Open field. — Defendant had no expectation of privacy to an area behind the defendant's house where marijuana plants grew because the area was separated by trails leading away from the defendant's mowed lawn, the plants were not growing inside any structure nor were they protected from view, and many of the plants were protected by mesh wire; the warrantless seizure of the plants did not violate the fourth amendment. *Smithson v. State*, 280 Ga. App. 421, 634 S.E.2d 184 (2006).

Visual surveillance from airplane. — The mere fact that the person observed has an expectation of privacy is not the whole story; rather, the expectation must be reasonable. Thus, defendant has no reasonable expectation of privacy to be free from a visual surveillance from an airplane flying at lawful height over the premises where defendant is. *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Expectation of privacy in automobile. — Expectation of privacy analysis is especially appropriate in cases which involve an individual's rights with respect to an automobile; insofar as U.S. Const., amend. 4's protection extends to a motor vehicle, it is the right to privacy that is the touchstone of the inquiry. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Diminished expectation of privacy surrounds an automobile. *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980).

Search and seizure cases involving vehicles have recognized that an individual's expectation of privacy in that individual's automobile is less than in other property. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Expectation of privacy in police car. — The search of a police car did not offend defendant's right to be protected against unlawful search and seizure as defendant

had no reasonable expectation of privacy in the back seat of a police car. *Mullinax v. State*, 227 Ga. App. 670, 490 S.E.2d 201 (1997).

Expectation of privacy in premises of truck. — A court would be authorized to find that the driver of a truck did not have a reasonable expectation of privacy in the premises of the truck, since the owner of the truck was riding in the truck, which contrasts with the expectation of privacy in a room maintained in another's house, where the expectation would be *prima facie*. *Braddock v. State*, 127 Ga. App. 513, 194 S.E.2d 317 (1972).

Items in automobile. — Although the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office, an individual enjoys an expectation of privacy with respect to items secreted within the interior of the automobile. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

Where codefendant denied any interest in the property seized from the vehicle, but testified that clothing and bedding belonging to the codefendant were contained in the van, codefendant was more than a mere passenger in the vehicle. The codefendant's position was instead analogous to that of a lessee of a rented vehicle, with the result that codefendant could legitimately claim a reasonable expectation of privacy with respect to it. *State v. Diaz*, 191 Ga. App. 830, 383 S.E.2d 195 (1989).

Search of automobile for contraband. — If police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, they may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. *Gonzalez v. State*, 195 Ga. App. 249, 392 S.E.2d 893 (1990).

Because a defendant was pulled over for playing the car radio too loudly in violation of city noise ordinances and the officer noted that the windshield was cracked, and because the officer confirmed by radio that the defendant's license had been suspended, there was probable cause for arrest; because of the lawful arrest and the necessity to impound the defendant's vehicle due to its unsafe condition, the officer was autho-

rized to search the passenger compartment. Thus, the trial court properly refused to suppress evidence of contraband on the basis that it stemmed from a pretextual stop unsupported by articulable suspicion or probable cause. *Freeman v. State*, 195 Ga. App. 357, 393 S.E.2d 496 (1990).

Expectation of privacy in automobile or property seized. — Passengers in an automobile, who assert neither a possessory interest in the automobile searched nor an interest in the property seized, do not have a legitimate expectation of privacy in the areas of the car to be searched, and, accordingly, do not have fourth amendment rights infringed by the search and seizure. *Meyer v. State*, 150 Ga. App. 613, 258 S.E.2d 217 (1979), cert. denied, 445 U.S. 952, 100 S. Ct. 1602, 63 L. Ed. 2d 788 (1980).

Mere assertion of ownership in items seized does not alone lead to the conclusion that a legitimate expectation of privacy exists if defendant claims no proprietary or possessory interest in the car in which they were found and all the evidence indicates that defendant was a mere passenger in the car, and as such, had no legitimate expectation of privacy therein. *Keishian v. State*, 202 Ga. App. 718, 415 S.E.2d 324 (1992).

Search of spare tire cavity. — The incongruity of a worn, oddly sized spare tire from a different manufacturer than the other tires of a late model sedan provided a state trooper with probable cause to support a search of the tire cavity, even though the defendant's consent to a search did not include permission to slash the spare tire to investigate its contents. *United States v. Strickland*, 902 F.2d 937 (11th Cir. 1990).

Mere possessor-driver of stolen automobile in operation on public highway has no legitimate expectation of privacy in a vehicle identification number observable through the windshield. *United States v. Pitts*, 588 F.2d 102 (5th Cir.), cert. denied, 441 U.S. 948, 99 S. Ct. 2171, 60 L. Ed. 2d 1051 (1979).

An unauthorized driver of a rental vehicle did not have a reasonable expectation of privacy after the driver was placed under arrest and acquiesced in the impoundment of the vehicle. *Hall v. State*, 223 Ga. App. 211, 477 S.E.2d 364 (1996).

Where appellants abandoned item before item was seized, the appellant's forfeited any expectation of privacy in it. *United States v.*

Berd, 634 F.2d 979 (5th Cir. 1981).

Possession of drugs not protected. — The right of privacy does not embrace the right to possess dangerous drugs. *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974).

Expectation of privacy as not extending to drugs in codefendant's immediate possession. — The defendant, though acting jointly with another to conceal cocaine on that other person, did not share with that other person a legitimate expectation of privacy, because the defendant could not have asserted control over that other person and could not have excluded access to the other person, and, hence, did not have the requisite standing to contest the legality of the search and seizure of the contraband. *United States v. Brown*, 743 F.2d 1505 (11th Cir. 1984).

Contents of luggage. — An individual has a reasonable expectation of privacy as to the contents of the individual's luggage and that these contents will not be exposed absent consent or a legally acquired search warrant. *Pullano v. State*, 169 Ga. App. 377, 312 S.E.2d 857 (1983).

Abandoned luggage. — Deplaned airline passenger abandoned any rights passenger may have had in bag prior to its search, where passenger disclaimed the bag, refused to pick it up after officers requested that passenger select passenger's bag, and stood silent while co-defendant claimed ownership of the bag and while it was searched. *Orman v. State*, 207 Ga. App. 671, 428 S.E.2d 813 (1993).

Closed refrigerator. — A police officer's opening the door of an operating, closed refrigerator in a storage unit, after having been called to investigate vandalism and possible burglary, did not rise to the level of emergency involving immediate threats to life or limb, and the warrantless search of the refrigerator was not justified. *State v. Gallup*, 236 Ga. App. 321, 512 S.E.2d 66 (1999).

Bank records. — There is no legitimate expectation of privacy concerning the information kept in bank records. *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (decided prior to passage of Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq.).

Reporting requirements of the federal Bank Secrecy Act, which requires certain

Expectation of Privacy (Cont'd)

financial institutions to file currency transaction reports, were not unconstitutional as applied to defendants charged with a money laundering scheme, as an individual who engages in a currency transaction with a bank has no reasonable expectation of privacy which is protected by U.S. Const., amend. 4. *United States v. Sanchez Vazquez*, 585 F. Supp. 990 (N.D. Ga. 1984).

Stillborn fetus. — Defendant's quasi-property interest in the defendant's stillborn fetus did not support a privacy claim sufficient to implicate the search and seizure provisions under U.S. Const., amend. 4, and defendant enjoyed no reasonable expectations of privacy to suppress evidence of traces of cocaine discovered in the fetus pursuant to Georgia's Death Investigation Act. *Jackson v. State*, 208 Ga. App. 391, 430 S.E.2d 781 (1993).

Invasion of privacy prior to executing warrant. — Police officer unreasonably invaded defendants' privacy by looking through their window before knocking on their door when executing an arrest warrant for a third party where: (1) there was insufficient evidence that the third party lived with defendants; (2) even if the police were authorized to enter defendants' home, looking through the window was unreasonable as the officer did not reach the window by traveling the route any visitor would travel to reach the front door; and (3) the officer did not have articulable facts which would warrant a reasonably prudent officer to believe that the third party was a danger. A police officer must have a reasonable belief that forewarning would jeopardize the officers before actions, such as peering through a window, would be justified. *State v. Schwartz*, 261 Ga. App. 742, 583 S.E.2d 573 (2003).

Places and Things to Which Right Extends

Primarily protects citizen, home, and effects. — U.S. Const., amend. 4 is primarily directed to protection of the citizen in one's home, one's person, and one's papers or effects which may be in the home or on one's person. *Anderson v. State*, 133 Ga. App. 45, 209 S.E.2d 665 (1974).

Protection not extended to places not specified or included. — Fourth amendment protection simply does not extend to

places which amendment does not specify or include. *Anderson v. State*, 133 Ga. App. 45, 209 S.E.2d 665 (1974).

Privacy interests regarding the home. — Individual's privacy interests are nowhere more clearly defined or rigorously protected by the courts than in the home — the core of fourth amendment rights. *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980).

Ascertainment of whether structure is dwelling. — It is not the physical character of a structure that determines whether it is a "dwelling"; rather, it is the actual habitation of a structure that makes it a "dwelling." *Olson v. State*, 166 Ga. App. 104, 303 S.E.2d 309 (1983), cert. denied, 467 U.S. 1209, 104 S. Ct. 2397, 81 L. Ed. 2d 354 (1984).

Dwelling place, whether flimsy or firm, permanent or transient, is its inhabitant's unquestionable zone of privacy under U.S. Const., amend. 4, for in one's dwelling a citizen unquestionably is entitled to a reasonable expectation of privacy. *Kelley v. State*, 146 Ga. App. 179, 245 S.E.2d 872 (1978).

Police may investigate complaint on private property. — Police officers do not need probable cause to proceed onto private property merely to investigate a complaint. *State v. Lyons*, 167 Ga. App. 747, 307 S.E.2d 285 (1983); *Guess v. State*, 197 Ga. App. 40, 397 S.E.2d 453 (1990).

Approach to outside of dwelling. — U.S. Const., amend. 4 extends beyond the pragmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. But it does not extend so far as to prevent the police from making any contact with the citizenry — and to hold that the police may not, upon request, although exigent circumstances do not appear, approach the outer doors of a dwelling absent a warrant or consent of an owner or occupant would work that result. *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Officer on way to front door not in violation. — Officer who witnessed the defendant in possession of marijuana, followed the defendant into the defendant's kitchen, arrested the defendant and, seeing cocaine in plain view, proceeded to search the rest of the house, was not in violation of defendant's fourth amendment rights, regardless

of whether the initial observation took place in the street, in defendant's yard or on the steps to the defendant's porch. *Jenkins v. State*, 223 Ga. App. 486, 477 S.E.2d 910 (1996).

Although police officers had probable cause to investigate a crime, the fourth amendment prohibited them from entering defendant's home or its curtilage without a warrant absent consent or a showing of exigent circumstances; consequently, the trial court erred by denying defendant's motion to suppress evidence of a 10-foot high marijuana plant plainly growing in defendant's backyard. *Kirsche v. State*, 271 Ga. App. 729, 611 S.E.2d 64 (2005).

Curtilage. — It is well settled that fourth amendment protection extends to the curtilage of a dwelling house, and a roofed structure within 50 or 60 feet of the back door is well within the protected area, provided it is used for purposes related to the family household and domestic economy. *McGee v. State*, 133 Ga. App. 184, 210 S.E.2d 355 (1974).

The curtilage is the area to which the intimate activity associated with the sanctity of a man's home and the privacies of life extend, and therefore has been considered part of the home for fourth amendment purposes. *Payton v. State*, 177 Ga. App. 104, 338 S.E.2d 462 (1985); *Thomas v. State*, 203 Ga. App. 529, 417 S.E.2d 353, cert. denied, 203 Ga. App. 908, 417 S.E.2d 353 (1992).

Yard of a private residence is curtilage within the protection of U.S. Const., amend. 4. *Bloodworth v. State*, 233 Ga. 589, 212 S.E.2d 774 (1975).

Curtilage includes the yards and grounds of a particular address, its gardens, barns, buildings, etc. *Payton v. State*, 177 Ga. App. 104, 338 S.E.2d 462 (1985).

Helicopter hovering over noncurtilage area. — Even if a low-flying helicopter would have been in a place which violated an expectation of privacy that society is prepared to honor if an officer in the helicopter was observing activities in the home, it was not violating the resident's fourth amendment rights when it hovered over the non-curtilage area. *Thomas v. State*, 203 Ga. App. 529, 417 S.E.2d 353, cert. denied, 203 Ga. App. 908, 417 S.E.2d 353 (1992).

Non-enclosed garden. — Where defendants deliberately chose to grow marijuana

in a non-enclosed area (i.e., outside any kind of structure) and thus open to plain view to those having an opportunity to approach or pass by the field (or garden) and the facts reasonably supported the trial court's conclusion that the deputies were present on the premises looking for a defendant and not conducting a search for marijuana, defendants waived any reasonable expectation of privacy and forsook any protection otherwise afforded by the fourth amendment and could not invoke any such protection simply by claiming the "garden" was a part of the curtilage. *Gravley v. State*, 181 Ga. App. 400, 352 S.E.2d 589 (1986).

Open fields. — The security of person and home from unreasonable search and seizure does not extend to open fields. *Kennemore v. State*, 222 Ga. 252, 149 S.E.2d 471 (1966).

Searches and seizures of uninhabited lands or open fields do not fall within the function of U.S. Const., amend. 4, and this also applies to property which is considered abandoned. *State v. Roberts*, 133 Ga. App. 206, 210 S.E.2d 387 (1974).

Since the special protection accorded by U.S. Const., amend. 4 to the people in their "persons, houses, papers, and effects" is not extended to open fields, evidence obtained from an aerial search of an open field is not inadmissible as the product of an illegal search. *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Party has no protection under U.S. Const., amend. 4 against seizure of contraband in open fields of another. *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

If a field is located beyond all of the buildings on a person's property and thus is beyond the curtilage of the home, the owner does not have a reasonable expectation of privacy in the field and a warrantless search of the field and seizure of any drugs grown thereon does not violate U.S. Const., amend. 4. *United States v. Berrong*, 712 F.2d 1370 (11th Cir. 1983), cert. denied, 467 U.S. 1209, 104 S. Ct. 2397, 81 L. Ed. 2d 354 (1984).

The constitutional protection does not extend to open fields, orchards, or other lands not an immediate part of the dwelling site, and a warrant is not a necessary prerequisite to a search of such an area. Thus, there cannot be an illegal extension of a search warrant beyond the curtilage, for beyond the

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curtilage a search warrant is not needed. *Ray v. State*, 181 Ga. App. 42, 351 S.E.2d 490 (1986).

Open fields do not provide the setting for those intimate activities that the amendment is intended to shelter from government interference or surveillance, and there is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. *Thomas v. State*, 203 Ga. App. 529, 417 S.E.2d 353, cert. denied, 203 Ga. App. 908, 417 S.E.2d 353 (1992).

Surveillance of defendant's house by officer stationed on defendant's property in a woods over 200 yards from the house was not illegal intrusion into curtilage of defendant's residence. *Mattingly v. State*, 205 Ga. App. 777, 423 S.E.2d 709 (1992).

It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. For these reasons, the asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable. Likewise, ineffective as a bar of the public from viewing or hearing in open fields are gates which cannot be closed and trafficable dirt roadways. *Perry v. State*, 204 Ga. App. 643, 419 S.E.2d 922 (1992); *Manley v. State*, 217 Ga. App. 556, 458 S.E.2d 179 (1995).

Special protection against unlawful search and seizure in one's home, pursuant to U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, extended to the curtilage of defendant's home but not into the open fields; accordingly, since police officers were in an unoccupied, undeveloped densely wooded/swamp area on defendant's property, it was part of the open fields, the officers had a right to be there, and evidence observed thereon was not subject to suppression for constitutional violations. Furthermore, there was no reasonable privacy right that was infringed by government intrusion in an open field, the fact that defendant owned the property was not determinative, nor was it instructive that being on that property would have constituted a trespass at common law. *State v. Clark*, 263 Ga. App. 480, 588 S.E.2d 254 (2003).

Open beach, like an open field, has no protection against a search or seizure under

U.S. Const., amend. 4. *Anderson v. State*, 133 Ga. App. 45, 209 S.E.2d 665 (1974).

Arrest alone does not give rise to right to search vehicle parked on premises. *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Warrantless search of vehicle on premises lawfully searched. — In order to authorize a search of a vehicle parked within the curtilage of the premises which are to be searched pursuant to a warrant, there must be some evidence to connect the vehicle with the premises. *Albert v. State*, 155 Ga. App. 99, 270 S.E.2d 220 (1980).

Automobile in plain view. — Defendant's rights under U.S. Const., amend. 4 were not violated and the trial court properly refused to suppress evidence relating to defendant's car in a hit and run case where a police officer, after tracing the license plate of the suspect vehicle to defendant, gained probable cause to search defendant's car based on the officer's observations of defendant's car gained from the vantage point of a public sidewalk before the officer ever entered the curtilage of defendant's home to inspect the car more carefully; such observations included damage to the side of the car which was consistent with the accident, and the type, color, and license plate number of the car, all of which matched the description and plate number of the hit and run vehicle as described by witnesses. Additionally, the officer had probable cause to seize the car as an instrumentality of the crime since the officer had no way of determining who might have access to the vehicle to remove and destroy evidence. *Jackson v. State*, 258 Ga. App. 806, 575 S.E.2d 713 (2002), cert. denied, 540 U.S. 1006, 124 S. Ct. 536, 157 L. Ed. 2d 413 (2003).

Warrant, consent, or exigent circumstances required to enter fire-damaged premises. — Because reasonable privacy expectations may remain in fire-damaged premises, official entries into those premises require a warrant, consent, or exigent circumstances. *Davis v. State*, 178 Ga. App. 760, 344 S.E.2d 730 (1986).

Commercial premises. — The protection of constitutional rights under U.S. Const., amend. 4 includes commercial premises. *State v. Cochran*, 135 Ga. App. 47, 217 S.E.2d 181 (1975).

There is nothing inherent in “papers” which immunizes them from searches otherwise proper under U.S. Const., amend. 4. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Telephone toll and billing records are not owned or possessed by defendant, but are business records belonging to the telephone company. *Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982).

Although defendants had general standing to attack the illegality of a wiretap on their telephone, they lacked the standing to assert that the illegality was due to the fact that their telephone toll records were illegally obtained, because telephone toll and billing records are not owned or possessed by the telephone customer but are business records belonging to the telephone company. *Van Nice v. State*, 180 Ga. App. 112, 348 S.E.2d 515 (1986), cert. denied, 480 U.S. 931, 107 S. Ct. 1568, 94 L. Ed. 2d 760 (1987).

Subpoena of brokerage records upheld. — Neither the first amendment nor the fourth amendment required a federal district court to quash a subpoena to obtain a brokerage firm’s records relating to members of an association, where the subpoena had been issued in connection with an investigation of possible criminal violations of the tax laws and the association’s financial system may have been used to evade requirements for reporting taxable income. In re Grand Jury Proceeding, 842 F.2d 1229 (11th Cir. 1988).

Luggage. — While one has a right under U.S. Const., amend. 4 to expect privacy of the contents of one’s luggage, this right does not extend to the bags’ exterior or to control of who actually handles them once they have been released to the custody of an airline. *Yocham v. State*, 165 Ga. App. 650, 302 S.E.2d 390 (1983).

Abandoned property. — The personal right to fourth amendment protection of property against search and seizure is lost when that property is abandoned. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Constitutional protection under U.S. Const., amend. 4 and U.S. Const., amend. 14, does not apply to property that has been abandoned. The issue of abandonment vel non of the property is a factual issue to be

resolved by the trier of fact. *Vines v. State*, 142 Ga. App. 616, 237 S.E.2d 17 (1977).

The constitutional protection of the fourth and fourteenth amendments does not apply to property that has been abandoned. *Ramsey v. State*, 183 Ga. App. 48, 357 S.E.2d 869, cert. denied, 183 Ga. App. 906, 357 S.E.2d 869 (1987); *Cooper v. State*, 186 Ga. App. 154, 366 S.E.2d 815 (1988); *Guess v. State*, 197 Ga. App. 40, 397 S.E.2d 453 (1990).

A defendant has no fourth amendment rights with respect to discarded or abandoned property. *Evans v. State*, 192 Ga. App. 832, 386 S.E.2d 712 (1989).

State trooper was entitled to treat the contents of a trash can located near a vehicle trooper was about to search as abandoned property. *Lirousa v. State*, 200 Ga. App. 475, 408 S.E.2d 436 (1991).

Because defendant was lawfully detained, claim could not be made that defendant was coerced into abandoning a bag of cocaine and, accordingly, the trial court did not err in denying defendant’s motion to suppress the evidence. *Edwards v. State*, 239 Ga. App. 44, 518 S.E.2d 426 (1999).

If contraband is discarded during flight or before a suspect is seized, it is admissible as evidence, even if there is an issue as to whether the officers possessed reasonable suspicion of criminal activity. *Watson v. State*, 247 Ga. App. 498, 544 S.E.2d 469 (2001).

Determination of abandonment. — The question of abandonment for fourth amendment purposes does not turn on strict property concepts but on whether the accused has relinquished an interest in the property to the extent that the accused no longer has a reasonable expectation of privacy in the premises at the time of the search. *Bloodworth v. State*, 233 Ga. 589, 212 S.E.2d 774 (1975).

The issue of abandonment of property is a factual issue to be resolved by the trier of fact, the trial court, and the court’s finding on a motion to suppress will not be disturbed if there is evidence to support the court’s determination of abandonment. *Holley v. State*, 157 Ga. App. 863, 278 S.E.2d 738 (1981).

Abandoned house and its surrounding property were not part of the curtilage of defendant’s residence. *Olson v. State*, 166 Ga. App. 104, 303 S.E.2d 309 (1983), cert.

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denied, 467 U.S. 1209, 104 S. Ct. 2397, 81 L. Ed. 2d 354 (1984).

Abandonment of vehicle. — If an abandoned car is a necessary part of a criminal investigation, its search is lawful even though no search warrant was obtained. *Crocker v. State*, 114 Ga. App. 43, 150 S.E.2d 294 (1966).

The following facts supported the trial court's finding that the defendant abandoned the defendant's car prior to its seizure and no longer retained a legitimate expectation of privacy in it: (1) the vehicle was found over 100 yards from the nearest home on land not belonging to the defendant; (2) it was down a deserted field road; (3) the tag and battery had been removed; and (4) the vehicle was covered with freshly cut bushes and debris. *Williams v. State*, 171 Ga. App. 546, 320 S.E.2d 389 (1984).

Abandoned luggage properly turned over to police. — Because the defendant, in making no provision for the luggage, had in effect abandoned it in an individual's automobile with no undertaking from the individual to keep it, the individual was at best a reluctant bailee, and thus defendant's argument that the individual had no authority to dispose of the luggage, by turning it over to the police, was clearly erroneous. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Items thrown from car. — Because law officers observed defendant throw a paper napkin containing a quantity of cocaine from a car, defendant affirmatively abandoned it by throwing it from the vehicle as the officers approached, thereby placing it within plain view on the public highway. Since neither abandoned property nor items in plain view of law enforcement officers, who are where they have a right to be, can be the subject of a motion to suppress when the abandonment of the evidence and the simultaneous placing of it in plain view occurs during the course of a legal stop, the trial court erred in granting defendant's motion to suppress. *State v. Howell*, 180 Ga. App. 449, 349 S.E.2d 476 (1986).

Garbage. — The fourth amendment does not prohibit the warrantless search and sei-

zure of garbage left for collection at the curb outside the home. *Perkins v. State*, 197 Ga. App. 577, 398 S.E.2d 702 (1990).

Trial court properly denied defendant's motion to suppress evidence, pursuant to O.C.G.A. § 17-5-30, because there was no violation of defendant's fourth amendment rights by the seizure of garbage bags from the garbage cans near defendant's residence, as they were a distance away from the house, there was no enclosure, and the sanitation workers had access to them; defendant was not found to have a subjective expectation of privacy that society would have accepted as objectively reasonable, as the cans were not found to be within the curtilage area of the home and their seizure was proper. *Scott v. State*, 270 Ga. App. 292, 606 S.E.2d 312 (2004).

Abandoned motel room. — Having abandoned motel room, defendant no longer had any expectation of privacy, and could not complain of entry and search of room. *Buttrum v. State*, 249 Ga. 652, 293 S.E.2d 334 (1982), cert. denied, 459 U.S. 1156, 103 S. Ct. 801, 74 L. Ed. 2d 1004 (1983); 479 U.S. 902, 107 S. Ct. 300, 93 L. Ed. 2d 275 (1986).

Because a motel manager opened the door to a room across the hall from the room in which the crimes were committed and saw no luggage or other signs of occupancy, after which the police entered the room and gathered evidence, finding that the manager had authority to open the room because it was abandoned and that defendant no longer had any expectation of privacy with respect to the room was not clearly erroneous. *Stovall v. State*, 216 Ga. App. 138, 453 S.E.2d 110 (1995).

Appropriation of abandoned property. — There is nothing unlawful in the government's appropriation of abandoned property, which does not constitute a search or seizure in the legal sense, such as when the accused drops a certain article at the approach of a police officer. *Green v. State*, 127 Ga. App. 713, 194 S.E.2d 678 (1972).

There is nothing unlawful in the appropriation by governmental agents of abandoned contraband property, which act in and of itself is not a search or seizure in a legal sense. *Holley v. State*, 157 Ga. App. 863, 278 S.E.2d 738 (1981).

O.C.G.A. § 52-7-25, allowing suspicionless stops of boats to check for required

safety equipment and vehicle registration, promoted the state's important interest in maintaining safe conditions for boaters on Georgia's lakes and rivers, and the procedure used was minimally intrusive, so that the statute did not violate U.S. Const., amend. 4. *Peruzzi v. State*, 275 Ga. 333, 567 S.E.2d 15 (2002).

Prisons

Prisoner letters. — For security and maintenance purposes, jail officials must have access to the cells and personal effects of all prisoners (including pretrial detainees). Letters found as a result of these searches are not within the scope of protection of the fourth amendment and are therefore admissible. *Thomas v. State*, 263 Ga. 85, 428 S.E.2d 564 (1993).

Letters written by codefendants to one another while in jail pending trial and left by them under the jail barber's chair were not protected. *Thomas v. State*, 263 Ga. 85, 428 S.E.2d 564 (1993).

Deliberate indifference to prisoner's health care needs. — Sheriff's knowledge of prisoner's need for medical care and the sheriff's intentional refusal to provide that care constituted "deliberate indifference," and the sheriff lost entitlement to qualified immunity to suit under § 1983 for violating the prisoner's fifth, eighth and fourteenth amendment rights. *Harris v. Coweta County*, 21 F.3d 388 (11th Cir. 1994).

Probable Cause

1. In General

Probable cause for arrest required. — The United States Constitution does not guarantee that only the guilty will be arrested, but a warrantless and malicious arrest based on no probable cause violates liberty. *Scott v. Donovan*, 539 F. Supp. 255 (N.D. Ga. 1982).

Probable cause required for warrantless arrest. — Although a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause. *United States v. Brookins*, 423 F.2d 463 (5th Cir. 1970), different result reached on rehearing, 434 F.2d 41 (5th Cir. 1970), cert. denied,

401 U.S. 912, 91 S. Ct. 880, 27 L. Ed. 2d 811 (1971).

If an arrest warrant has not been issued, a law enforcement officer may not arrest a person unless the officer has probable cause to believe the person has committed or is committing a crime. *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980).

Where an arrest is effected without a warrant, the fourth amendment requires a judicial determination of probable cause following arrest as a prerequisite to an extended restraint of liberty (other than the condition that one appear for trial). *City of Marietta v. Kelly*, 175 Ga. App. 416, 334 S.E.2d 6 (1985).

Detention for custodial interrogation must be supported by probable cause. *United States v. Hill*, 626 F.2d 429 (5th Cir. 1980).

Requirement that searches be based on probable cause. — The requirement under U.S. Const., amend. 4 that searches be based on probable cause applies only to searches of constitutionally protected areas. *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Probable cause for arrest does not necessarily constitute probable cause to search defendant's residence. *United States v. Morris*, 491 F. Supp. 222 (S.D. Ga. 1980), aff'd, 647 F.2d 568 (5th Cir. 1981).

Probable cause is a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, the judgment of a magistrate on the probable cause issue and the issuance of a warrant are also required before a search is made. *State v. Bradley*, 138 Ga. App. 800, 227 S.E.2d 776 (1976).

It is the purpose behind the search that is controlling as to which standard — probable cause or reasonable suspicion — will be applied. *Lowe v. City of Macon*, 720 F. Supp. 994 (M.D. Ga. 1989), aff'd, 925 F.2d 1475 (11th Cir. 1991).

Test of "probable cause" required by U.S. Const., amend. 4 can take into account nature of search that is being sought. *West Point-Pepperell, Inc. v. Marshall*, 496 F. Supp. 1178 (N.D. Ga. 1980), rev'd on other grounds, 689 F.2d 950 (11th Cir. 1982).

Evidence to be considered as a whole. — The evidence presented to establish probable cause for a search warrant must be

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considered as a whole. *Clarrington v. State*, 178 Ga. App. 663, 344 S.E.2d 485 (1986).

Determination of sufficiency of probable cause. — Determination of whether there was sufficient showing of probable cause to justify issuance of search warrant depends on resolution of two questions: first, whether or not the facts as stated in the affidavit constitute a sufficient showing of probable cause, and second, whether in the light of all of the sworn evidence placed before the magistrate, the magistrate was justified in ordering the issuance of the warrant. *Campbell v. State*, 226 Ga. 883, 178 S.E.2d 257 (1970), cert. denied, 401 U.S. 1002, 91 S. Ct. 1246, 28 L. Ed. 2d 535 (1971).

In a case where defendants were convicted of trafficking in cocaine, the trial court did not err in finding that there was probable cause to arrest the two defendants because after co-defendant met the two defendants in a nearby apartment complex, the co-defendant returned with the package of cocaine to sell to the undercover agent, and the second defendant parked a truck facing the area of the anticipated exchange, apparently so that the second defendant and the first defendant could watch the drug deal; therefore, the trial court did not err by denying the first defendant's motion to suppress. *Lopez v. State*, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

In dealing with probable cause, as the very name implies, the court deals with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976); *Duffy v. State*, 156 Ga. App. 847, 275 S.E.2d 658 (1980); *McConnell v. State*, 156 Ga. App. 612, 275 S.E.2d 697 (1980).

Standard of probabilities. — The inquiry reduces to a standard of probabilities, that is, whether the magistrate can reasonably conclude that the items described in the warrant are probably at the residence. *United States v. Morris*, 491 F. Supp. 222 (S.D. Ga. 1980), aff'd, 647 F.2d 568 (5th Cir. 1981).

Burden of proof is upon state to show what facts constituting probable cause ex-

isted and were presented to the magistrate before the warrant was issued. *Bell v. State*, 128 Ga. App. 426, 196 S.E.2d 894 (1973).

Marginal cases of probable cause determined by preference accorded warrants. — Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *State v. Babb*, 134 Ga. App. 302, 214 S.E.2d 397 (1975); *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

In reaching judgment on probable cause for search warrant, judge must use common-sense approach because the judge is dealing with a probability and not a certainty that a crime has been committed. *Ward v. State*, 234 Ga. 882, 218 S.E.2d 591 (1975).

Determination of probable cause does not rest upon a technical framework; instead, it depends on the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980).

If the underlying circumstances are detailed, if the reason for crediting the source of the information is given, and if a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

Probable cause determination for issuance of warrant must be made by neutral and detached magistrate instead of the officer engaged in the often competitive enterprise of ferreting out crime. *Mitchell v. State*, 136 Ga. App. 2, 220 S.E.2d 34 (1975).

In determining whether to issue search warrant, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before the magistrate, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Futch v. State*, 178 Ga. App. 115, 342 S.E.2d 493 (1986); *Lowe v. State*, 203 Ga. App. 277, 416

S.E.2d 750, cert. denied, 203 Ga. App. 906, 416 S.E.2d 750 (1992).

Magistrate determination's as a reasonable person. — The fourth amendment requirement that probable cause be shown for a warrant to issue means, in essence, that the magistrate must be presented with information as to facts or circumstances sufficient to give the magistrate, as a reasonable person, grounds to believe that a crime is being or has been committed. *Rothfuss v. State*, 160 Ga. 863, 288 S.E.2d 579 (1982).

Magistrate must have information sufficient to form independent judgment. — Judicial officer issuing warrant must be supplied with sufficient information to support independent judgment that probable cause exists for issuance of warrant. *Morgan v. Kiff*, 230 Ga. 277, 196 S.E.2d 445 (1973), overruled on other grounds, *Jacobs v. Hopper*, 238 Ga. 461, 233 S.E.2d 169 (1977).

The trial court in reviewing the probable cause determination made by the issuing magistrate must be convinced by the state that the magistrate had enough information to make an independent judgment that probable cause existed to search the defendant's premises. *Keith v. State*, 238 Ga. 157, 231 S.E.2d 727 (1977).

Rule under U.S. Const., amend. 4 that warrant be issued by neutral and detached magistrate requires magistrate's severance and disengagement from activities of law enforcement. Although the magistrate may be engaged only in part-time law enforcement activities, this association with law enforcement is an appropriate setting for a per se rule of disqualification. *Baggett v. State*, 132 Ga. App. 266, 208 S.E.2d 23 (1974).

Fourth amendment does not contemplate executive officers of government as neutral and disinterested magistrates. The fourth amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with the basic constitutional doctrine that individual freedom will best be preserved through a separation of powers and division of functions among the different branches and levels of government. *Vaughn v. State*, 160 Ga. App. 283, 287 S.E.2d 277 (1981).

Issuance of search warrant by justice of peace having pecuniary interest in issuing warrant effects a violation of the protections

afforded by U.S. Const., amend. 4 and U.S. Const., amend. 14. *Connally v. Georgia*, 429 U.S. 245, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977).

Justice of peace who also holds position as deputy sheriff is "per se" disqualified as a neutral and detached magistrate. *Vaughn v. State*, 160 Ga. App. 283, 287 S.E.2d 277 (1981).

Validity of search warrant issued by mayor involved in investigation. — Because the mayor was personally involved, along with the chief of police, in investigating the case against the defendant, and in fact encouraged the chief to catch the defendant, it cannot be maintained that the mayor acted independently of the police and prosecution, and the search warrant issued by the mayor was issued in violation of the defendant's rights under U.S. Const., amend. 4. *Jackson v. State*, 150 Ga. App. 67, 256 S.E.2d 670 (1979).

"Probable cause" determinations are not always jury questions. *Scott v. Donovan*, 539 F. Supp. 255 (N.D. Ga. 1982).

Conflict between testimony of magistrate and law enforcement officer. — Where any conflict between testimony of magistrate and law enforcement officer seeking warrant as to circumstances surrounding seeking of warrant was resolved by the court and supported by the record, motion to suppress evidence was properly denied. *Daitch v. State*, 168 Ga. App. 830, 310 S.E.2d 703 (1983).

Scope of amendment not determined by subjective conclusion of officer. — Even though a police officer believed that probable cause for a search was lacking, the court still had the duty to objectively determine if probable cause was present. The scope of U.S. Const., amend. 4 is not determined by the subjective conclusion of the law enforcement officer. *United States v. Clark*, 559 F.2d 420 (5th Cir.), cert. denied, 434 U.S. 969, 98 S. Ct. 516, 54 L. Ed. 2d 457 (1977).

What constitutes probable cause is evidence that would warrant a person of reasonable caution to believe that a felony has been committed, and such evidence must be measured by the facts of the particular case in which legality is questioned. *Cook v. Smith*, 303 F. Supp. 90 (S.D. Ga. 1969), aff'd, 427 F.2d 1172 (5th Cir. 1970); *United States v. Brown*, 305 F. Supp. 299 (S.D. Ga. 1969).

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Where the facts and circumstances known to the arresting officer are such as to warrant a person of prudence and caution in believing an offense has been committed, the quantum of evidence necessary to establish probable cause does not require proof of guilt. *Hood v. State*, 122 Ga. App. 547, 178 S.E.2d 44 (1970).

Probable cause exists under U.S. Const., amend. 4 if the facts and circumstances known to the officer warrant a prudent person in believing that the offense has been committed. *United States v. Brookins*, 423 F.2d 463 (5th Cir. 1970), different result reached on rehearing, 434 F.2d 41 (5th Cir. 1970), cert. denied, 401 U.S. 912, 91 S. Ct. 880, 27 L. Ed. 2d 811 (1971); *United States v. Elsoffer*, 671 F.2d 1294 (11th Cir. 1982).

Probable cause for arrest exists where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. *United States v. Bullock*, 441 F.2d 59 (5th Cir.); *United States v. Williams*, 322 F. Supp. 1074 (N.D. Ga. 1971); *State v. Causey*, 132 Ga. App. 17, 207 S.E.2d 225 (1974); *Quinn v. State*, 132 Ga. App. 395, 208 S.E.2d 263 (1974); *Fenning v. State*, 136 Ga. App. 569, 222 S.E.2d 122 (1975); *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975); *United States v. Casey*, 540 F.2d 811 (5th Cir. 1976); *United States v. Williams*, 594 F.2d 86 (5th Cir. 1979); *Palmer v. State*, 156 Ga. App. 291, 274 S.E.2d 692 (1980); *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980); *McQuarter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Test for probable cause is whether under facts a person of reasonable caution would believe that evidence was being possessed by defendant in the defendant's house. This requires merely a probability and not a certainty but does require more than a mere suspicion. *Brooks v. State*, 140 Ga. App. 371, 231 S.E.2d 138 (1976); *Gordon v. State*, 150 Ga. App. 862, 258 S.E.2d 664 (1979).

Probable cause means reasonable grounds, and is that apparent state of facts

which seems to exist after reasonable and proper inquiry. *Hogan v. State*, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

To establish probable cause (whether for the issuance of a warrant by a magistrate or, under exigent circumstances, for search without a warrant) three elements are essential: that there is reason to accept the informer's reliability; that the facts are sufficient to show how the informer obtained the information or that the criminal activity is described in such detail as to negate its being a mere rumor; and, that the information is current, not stale. *State v. Watts*, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

What is "reasonable, articulable ground" for detention may be less than probable cause to make an arrest or conduct a search, but must be more than mere caprice or arbitrary harassment. Each case depends on its own facts. Where there are some reasonable articulable grounds for suspicion, the state's interest in the maintenance of community peace and security outweigh the momentary inconvenience and indignity of investigatory detention. *Allen v. State*, 140 Ga. App. 828, 232 S.E.2d 250 (1976).

Test for probable cause. — Judge may consider totality of information before the judge to determine if probable cause exists, before issuing a search warrant. *Ward v. State*, 234 Ga. 882, 218 S.E.2d 591 (1975).

Test for probable cause is the totality of the evidence before the magistrate. Inferences of probable cause may be drawn only by a neutral and detached magistrate, not by the officer engaged in the often competitive enterprise of ferreting out crime. *State v. Guhl*, 140 Ga. App. 23, 230 S.E.2d 22 (1976), rev'd on other grounds sub nom. *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509 (1977).

The test for probable cause is the totality of the evidence before the magistrate. *Walker v. State*, 140 Ga. App. 418, 231 S.E.2d 386 (1976).

Under the "totality-of-the-circumstances test," evidence supplied by a citizen informant, corroborated by observation and information from police officers, plus complaints of other citizens to the police of late-night traffic at the location, provide a substantial basis for the magistrate to conclude that probable cause exists for a search. *Whitten v. State*, 174 Ga. App. 867, 331 S.E.2d 912 (1985).

What constitutes reasonable suspicion. — Specific and articulable facts, taken together with rational inferences from those facts, constitute reasonable suspicion. *United States v. Elsoffer*, 671 F.2d 1294 (11th Cir. 1982).

After an officer observed defendant's vehicle parked at a baseball park where there was no activity and saw a wide-eyed, scared look on the face of defendant's passenger, the officer did not have to have a reasonable suspicion that defendant or defendant's passenger were engaged in criminal activity to approach the passenger's side of the car and ask the passenger to roll down the passenger's window. *Akins v. State*, 266 Ga. App. 214, 596 S.E.2d 719 (2004).

Determination of probable cause for arrest without warrant. — Probable cause for an arrest without a warrant exists where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient to give them reasonable ground to believe that the accused has committed a felony. *McConnell v. State*, 156 Ga. App. 612, 275 S.E.2d 697 (1980).

Probable cause standards for items sought to be seized. — The requirements of U.S. Const., amend. 4 secure the same protection of privacy whether the search is for mere evidence or for fruits, instrumentalities, or contraband. There must be a nexus — automatically provided in the case of fruits, instrumentalities, or contraband — between the item to be seized and criminal behavior. In the case of mere evidence, however, probable cause to conduct a search must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. *United States v. Munroe*, 421 F.2d 644 (5th Cir.), cert. denied, 400 U.S. 851, 91 S. Ct. 79, 27 L. Ed. 2d 89 (1970).

Search warrant issuable upon fair probability. — In issuing a search warrant, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before the magistrate, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Morrow, 175 Ga. App. 743, 334 S.E.2d 344 (1985).

Requirements for issuance of search warrant generally. — Under U.S. Const., amend. 4, an officer may not properly issue a warrant to search a private dwelling unless the officer can find probable cause therefor from facts or circumstances presented to the officer under oath or affirmation. *Farmer v. Lawson*, 510 F. Supp. 91 (N.D. Ga. 1981).

Emphasis is on credibility and reliability of information presented to the magistrate and reasonableness of the magistrate's issuing the search warrant. *Keith v. State*, 238 Ga. 157, 231 S.E.2d 727 (1977).

Difference between requirements for guilt and probable cause. — There is a great difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968); *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975); *Duffy v. State*, 156 Ga. App. 847, 275 S.E.2d 658 (1980).

While the prosecution must bear the burden of persuasion with regard to probable cause for a warrantless search, it need not establish probable cause beyond a reasonable doubt, nor must a finding of probable cause rest upon evidence which is legally competent in a criminal trial. *United States v. Rodgers*, 442 F.2d 902 (5th Cir. 1971).

Law sanctions difference between methods permitted to prove ultimate issue of guilt and that of probable cause for search or arrest. *Ward v. State*, 234 Ga. 882, 218 S.E.2d 591 (1975).

The "reasonable cause" necessary to support arrest cannot demand the same strictness of proof as the accused's guilt upon a trial. *Duffy v. State*, 156 Ga. App. 847, 275 S.E.2d 658 (1980).

A lesser standard of proof is required to establish probable cause than to prove guilt. *McConnell v. State*, 156 Ga. App. 612, 275 S.E.2d 697 (1980).

Legal evidence not required for probable cause. — To show probable cause for the search and seizure it is not necessary that the arresting officer should have had before the officer legal evidence of the suspected illegal act. *Crocker v. State*, 114 Ga. App. 43, 150 S.E.2d 294 (1966).

"Staleness" as relates to probable cause is measured by the probability that the thing to

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be seized is located at the place to be searched and it involves the interval between: (1) the time when the thing to be seized is indicated by the evidence or information to be at the place to be searched; and (2) the time when the search warrant is issued. *Cline v. State*, 178 Ga. App. 470, 343 S.E.2d 506 (1986).

Information not stale. — Updated affidavit alleging ongoing criminal activity and a continuing relationship between coconspirators prior to the time of the search was not fatally stale. *United States v. Harris*, 20 F.3d 445 (11th Cir.), cert. denied, 513 U.S. 967, 115 S. Ct. 434, 130 L. Ed. 2d 346 (1994).

Suppression of evidence from "good" search. — Court erred by suppressing evidence in defendant's drug case because the search warrant was supported by probable cause as the informant's information was reliable, the information in the warrant was not stale, and the curtilage was properly searched. *State v. Graddy*, 262 Ga. App. 98, 585 S.E.2d 147 (2003), aff'd, 277 Ga. 765, 596 S.E.2d 109 (2004).

Suppression of evidence upheld. — Because the police had no information that two men were involved in any criminal conduct and the officers saw nothing that would give rise to reasonable suspicion, there was no error in the trial court's suppression of evidence. *State v. Harris*, 261 Ga. App. 119, 581 S.E.2d 736 (2003).

Collective knowledge of peace officers may form probable cause. — Probable cause for arrest is to be determined on basis of collective information of officers involved rather than only the one who makes the arrest. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Whether probable cause for arrest existed is to be decided by courts on basis of collective information of police involved in the arrest rather than upon the extent of knowledge of particular officer making arrest. The individual knowledge of the officer who made the arrest is not the standard by which the legality of a warrantless arrest is measured, but rather the existence of probable cause is determinable on the basis of the collective information of the officers partic-

ipating in the arrest. *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

Probable cause for arrest can rest upon collective knowledge of police, rather than solely on that of the officer who actually makes the arrest, when there is some degree of communication between the two. *United States v. Ashley*, 569 F.2d 975 (5th Cir.), cert. denied, 439 U.S. 853, 99 S. Ct. 163, 58 L. Ed. 2d 159 (1978).

Where there is communication between the two, probable cause can rest upon the collective knowledge of the various peace officers involved. *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Observations of fellow officers of government engaged in common investigation are reliable basis for a warrant applied for by one of their number. *Walker v. State*, 140 Ga. App. 418, 231 S.E.2d 386 (1976).

Probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

Information conveyed by radio dispatch. — When a county deputy sheriff hears a radio dispatch concerning a crime in another jurisdiction, the deputy has probable cause to stop any suspects, arrest them, search their car, and seize any contraband contained therein, particularly where there is suspicious conduct once the suspects are spotted by the officer. *Sanborn v. State*, 251 Ga. 169, 304 S.E.2d 377 (1983).

Direct observation is not essential to the existence of probable cause. *United States v. Morris*, 491 F. Supp. 222 (S.D. Ga. 1980), aff'd, 647 F.2d 568 (5th Cir. 1981).

Probable cause for arrest for misdemeanor committed out of officer's presence.

— If an arrest is made by an officer for a misdemeanor committed out of the officer's presence, probable cause therefor may be established by the possession of knowledge and facts justifying the belief on the part of one of reasonable prudence that the person arrested was guilty of the crime charged. *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

Sufficient probability exists when nexus is shown between items to be seized and resi-

dence to be searched. Without direct observation, the appropriate indicia establishing this nexus include the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide the instruments and fruits of the crime. *United States v. Morris*, 491 F. Supp. 222 (S.D. Ga. 1980), *aff'd*, 647 F.2d 568 (5th Cir. 1981).

Although flight alone will not provide probable cause that a crime is being committed, in appropriate circumstances it can supply the key ingredient justifying the decision of a law enforcement officer to take action. *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980).

Determination of probable cause to search automobile. — Probable cause to search an automobile exists when the facts and circumstances before the officer are such as would lead a reasonably discreet and prudent person to believe that the vehicle contains contraband. In determining whether there was reasonable cause to believe that a vehicle contained contraband, the court will look to the totality of the circumstances, including, but not limited to, information obtained by law enforcement agents conducting a common investigation. *McDonald v. State*, 156 Ga. App. 143, 273 S.E.2d 881 (1980).

Probable cause to search an automobile exists if the facts and circumstances before the officer are such as would lead a reasonably discreet and prudent person to believe that the contents of the vehicle offend the law. *Williams v. State*, 167 Ga. App. 42, 306 S.E.2d 46 (1983).

Reasonable cause required for search and seizure of automobile. — While Georgia has less stringent requirements for a warrantless search of an automobile than a permanent dwelling, the fact that it is an automobile is not talismanic. The right to search and the validity of the seizure are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. *State v. Avret*, 156 Ga. App. 527, 275 S.E.2d 113 (1980).

Probable cause for search of automobile believed to contain contraband. — An automobile in which contraband is concealed and transported may be searched without a warrant if police have probable cause for

believing the automobile to be searched contains the contraband. The search without a warrant is permitted where it is impractical to obtain one because of the automobile's potential for instant mobility. *State v. Avret*, 156 Ga. App. 527, 275 S.E.2d 113 (1980).

Facts justified initial stop of defendant in vehicle for improper turn and later arrest. — Where the defendant, in the defendant's vehicle proceeded along the emergency lane and turned therefrom despite the presence of a solid white line indicating the end of such emergency lane prior to entry into the intersection, the officer was justified in stopping the defendant for making an improper right turn. Since this was true, the officer had specific and reasonably articulable facts warranting the defendant's detention and the request for identification. Upon learning that the defendant was driving with a revoked license, the officer then had probable cause to make a lawful arrest and to conduct a limited inventory search of the automobile. *State v. Williams*, 156 Ga. App. 813, 275 S.E.2d 133 (1980).

Probable cause present for search of car on school premises. — Police officers, having been called to investigate an accident on school premises and finding a motor vehicle trespassing thereon in the early hours of the morning, which are, to say the least, suspicious circumstances, did not perform an illegal search and seizure in taking the ignition keys out of the car and unlocking the trunk where they found stolen goods. *Craft v. State*, 124 Ga. App. 57, 183 S.E.2d 37 (1971).

Requirement that items will probably be found in place to be searched. — A probable cause finding must be based on more than the conclusion that a crime was committed and that the items sought are connected with the crime. The magistrate must also have a sufficient reason to believe that the items will be found in the place to be searched. *Murphy v. State*, 238 Ga. 725, 234 S.E.2d 911 (1977).

Probable cause for self-protective search for weapons. — In case of self-protective search for weapons, police officers must be able to point particularly to facts from which it reasonably can be inferred that individual is armed and dangerous. *Smith v. State*, 140 Ga. App. 94, 230 S.E.2d 101 (1976).

Mere propinquity with others engaged in crime does not without more justify either

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arrest or search. *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Elimination of illegal drug manufacturing. — The governmental interest in eliminating illegal drug manufacture is a persuasive reason to permit minimally intrusive practice. Thus, an intermediate response based on something less than probable cause, is a proper investigatory tool to aid law enforcement agents in discovering and eliminating clandestine laboratory operations. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Eavesdropping to ascertain probable cause. — Police agents' entry into a public hallway and listening to conversations inside an apartment by placing their ears to the front door was proper to ascertain if probable cause existed for the issuance of a search warrant. *Cox v. State*, 160 Ga. App. 199, 286 S.E.2d 482 (1981).

No probable cause created by refusing to furnish identification. — A police officer does not have probable cause to believe a suspect has violated Georgia law by falsely identifying himself when the suspect refuses to furnish identification. The refusal to furnish identification may create suspicion that the suspect has used a false name, but falls far short of probable cause. *United States v. Brown*, 731 F.2d 1491 (11th Cir.), modified, 743 F.2d 1505 (11th Cir. 1984).

Use of sworn unrecorded oral evidence outside affidavit. — The magistrate issuing a search warrant may consider sworn unrecorded oral evidence outside the affidavit to establish probable cause. *Waller v. State*, 251 Ga. 124, 303 S.E.2d 437 (1983), rev'd on other grounds, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Determination of probable cause before extradition. — U.S. Const., amend. 4 requires that determination of probable cause to arrest be made by neutral magistrate before pretrial interstate extradition. *Batton v. Griffin*, 240 Ga. 450, 241 S.E.2d 201 (1978).

Magistrate is entitled to rely on personal observations and conclusions of member of

narcotics squad of a distant police force in determining whether it was probable that the box police officer had observed was being used to ship marijuana illegally. *United States v. Black*, 344 F. Supp. 537 (N.D. Ga. 1972), aff'd, 476 F.2d 267 (5th Cir. 1973).

Specificity of evidence constituting probable cause to stop vehicle. — Police officers who stopped vehicle without first obtaining search warrant did not err in so doing even though the information they possessed before stop was not specific enough to authorize issuance of a search warrant. *State v. Estrado*, 170 Ga. App. 889, 318 S.E.2d 505 (1984).

Right to search and validity of seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. *Meneghan v. State*, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Probable cause for belief that certain articles subject to seizure are in dwelling cannot of itself justify a search without a warrant. *Black v. State*, 119 Ga. App. 855, 168 S.E.2d 916 (1969).

If considered a search, probable cause is to be determined on a case by case basis in light of the particular circumstances. *Grimes v. United States*, 405 F.2d 477 (5th Cir. 1968).

Police officers who stopped and searched vehicles without first obtaining warrant did not err by so doing because additional corroborative evidence, including accuracy of confidential information and strong odor of marijuana detected at time of stop, provided probable cause to search, even though prior information was not detailed enough to authorize issuance of warrant. *State v. Estrado*, 170 Ga. App. 889, 318 S.E.2d 505 (1984).

Presence of accused at probable cause hearing. — The arrested person need not be present when the judicial officer is determining whether probable cause to detain the arrested person exists following the arrest. It is the independent and neutral determination by a judicial officer of whether probable cause exists which is fundamental under the fourth amendment and which must be made within 48 hours, not the presence of the defendant. *Fiscus v. City of Roswell*, 832 F. Supp. 1558 (N.D. Ga. 1993).

Nature of probable cause hearing. — In a pretrial hearing, U.S. Const., amend. 4 does

not require a full-fledged adversarial commitment hearing, although it does require some minimal probable cause hearing that has nothing to do with whether the accused should be prosecuted, at which the sole question is whether the accused should be detained pending further proceedings. If the suspect is incorrectly detained without a hearing in violation of U.S. Const., amend. 4, the accused may be entitled to habeas corpus relief, but in no event will the illegal detention void a subsequent conviction. *State v. Middlebrooks*, 236 Ga. 52, 222 S.E.2d 343 (1976).

Utilization of hearing testimony on issue of probable cause. — If testimony adduced at post-conviction hearing can be utilized to show whether or not there was probable cause for arrest, then it follows that testimony adduced at commitment hearing and at trial may be utilized for same purpose. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Deference on review to finding of probable cause. — When an application for a search warrant has been made by the police to a neutral and detached magistrate, and the magistrate has issued the warrant based on a finding of probable cause, a reviewing court will pay substantial deference to the magistrate's finding. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

After-the-fact scrutiny by courts of the sufficiency of an affidavit supporting a search warrant should not take the form of a de novo review. Instead, a magistrate's determination of probable cause should be paid great deference by reviewing courts. *State v. Fultz*, 171 Ga. App. 886, 321 S.E.2d 381 (1984).

Evidence that is seized in good-faith reliance upon a search warrant issued by a neutral and detached magistrate will generally not be subject to suppression on fourth amendment grounds, regardless of whether the allegations upon which the magistrate based the issuance of the warrant were sufficient to establish the probable cause for the search. *Rodriguez v. State*, 191 Ga. App. 241, 381 S.E.2d 529 (1989).

2. Affidavits

Before valid warrant may issue, affidavit must be submitted to court setting forth

necessary facts and circumstances whereby the judge may determine probable cause. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976).

Affidavit upon which justice of the peace issues search warrant is inadequate where it does not show facts and circumstances which would warrant a person of reasonable caution to believe that the articles sought are located at the place where it is proposed to search. *Farmer v. Lawson*, 510 F. Supp. 91 (N.D. Ga. 1981).

Information supporting finding of probable cause may be presented to magistrate by means of affidavit or by oral testimony. *Marshall v. State*, 113 Ga. App. 143, 147 S.E.2d 666 (1966).

Affidavit enough to provide basis for magistrate's finding of probable cause. — See *Borders v. State*, 173 Ga. App. 110, 325 S.E.2d 626 (1984); *Whitehead v. State*, 184 Ga. App. 307, 361 S.E.2d 188 (1987).

In a murder prosecution, an affidavit in support of a search warrant stated that the victim and defendant left a ballpark where they worked in close temporal proximity; that the victim's car was found abandoned at a gas station next to the park; that a person fitting defendant's voice characteristics made two telephone calls claiming to have the victim; that the victim's ring was found near the pay phone from which the second call was made; and that defendant had a history of assaults on the opposite sex, having abducted a victim and secreted the victim to the defendant's home, gave the magistrate a substantial basis for concluding there was probable cause that evidence pertaining to the victim's disappearance would be found in defendant's home. *Hinton v. State*, 280 Ga. 811, 631 S.E.2d 365 (2006).

Determination by court of whether magistrate justified in issuing warrant. — In determining whether the magistrate was justified in issuing the search warrant, the court is not limited to the facts on the face of the affidavit, and is free to make judgments on the veracity of any or all of the evidence. *Campbell v. State*, 226 Ga. 883, 178 S.E.2d 257 (1970), cert. denied, 401 U.S. 1002, 91 S. Ct. 1246, 28 L. Ed. 2d 535 (1971).

Affidavit to support finding of probable cause need only show facts and circumstances that would warrant a person of reasonable caution to believe that the articles

Probable Cause (Cont'd)**2. Affidavits** (Cont'd)

sought were located at the place where it was proposed to search. *United States v. Morris*, 491 F. Supp. 222 (S.D. Ga. 1980), *aff'd*, 647 F.2d 568 (5th Cir. 1981).

Affidavit not required. — U.S. Const., amend. 4 does not by its terms require that probable cause be shown by affidavit, but that the judicial officer be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Common-sense testing of affidavits for search warrants. — Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion, and technical requirements of elaborate specificity have no proper place in this area. *Driscoll v. State*, 129 Ga. App. 702, 201 S.E.2d 11 (1973); *State v. Babb*, 134 Ga. App. 302, 214 S.E.2d 397 (1975).

Recital of underlying circumstances in the affidavit is essential if the magistrate is to perform a detached function and not serve merely as a rubber stamp for the police. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

Affidavit must recite specifics of informant's basis for information. — Although it is not required as a showing of probable cause for the issuance of a search warrant that the informant's name be stated, there must be a recital of specifics as to what the informant based the informant's information upon. *Burns v. State*, 119 Ga. App. 678, 168 S.E.2d 786 (1969).

Presentation of underlying circumstances in support of issuance of warrant. — The Constitution requires that there be presented to the judicial officer issuing the search warrant some of the underlying circumstances relied on by the officer applying for the warrant, and, if the officer relies on an informant, some of the underlying circumstances from which the officer concluded that the informant was reliable. *Wood v. State*, 118 Ga. App. 477, 164 S.E.2d 233 (1968).

Detail in affidavit sufficient to support issuance of search warrant. — Although an affidavit for procurement of a search warrant

was not as detailed as it might be in affording information showing reliability of the informant upon whose information the police officer was proceeding, but because the information as to the activities and the whereabouts of the parties came from one who, in the past, had supplied information leading to the arrest and conviction of persons who had committed crimes, as well as from parties in stores who complained that the parties sought had passed altered or counterfeit money to them, there was sufficient detail to afford reasonable cause for seeking and obtaining the search warrant. *Bostwick v. State*, 124 Ga. App. 113, 182 S.E.2d 925 (1971).

Personal observation by affiant plus informant's information sufficient for issuance. — Personal observation by the affiant that known violators of the law sought to be enforced frequented the defendant's home, plus information from an informant, who had proven reliable in the past, of specific facts sufficient to constitute probable cause, will authorize the issuance of the warrant. *Wood v. State*, 118 Ga. App. 477, 164 S.E.2d 233 (1968).

Affidavit must contain underlying circumstances supporting hearsay. — Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the articles were where the informant claimed they were. *Knowles v. State*, 124 Ga. App. 377, 183 S.E.2d 617 (1971); *Maddox v. State*, 133 Ga. App. 709, 213 S.E.2d 1 (1975).

Requirements for officer's affidavit relying upon informant. — If an officer making an affidavit for a search warrant relies upon an informant, the officer must give sufficient information of the underlying circumstances from which the officer concluded that the informant was reliable. In the officer's affidavit should appear a recital of what the informant actually said, and why the officer thought that the information was credible, especially when the name of the informant is not stated. *Burns v. State*, 119 Ga. App. 678, 168 S.E.2d 786 (1969).

Production of nonaffidavit testimony when warrant challenged. — If the magistrate issuing the warrant does so not on the basis of the affidavit but on other testimony,

such testimony should itself be produced when, on the trial of a criminal case, the affidavit and warrant are challenged. *Veasey v. State*, 113 Ga. App. 187, 147 S.E.2d 515 (1966).

Probable cause cannot be made out by affidavits which are purely conclusory. *Veasey v. State*, 113 Ga. App. 187, 147 S.E.2d 515 (1966).

Mere conclusion based on unspecified information insufficient. — It is not enough to show probable cause simply to recite in an affidavit that from information received from a reliable informant the affiant has come to suspect or to believe that a named person is in possession of contraband items. *Burns v. State*, 119 Ga. App. 678, 168 S.E.2d 786 (1969); *Courson v. State*, 125 Ga. App. 373, 187 S.E.2d 554 (1972).

Unsubstantiated conclusory allegation. — Exclusionary rule did not bar admission of seized contraband alleged to be the fruit of a search warrant issued without probable cause, because defendant did not substantiate with evidence the conclusory allegation that the magistrate did not act impartially and disinterestedly but instead rubber stamped a detective's offered affidavit. *Giles v. State*, 197 Ga. App. 895, 400 S.E.2d 368 (1990).

Deficiency in affidavit for search warrant cannot be supplied by facts discovered in making the search, for the sufficiency of the affidavit must be determined as of the time the warrant issues, and an appellate court can consider only the information brought to the magistrate's attention. *Burns v. State*, 119 Ga. App. 678, 168 S.E.2d 786 (1969).

Factual inaccuracies of peripheral relevance. — If, on the hearing of a motion to suppress evidence, the testimony of an informant is consistent with the material allegations in the affidavit, factual inaccuracies of peripheral relevance that are not the personal observations of the affiant do not destroy an otherwise adequate showing of probable cause. *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971).

Consideration of attacks on legality of nonessential allegations in affidavit. — If certain allegations in a search warrant affidavit are sufficient per se to establish probable cause, the court need not consider a defendant's attacks on the legality or sufficiency of the other allegations in the affida-

vit. *United States v. Williams*, 594 F.2d 86 (5th Cir. 1979), rev'd on other grounds, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127, 101 S. Ct. 946, 67 L. Ed. 2d 114 (1981).

Sufficiency of affidavit where defective affidavit unnecessary. — Even if police officer's affidavit filed in support of the issuance of a search warrant was fatally defective because it did not establish the reliability of informant, this was immaterial because the affidavit, without the informant's statement, was sufficient to establish probable cause and justify issuance of the search warrant. *Roth v. State*, 164 Ga. App. 347, 297 S.E.2d 107 (1982).

Magistrate may consider oral testimony as well as the affidavit in issuing a search warrant. Not only what is stated in the affidavit for the search warrant but also the totality of the sworn circumstances before the magistrate may be considered in establishing probable cause. *Franklin v. State*, 135 Ga. App. 718, 218 S.E.2d 641 (1975).

Oral testimony must be under oath or affirmation. — The magistrate, in considering whether to issue a search warrant, may consider both the affidavit and oral testimony as to probable cause. However, in considering matter other than that contained in the affidavit, such proof must be under oath or affirmation. *Maddox v. State*, 133 Ga. App. 709, 213 S.E.2d 1 (1975).

Coverage of oath administered after affidavit signed. — If the magistrate does not administer any oath until after the affidavit is signed, the oath covers only the truthfulness of the statements contained in the written affidavit and not the oral statements given to show probable cause. *Riggins v. State*, 136 Ga. App. 279, 220 S.E.2d 775 (1975).

Absence of time information relevant to probable cause in affidavit is fatal. — Failure to include in the affidavit for search warrant the time of the occurrence witnessed by informer upon which probable cause was based is a fatal defect. *Windsor v. State*, 122 Ga. App. 667, 178 S.E.2d 751 (1970).

If there is nothing appearing in an affidavit supporting a search warrant whereby the issuing officer could determine the time of the events relied upon for probable cause, and this fatal defect is asserted as a ground of a motion to suppress the evidence, a trial judge errs in overruling the motion.

Probable Cause (Cont'd)**2. Affidavits (Cont'd)**

Flournoy v. State, 123 Ga. App. 658, 182 S.E.2d 159 (1971).

Determination of existence of probable cause absent time information in affidavit.

— Absent any statement in an affidavit as to the time of the occurrence on which a warrant is based, a magistrate cannot make an independent determination as to whether probable cause still existed for the issuance of the search warrant. It is not necessary in an affidavit that the precise date of an occurrence on which a search warrant is based be given, but it should appear from the facts that the occurrence should be so near in point of time to the making of the affidavit and the execution of the search warrant as to create a reasonable belief that the same conditions described in the affidavit still prevailed at the time of the issuance of the warrant. *Terry v. State*, 123 Ga. App. 746, 182 S.E.2d 513 (1971).

Sufficient lawful information to overcome taint.

— If the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant, apart from the tainted information, the evidence seized pursuant to the warrant is admissible. *Rothfuss v. State*, 160 Ga. App. 863, 288 S.E.2d 579 (1982).

Effect of misinformation in affidavit. — If there was sufficient information in an affidavit to support a finding of probable cause despite the presence of other mistaken information, the court did not err in finding that the affidavit was sufficient. *Waller v. State*, 251 Ga. 124, 303 S.E.2d 437 (1983), rev'd on other grounds, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

If an affidavit is insufficient to establish probable cause once its false material is set aside, then evidence obtained by means of a search warrant issued in reliance on the affidavit is inadmissible. However, if the remaining information is sufficient to show probable cause, the search warrant is valid. *Rimmer v. State*, 197 Ga. App. 294, 398 S.E.2d 282 (1990).

False statements in affidavit. — A supporting affidavit was found to have established probable cause, even though it contained false material which the officer submitting the affidavit knew was not true. *Kelly v. State*,

184 Ga. App. 337, 361 S.E.2d 659, cert. denied, 257 Ga. 562, 362 S.E.2d 200 (1987).

Under the fourth and fourteenth amendments, if a defendant makes a preliminary showing that: (1) an affiant knowingly and intentionally included a false statement in an affidavit; or (2) an affiant made a false statement with reckless disregard for its truth; and (3) the false statement was necessary to the finding of probable cause; then constitutional mandate requires that a hearing be held at the defendant's request but if, after eliminating statements alleged to be false, sufficient allegations in the warrant affidavits remain to support a finding of probable cause, defendant's attempt to question the sufficiency of the warrant lacks merit. *United States v. Sims*, 845 F.2d 1564 (11th Cir.), cert. denied, 488 U.S. 957, 109 S. Ct. 395, 102 L. Ed. 2d 384 (1988).

Affidavit as a whole examined. — Remaining information was sufficient to show probable cause although the affiant's statement that affiant had maintained "constant surveillance", even though affiant had not witnessed actual transactions, may have implied to the trial judge that the agent observed the entire transaction, including the handing over of money in exchange for the drugs. The trial court could not conclude that this was the only implication flowing from those words, therefore, the search warrant was valid. *State v. Thomas*, 203 Ga. App. 623, 417 S.E.2d 328, cert. denied, 203 Ga. App. 907, 417 S.E.2d 328 (1992).

Practical reading. — Items described in an affidavit were "fruits" of the crimes although the affidavit did not list "robbery" as one of the crimes and although some of the items were also instrumentalities, because the affiant had stated that affiant had probable cause to believe the items taken were in defendant's residence or vehicle; it was obvious from a practical reading of the affidavit that the items to be seized were fruits, instrumentalities, or evidence of the crimes. *Mozier v. State*, 207 Ga. App. 264, 427 S.E.2d 551 (1993).

In reviewing the sufficiency of an affidavit containing false statements and omitting material information, the false statements must be deleted, the omitted truthful material must be included, and the affidavit must be reexamined to determine whether probable cause exists to issue a search warrant.

Redding v. State, 192 Ga. App. 87, 383 S.E.2d 640 (1989).

Effect of intentional and unintentional errors in affidavit on validity of warrant. — If a misrepresentation in an affidavit for a search warrant is made with the intention of deceiving the magistrate it will invalidate the warrant regardless of whether the error is material to the showing of probable cause. On the other hand, if the error was unintentional, it is of no moment unless it was material to the establishment of probable cause. *United States v. Park*, 531 F.2d 754 (5th Cir. 1976).

When an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue. *Rothfuss v. State*, 160 Ga. App. 863, 288 S.E.2d 579 (1982).

Sufficiency of affidavit to be determined as of time warrant issued. — A void search warrant cannot be validated and property illegally seized introduced in evidence merely because the officers were in fact reliably informed and did in fact recover contraband, nor can a deficiency be supplied by facts discovered in making the search, for the sufficiency of the affidavit must be determined as of the time the warrant issued. *Anderson v. State*, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

Present belief of affiant as to commission of offense charged. — In determining whether probable cause exists for the issuance of a search warrant, it is necessary to determine whether the affiant, at the time of making the affidavit and the issuance of the warrant, had reasonable grounds to believe the offense charged was being or had been committed. *United States v. Williams*, 594 F.2d 86 (5th Cir. 1979), rev'd on other grounds, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127, 101 S. Ct. 946, 67 L. Ed. 2d 114 (1981). *United States v. Williams*, 594 F.2d 86 (5th Cir. 1979), rev'd on other grounds, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127, 101 S. Ct. 946, 67 L. Ed. 2d 114 (1981).

Affidavit provided substantial probable cause basis. — Affidavit containing investigator's corroboration of informant's statements describing people involved in opera-

tions, locations, and movements and report of a controlled buy presented a picture from which magistrate could conclude a search warrant should issue. *United States v. Wright*, 811 F. Supp. 1576 (S.D. Ga. 1993).

Trial court did not err in denying defendant's suppression motion as the affidavit provided probable cause for the issuance of a search warrant under the totality of the circumstances test where: (1) the controlled buy from defendant was described; (2) defendant's willingness to turn over the cocaine at defendant's residence was set forth; and (3) a statement from the witness who was with defendant at the time of defendant's arrest that defendant had taken the witness to the residence to pick up cocaine was set forth. *Johnson v. State*, 267 Ga. App. 549, 600 S.E.2d 667 (2004).

Defendant's suppression motion was properly denied as: (1) the search warrant affidavit outlined the information provided by a New Hampshire detective's investigation, including the fact that the defendant had electronically sent the detective sexually explicit photographs of young children; (2) the officer's affidavit also included information regarding the New Hampshire detective's extensive background and vast experience in the investigation of child sexual exploitation cases; (3) the New Hampshire detective's investigation provided probable cause to search the defendant's residence wherever that was; (4) the warrant sought sexually explicit photographs and other sexually explicit visual depictions of children, as well as the computer hardware and software used to create, store, and distribute those depictions; and (5) the affidavit contained information based on the New Hampshire detective's contact and electronic correspondence with the defendant indicating the likelihood that defendant's computer files would contain evidence of child sexual exploitation, given that the affidavit stated that those who sexually exploited children often kept sexually explicit photographs and other images in their possession and often stored those images in computer files. *Walthall v. State*, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

Where state revenue agent purchases the beer, affidavit sworn to by agent as informant is sufficient to establish the probable cause element in issuing a search warrant in the

Probable Cause (Cont'd)**2. Affidavits (Cont'd)**

investigation of the defendant for the illegal sale of beer. *Johnson v. State*, 121 Ga. App. 477, 174 S.E.2d 246 (1970).

Arrest warrant held invalid. — Arrest warrant was issued without probable cause, where the incorporated affidavit supporting the warrant stated only that the affiant swore that “to the best of (his or her) knowledge and belief Teresa Ann Garmon did . . . commit the offense of false report of a crime.” *Garmon v. Lumpkin County*, 878 F.2d 1406 (11th Cir. 1989).

Search warrant held invalid. — Where an affidavit for a search warrant alleges that numerous complaints have been made to the sheriff’s department that a person is selling illegal beer and whiskey, and that heavy traffic and large amounts of beer cans have been observed on the road around that person’s residence, but no date is set as to these occurrences, and where the only dated occurrence in the affidavit is four months before the issuance of a warrant, a search warrant based on such an affidavit is invalid. *Terry v. State*, 123 Ga. App. 746, 182 S.E.2d 513 (1971).

Affidavit held ineffective to provide basis for magistrate’s finding of probable cause. See *Poole v. State*, 175 Ga. App. 374, 333 S.E.2d 207 (1985).

Merely existence of “hearsay upon hearsay” was not fatal to a search warrant because under the totality of the circumstances, the magistrate was informed of the underlying circumstances involving an undercover buy from the defendant, independent of the double hearsay, which did not depend upon the reliability of the hearsay declarations; further, a known informant’s statements to police against a penal interest elevated that statements’ reliability. *Cochran v. State*, 281 Ga. 4, 635 S.E.2d 701 (2006).

Affidavit did not support second search warrant. — Investigator’s affidavit did not supply a substantial basis on which the magistrate could find probable cause for issuing a second warrant since the extensiveness of the first search allowed for a second search only if new information established probable cause to believe that defendant’s home still contained seizable items. *United States v. Wright*, 811 F. Supp. 1576 (S.D. Ga. 1993).

Deficiency of state statutes failing to require affidavit to show probable cause. —

Before a warrant for either arrest or search can issue, the judicial officer issuing such warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. Former Code 1933, §§ 27-103, 27-103.1, and 27-104, and the forms prescribed therein (see O.C.G.A. §§ 17-4-41 and 17-4-45) do not contain this requirement, and to that extent they are deficient. The better practice clearly would be for the affidavit to show probable cause. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Showing of probable cause on motion to suppress by affidavit attached to warrant. —

Probable cause for the issuance of a search warrant, on a motion to suppress, may be shown by the affidavit attached to the warrant, together with evidence of the sworn testimony adduced before the issuing magistrate. *State v. Causey*, 132 Ga. App. 17, 207 S.E.2d 225 (1974).

Effect on validity of warrant of failure to record affidavit. —

If information sufficient to uphold a determination of probable cause is presented under oath to a state magistrate, the failure to record the information in the form of an affidavit will not invalidate the search warrant. *Marshall v. State*, 113 Ga. App. 143, 147 S.E.2d 666 (1966).

Although affidavit deficient, evidence in lower court may support probable cause finding. — Although the affidavit supporting a search warrant did not itself show probable cause, it was sufficient where the evidence of the law enforcement officer in the lower court as to what the officer told the issuing magistrate under oath supported a finding of probable cause. *Daitch v. State*, 168 Ga. App. 830, 310 S.E.2d 703 (1983).

3. Informants

Search warrants supported by affidavits based upon information furnished by reliable informants are not constitutionally inadequate. *McSears v. State*, 247 Ga. 48, 273 S.E.2d 847 (1981).

Probable cause to search may be provided by reasonably contemporaneous information from reliable confidential informant. *Smith v. State*, 135 Ga. App. 424, 218 S.E.2d

133 (1975); *Collier v. State*, 177 Ga. App. 217, 338 S.E.2d 724 (1985).

Present reliability of informant and totality of circumstances control. — An averment of previous reliability is not essential, the question being whether the informant's present information is truthful and reliable. Hence the facts known to the officer must be weighed and evaluated, not in terms of "prior reliability" of the informant or a judicial analysis of "probable cause" to search, but as understood by those versed in the field of law enforcement under the "totality of the circumstances" test. *State v. Bassford*, 183 Ga. App. 694, 359 S.E.2d 752 (1987).

"Totality of circumstances" test. — The U.S. Supreme Court discarded the strict two-pronged, requirement of (a) demonstrating an informant's reliability and (b) providing the source of the informant's tip in an affidavit to support issuance of a search warrant, and adopted the "totality of the circumstances" test. The task of the issuing magistrate is simply to make a practical, common-sense decision, whether, given all the circumstances set forth in the affidavit before the magistrate, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Carr v. State*, 185 Ga. App. 504, 364 S.E.2d 633 (1988).

The sufficiency of information obtained from an informant is not to be judged by any rigid tests. Generally, probable cause is determined by the "totality of the circumstances" surrounding (1) the basis of the informant's knowledge and (2) the informant's veracity or reliability. A deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. *Polke v. State*, 203 Ga. App. 306, 417 S.E.2d 22 (1992).

Name and description of defendant enough for arrest. — Because the arresting officer was given the name and description of defendant as perpetrator of both a murder and an aggravated assault, the officer had probable cause to arrest defendant without a warrant outside the defendant's home. *Gibbons v. State*, 253 Ga. 283, 319 S.E.2d 861 (1984).

Reliability of informant. — One may act on the information of an informer as to whom the magic phrase "has given reliable information in the past" cannot be applied. An averment of previous reliability is not essential; the question is whether the informant's present information is truthful and reliable. *Meneghan v. State*, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Informant's lack of previous contact with authorities is not fatal to the informant's veracity. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Police officer's statement that informant was known personally to the police officer, had no criminal record, and had supplied reliable information leading to nine drug-related arrests and one conviction in the past 14 months was sufficient to establish the informer's reliability for purposes of issuing a search warrant. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

Because the affidavit provided the justice of the peace (now magistrate) with the knowledge that the informant had personally observed defendants in possession of the cocaine and the informant's reliability was demonstrated within the affidavit by statements that the informant had furnished information in the previous six months leading to the issuance of three felony warrants for possession of illegal drugs and that all information provided by the informant had proven to be true, both prongs of the test for a showing of probable cause based upon an unidentified informant's tip were met in the affidavit. *Law v. State*, 165 Ga. App. 687, 302 S.E.2d 570, *aff'd*, 251 Ga. 525, 307 S.E.2d 904 (1983).

An informant is established as reliable, if the informant has on more than one occasion given to the sheriff truthful information which led to at least one conviction. *Lang v. State*, 168 Ga. App. 693, 310 S.E.2d 276 (1983).

In considering the totality of the circumstances, the information disclosed to the officer was insufficient to establish reasonable cause for belief that the defendant was currently in possession of cocaine, where reliable informants had told the officer that defendant was a drug dealer, but there was no showing as to how those informants had come to that conclusion. *Polke v. State*, 203 Ga. App. 306, 417 S.E.2d 22 (1992).

Probable Cause (Cont'd)**3. Informants (Cont'd)**

Warrant to search defendant's residence was supported by probable cause, despite the fact that the affidavit in support thereof made only a conclusory statement regarding the "reliability" of the informant; the deficiency regarding reliability of the informant was corrected by the officer's independent investigation. *Munson v. State*, 211 Ga. App. 80, 438 S.E.2d 123 (1993).

The uncorroborated statement of an unnamed third-party source, as filtered through a reliable informant to a police affiant, did not give rise to probable cause sufficient to support the issuance of a search warrant. *Wood v. State*, 214 Ga. App. 848, 449 S.E.2d 308 (1994).

Probable cause supported a warrant for the search of the defendant's residence since the affidavit stated: (1) that a confidential and reliable informant told police that the codefendant, driving a described vehicle was delivering methamphetamine to the residence; (2) that approximately two weeks after receiving this information, police saw the vehicle parked at the above address; and (3) that the car was stopped and searched and trafficking amounts of methamphetamine were confiscated. The reliability of the informant was established by the confiscation of methamphetamine from the codefendant's car. *Gordon v. State*, 248 Ga. App. 776, 546 S.E.2d 925 (2001).

Determination of truthfulness of informant. — The reliable manner of acquisition of information having been demonstrated, it must now be determined whether the individual supplying this reliable information is a truthful person. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Information from one not known to be reliable, coupled with verification. — Information from an unidentified informant not known to be reliable, coupled with verification of that information in essential particulars, may form a basis for probable cause to arrest. *United States v. Crane*, 445 F.2d 509 (5th Cir. 1971).

If police officer is informant, reliability of the informant is presumed as matter of law. *State v. Causey*, 132 Ga. App. 17, 207 S.E.2d 225 (1974); *Quinn v. State*, 132 Ga. App. 395, 208 S.E.2d 263 (1974); *Williams v. State*,

157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

If coupled with corroboration by the personal observation of a law enforcement officer, a reliable informant's tip is sufficient to establish probable cause. *State v. Hancock*, 203 Ga. App. 577, 417 S.E.2d 381, cert. denied, 203 Ga. App. 907, 417 S.E.2d 381 (1992).

Reliability of informant and informant's informant. — If a search warrant is issued pursuant to an affidavit based upon information supplied by a confidential informant, who in turn based the information upon another unidentified informant, then there must be a showing as to why the informant and informant's informant are reliable. *Osbourne v. State*, 128 Ga. App. 81, 195 S.E.2d 662 (1973).

Probable cause existed for issuance of search warrant where informant was credible and stated, inter alia, that marijuana was being stored at and sold from a specific house in Atlanta, as personally witnessed by the informant within 72 hours before the warrant was sought. *Wilbanks v. State*, 176 Ga. App. 533, 336 S.E.2d 312 (1985), cert. denied, 475 U.S. 1087, 106 S. Ct. 1473, 89 L. Ed. 2d 728 (1986).

Inadvertent error in describing informant's previous credibility not grounds for voiding warrant. — Where all that was shown at the hearing on defendant's motion to suppress was that the affiant mistakenly substituted the name of the victim of a burglary for the name of the burglar in the portion of the affidavit showing the reliability of a confidential informant, but the officer freely admitted the mistake, ascribing it to confusion arising from a change in filing systems, the trial court was authorized to find that there had been no intentional and knowing falsehood or reckless disregard for the truth making the warrant void under either the federal or state Constitution. *Wells v. State*, 180 Ga. App. 133, 348 S.E.2d 681 (1986).

Identity of informant. — Where reasonable grounds for belief that exigent circumstances exist relieving police officers of their duty to give verbal notice of their authority and purpose in the execution of a search warrant are supplied by an informer, the informant's identity need not be disclosed if the information meets the same tests as

those for probable cause for the issuance of a warrant, i.e., reliability of the informer shown and the tip sufficiently detailed. *Scully v. State*, 122 Ga. App. 696, 178 S.E.2d 720 (1970).

Where sole question is whether information offered to support the warrant meets the test for probable cause, there is no need to reveal the informer's identity. Where the state relied on information supplied by an informer to establish probable cause for a search warrant, the state need not reveal the names of its informers at a motion to suppress. *Keith v. State*, 238 Ga. 157, 231 S.E.2d 727 (1977); *State v. Burnett*, 249 Ga. App. 334, 548 S.E.2d 443 (2001).

Absent a showing that the disclosure of an informer's identity or the contents of the informer's communications, if any, are relevant and helpful to the defense of an accused, or are essential to a fair determination of a cause relating to the guilt or sentence of such accused, it was error to require disclosure of the identity of an informant whose participation is limited to the establishment of probable cause for the issuance of a search warrant. *State v. Martin*, 156 Ga. App. 554, 275 S.E.2d 129 (1980).

There is no necessity to reveal name of informer where issue is preliminary one of probable cause and where guilt or innocence is not at stake. Even if the informant were a witness, this would not be controlling where such evidence is not necessary to obtain a conviction. *State v. Martin*, 156 Ga. App. 554, 275 S.E.2d 129 (1980).

Prosecution need not disclose name of informant who provided police with probable cause for a search. *State v. Martin*, 156 Ga. App. 554, 275 S.E.2d 129 (1980).

Where information supplied to the magistrate was sufficient to demonstrate the informant's reliability, although the better practice would have been to include the informant's felony history, the omission was not fatal and did not warrant revealing the informant's identity. *Kessler v. State*, 221 Ga. App. 368, 471 S.E.2d 313 (1996); *Gremillion v. State*, 233 Ga. App. 393, 504 S.E.2d 265 (1998).

Whether informer really exists is question of evidence to be decided by trial court after the officers have been thoroughly questioned and cross-examined. *Keith v. State*, 238 Ga. 157, 231 S.E.2d 727 (1977).

Issue of informer's privilege of anonymity is evidentiary, not constitutional. — When the state relies on information supplied by an informer to establish probable cause for a warrant, the informer's privilege to remain anonymous presents a question of evidentiary rather than constitutional magnitude at a motion to suppress, where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. If the informer's privilege to remain anonymous at a probable cause hearing is a state evidentiary question, the court must look to Georgia law. *Keith v. State*, 238 Ga. 157, 231 S.E.2d 727 (1977).

Requirement of specificity where informant not named. — Where the information upon which an officer seeks the issuance of a search warrant comes from an informant who is not named, it is essential that sufficient facts be stated with specificity to indicate that the informant was reliable. *Courson v. State*, 125 Ga. App. 373, 187 S.E.2d 554 (1972).

Rumors or information from unidentified persons cannot form basis for issuance of search warrant. *Thornton v. State*, 125 Ga. App. 374, 187 S.E.2d 583 (1972).

Tip from known informant. — A tip from an informant of unknown reliability will not ordinarily create a reasonable suspicion of criminality, but information from a known informant of unknown reliability has more indicia of reliability than an anonymous telephone tip. *Burse v. State*, 209 Ga. App. 276, 433 S.E.2d 386 (1993).

Corroboration of tip's details by independent police work. — If a tip is sufficiently detailed so as to show a reliable basis for the informant's information, independent police work can corroborate the details of the tip. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Independent police corroboration of inadequate tip. — To support the issuance of a search warrant the informant's tip must contain a sufficient statement of the underlying circumstances from which the informer reached the conclusions forming the basis of the tip, but the inadequacy of an informant's tip does not ipso facto invalidate the search warrant since independent corroboration can be supplied by police investigation. *Farmer v. Lawson*, 510 F. Supp. 91 (N.D. Ga. 1981).

Probable Cause (Cont'd)**3. Informants** (Cont'd)

Insufficient corroboration of tip. — Where the independent investigation revealed only that defendant resided at certain premises and that defendant had been arrested on drug-related charges a decade prior, this minor corroboration did not infuse with reliability anonymous informant's tip regarding controlled substances on the premises. *State v. Goodrich*, 209 Ga. App. 280, 433 S.E.2d 390 (1993).

Determination of reliability of tip without reference to independent verification. — In determining the reliability of the manner in which an informant obtained information, determination of whether the tip meets the "sufficient detail" test is based exclusively on what information came from the informant without reference, at this point, to independent verification of the information. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Informer's tip which is insufficient to justify grant of search warrant may be buttressed by either: (1) independent observations by the affiant officer to corroborate sufficient details of the tip (whether suspicious or not) to negate the possibility that the informer fabricated the report out of whole cloth, or (2) independent observations by the affiant that contribute to a showing of probable cause by revealing not merely normal patterns of activity but activity that reasonably arouses suspicion. *Davis v. Smith*, 430 F.2d 1256 (5th Cir. 1970).

Consideration of corroborating information only when informant's report defective. — No corroborating information can be considered by a magistrate considering an application for a search warrant until the magistrate determines that the informant's report, standing alone, does not meet U.S. Const., amend. 4's standards. *United States v. Black*, 344 F. Supp. 537 (N.D. Ga. 1972), aff'd, 476 F.2d 267 (5th Cir. 1973).

Facts corroborating informer's allegations constituting probable cause for search. — See *United States v. Rodgers*, 442 F.2d 902 (5th Cir. 1971).

Factual basis for believing informant, coupled with affiant's own knowledge of accused's background, affords sufficient grounds upon which a magistrate can rea-

sonably issue a warrant. *Crumley v. State*, 135 Ga. App. 394, 217 S.E.2d 464 (1975).

Where information in an affidavit was supplied by a "concerned citizen," and the information had been corroborated by the affiant, the magistrate had sufficient basis for finding that probable cause existed for issuance of a warrant. *State v. Davis*, 217 Ga. App. 225, 457 S.E.2d 194 (1995), aff'd, 266 Ga. 12, 465 S.E.2d 438 (1996).

Police officer's affidavit was insufficient where the informant had given no facts from which the officer could conclude that contraband might be found in defendants' home, and the officer admitted the information amounted to "just a suspicion" on the part of the informant. *State v. Brown*, 186 Ga. App. 155, 366 S.E.2d 816 (1988).

Where affidavit contains false statements as to informant. — Where the police officer who executed the search warrant affidavit acknowledged during the hearing and defendant's motion to suppress that the allegedly reliable information was actually just "street talk" picked up at various times from more than one person, and that the police officer/affiant, instead of receiving the material information from a single person possessing appropriate credentials as an informant, had pieced together fragments of information obtained from at least three persons and had concocted the fictitious "reliable informant" from three different people, and, affiant admitted, no single one of the three actual informants could have fully qualified, under the criteria recited in the affidavit as the sort of reliable informant whose information can ordinarily constitute the basis for probable cause for the issuance of a search warrant, the trial court erred in denying defendant's motion to suppress the inculpatory evidence seized during the search. *Daniels v. State*, 183 Ga. App. 651, 359 S.E.2d 735 (1987).

Affidavit based on information from informant sufficient. — Where the affidavit related that the affiant was told by an informant whose information had previously led to an arrest in a drug case and an arrest and conviction in a burglary case that the informant had personally observed marijuana and cocaine in defendant's possession within the past 36 hours, that information was sufficient, under the totality of the circumstances, to show probable cause to be-

lieve that appellant was in possession of contraband and to support issuance of a search warrant. *Wells v. State*, 180 Ga. App. 133, 348 S.E.2d 681 (1986).

Effect of failure to include informant's basis of knowledge in affidavit or testimony.

— It clearly is the better practice, if an informant has obtained information through personal observation, or contact, or through some other reliable manner, to include this fact in the affidavit or so inform the magistrate considering its issuance; however, failure to include a statement of the informant's basis of knowledge in the affidavit or to specifically inform the magistrate of that basis by sworn testimony does not always cause the resulting warrant to be fatally defective. Where neither the affidavit nor the sworn oral testimony demonstrates that the magistrate was informed of the manner in which the information was obtained by the informant, it is necessary to decide whether the affidavit and testimony concerning the informant's tip supplied the magistrate with a detailed report of the sort which in common experience may be recognized as having been obtained in a reliable way. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Purpose of "underlying circumstances" requirement. — The "underlying circumstances" requirement is designed to locate the original source of the incriminating information and to examine the validity or reliability of that information, but is not concerned with the overall reliability of the informant. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Informant only a "tipster" where participation in the offense merely established probable cause. — Where the informant's participation merely established probable cause to search the defendant's residence, and the defendant is charged with possession with intent to distribute and not for the sale of marijuana to the informant, in the strict sense, the informant was a "tipster" and not a "participant" in the offense charged against the defendant. *State v. Martin*, 156 Ga. App. 554, 275 S.E.2d 129 (1980).

Search warrant based on informant's observation of contraband was valid. — Where the affidavit related that the informant personally observed contraband at appellants' residence, the informant's observation was

sufficient to establish the basis for information of the contraband. Therefore, appellants' contentions of error in regard to the sufficiency of the search warrant are not meritorious. *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980).

Informant's observation of where contraband concealed supported probable cause finding. — Evidence affirming details of an informant's tip, i.e., that defendant matched the description of a drug dealer and that defendant had "a large bulge" in the area of the defendant's pants where the informant had seen defendant conceal contraband, was sufficient to verify the tipster's veracity and support the trial court's finding that the police had probable cause on which to arrest the defendant. *Manzione v. State*, 194 Ga. App. 227, 390 S.E.2d 121 (1990).

Informant's information not stale. — Information was sufficiently detailed to show that it was more than a mere casual rumor or accusation made on reputation and not stale, where it stated that the informant had been on the property "in the very recent past" and that defendant "is presently storing marijuana in the described building." *Lang v. State*, 168 Ga. App. 693, 310 S.E.2d 276 (1983).

An affidavit for a search warrant stating that an informant has seen drugs on a suspect's premises within the past week is not invalid as containing stale information. *Black v. State*, 167 Ga. App. 204, 305 S.E.2d 837 (1983).

Stale information held not sole basis of probable cause. — Where, based upon information of an informant, surveillance is carried out for several months and up to one day prior to the securing of the warrant, which surveillance shows an activity and the manner in which it occurs, which activity indicates a very probable violation of the lottery law, the activity being a repetitive one and such as would ordinarily occur when a lottery was being carried on (in the manner as previously stated by the informant) as distinguished from a chance occurrence, the stale information of the informant is not the sole basis of probable cause. *Logan v. State*, 135 Ga. App. 879, 219 S.E.2d 615 (1975).

4. Hearsay

Hearsay itself can form basis for existence of probable cause if it is reliable or otherwise

Probable Cause (Cont'd)**4. Hearsay** (Cont'd)

corroborated, and observations of fellow officers engaged in a common investigation are also plainly a reliable basis for a warrant applied for by one of their number. *Dudley v. United States*, 320 F. Supp. 456 (N.D. Ga. 1970).

An arrest may be made upon hearsay evidence. *Duffy v. State*, 156 Ga. App. 847, 275 S.E.2d 658 (1980).

Requirements for sufficient hearsay. — If hearsay tip of a reliable informer on which warrant is based does not sufficiently state the underlying circumstances from which informant has concluded the defendants are violating the law, or does not sufficiently detail the informant's activities, but is relying on mere casual rumor or general reputation, a warrant, search, or seizure based thereon is illegal. *Register v. State*, 124 Ga. App. 136, 183 S.E.2d 68 (1971), cert. denied, 405 U.S. 919, 92 S. Ct. 947, 30 L. Ed. 2d 790 (1972).

Creditable hearsay sufficient to support issuance of warrant. — Insufficiency of probable cause for a search warrant does not appear from the fact alone that some or all of the facts recited in an affidavit come from information furnished by others, if there is substantial basis for crediting the hearsay. *Burns v. State*, 119 Ga. App. 678, 168 S.E.2d 786 (1969).

An affidavit supporting a search warrant may be based on hearsay information so long as there is a substantial basis for crediting the hearsay. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

Substantial basis required for crediting hearsay. — Hearsay may support the issuance of a valid warrant if the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and the affiant's belief that the informant was credible or the informant's information reliable; there must be a substantial basis for crediting such hearsay. *Smith v. State*, 136 Ga. App. 17, 220 S.E.2d 11 (1975), cert. denied, 425 U.S. 938, 96 S. Ct. 1671, 48 L. Ed. 2d 179 (1976).

Affidavit based on hearsay, without more, insufficient to support issuance. — If the affidavit submitted for the issuance of a search warrant does not set forth the underlying circumstances upon which the inform-

er's conclusions are based and does not present facts to show the credibility and reliability of the informer, the magistrate should not issue the warrant. *United States v. Williams*, 322 F. Supp. 1074 (N.D. Ga. 1971).

Necessity of underlying circumstances to support hearsay information. — Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible or the informant's information reliable. *Gordon v. State*, 150 Ga. App. 862, 258 S.E.2d 664 (1979).

Insufficient support where affidavit recites no underlying facts supporting hearsay. — There is insufficient probable cause for the issuance of the search warrant on its face if the affidavit states no factual reasons for the reliability of the unnamed informer nor any facts to support the reiterated, bare conclusion that the property was stolen. *Johnson v. State*, 128 Ga. App. 51, 195 S.E.2d 754 (1973).

Probable cause not precluded by "hearsay upon hearsay." — That there is "hearsay upon hearsay" for the information upon which an affidavit is based does not preclude a finding of probable cause. *Gordon v. State*, 150 Ga. App. 862, 258 S.E.2d 664 (1979).

Reliable hearsay information plus affiant's personal observations sufficient support. — Information received from an informant who has proven to be reliable in the past, in conjunction with affiant's personal observation that violators of the law sought to be enforced frequent the place to be searched, is sufficient to sustain a search warrant. *Thornton v. State*, 125 Ga. App. 374, 187 S.E.2d 583 (1972).

Hearsay information sufficient to support issuance of warrant. — If the underlying circumstances on which the warrant is sought and upon which the informant concluded the stolen articles sought were where the informant claimed them to be are disclosed in the affidavit, the fact that the circumstances involved hearsay information is immaterial so long as the information was sufficient to show probable cause for the issuance of the warrant. *Knowles v. State*, 124 Ga. App. 377, 183 S.E.2d 617 (1971).

Hearsay declarant reliable where identified as interested citizen. — On the defendant's contention that the affidavit on which a search warrant was based was defective because the hearsay declarants were not shown to be reliable, because the hearsay declarants were identified as interested citizens, the mere averments of those who provided the information were enough to support a presumption of reliability, credibility, and accuracy, and the hearsay statements therefore could serve as the foundation for probable cause. *Cash v. State*, 166 Ga. App. 835, 305 S.E.2d 618 (1983).

Information relayed by police to other law enforcement officers not double hearsay. — Factual information relayed by police to other law enforcement officers is not per se subject to "double hearsay" objection, question being whether probable cause is shown. *Meneghan v. State*, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

5. Probable Cause Found

Facts sufficient to find probable cause for search in drug transaction. — Considering the totality of the facts, including an informant's statement, a timely connection between the informant's drug buy at defendant's apartment and the application for a warrant to search that apartment, the drugs found in the informant's car, and observations of the informant entering and leaving defendant's apartment, a magistrate had a substantial basis to find a fair probability that contraband would be found at defendant's apartment. *Evans v. State*, 263 Ga. App. 572, 588 S.E.2d 764 (2003).

Facts sufficient to find probable cause to arrest defendant for drug offenses. — Probable cause for a warrantless arrest existed since: (1) after receiving information from a county sheriff's department that a certain pager number might be that of a drug dealer, an agent of a narcotics squad called the pager number and arranged a drug buy using a confidential informant; (2) the buy took place, two individuals were arrested, and one of them informed the arresting officers that the defendant had given the arrested person the cocaine to sell and observed the transaction from a nearby alleyway; and (3) the officers went to the defendant's home and found defendant outside the home, running, and carrying a flashlight

and a police scanner. *Fortson v. State*, 247 Ga. App. 533, 544 S.E.2d 719 (2001).

Facts justified officer's belief that officer had seen possession of marijuana. — Because a police officer, upon observing a person smoking what the officer believed to be a marijuana cigarette and upon discovering a partially smoked cigarette in the same area, the officer clearly had probable cause to believe the person possessed less than one ounce of marijuana, a misdemeanor (O.C.G.A. § 16-13-2(b)), thus authorizing a warrantless arrest. *Corbitt v. State*, 166 Ga. App. 311, 304 S.E.2d 123 (1983).

Odor of burning marijuana coming from defendant's vehicle was sufficient to provide probable cause for the warrantless search of the vehicle since the officer's initial approach was permissible. *State v. Folk*, 238 Ga. App. 206, 521 S.E.2d 194 (1999).

Trial court erred in granting defendant's motion to suppress since the police had probable cause to search the driver's vehicle because a police officer smelled the odor of burning marijuana coming from the car following a valid traffic stop and the driver gave consent to search the car, the police did not need to establish that probable cause existed to search individual containers in the car which might contain contraband since the probable cause that existed to search the car gave them the right to also search each of the car's containers, and, thus, the trial court should not have suppressed evidence of contraband found in the book bag of the passenger, the defendant. *State v. Selph*, 261 Ga. App. 541, 583 S.E.2d 212 (2003).

Police dog's positive reaction to presence of drugs as probable cause. — A police dog's positive reaction to the presence of drugs in the defendant's suitcase, along with the other facts present, supplied DEA agents with requisite probable cause to seek a search warrant for the luggage, where the defendant had given false information to the airline concerning the defendant's call back telephone number, as well as false information to a DEA agent concerning the telephone number of the defendant's residence, the defendant was traveling alone on a revalidated ticket paid for with cash from a known source city with little luggage and the defendant became nervous when interrogated by DEA agents. *Bothwell v. State*, 250 Ga. 573, 300 S.E.2d 126, cert. denied, 463

Probable Cause (Cont'd)**5. Probable Cause Found (Cont'd)**

U.S. 1210, 103 S. Ct. 3545, 77 L. Ed. 2d 1393 (1983); *Carter v. State*, 222 Ga. App. 345, 474 S.E.2d 240 (1996).

A drug dog's alert, together with the defendant's behavior, demeanor, and responses to the questions posed by law enforcement officers, provided probable cause for a search warrant for defendant's luggage. *Rivera v. State*, 247 Ga. App. 713, 545 S.E.2d 105 (2001), cert. denied, 534 U.S. 901, 122 S. Ct. 231, 151 L. Ed. 2d 165 (2001).

Probable cause based on companion's possession of contraband. — Defendant's motion to suppress was properly denied where defendant was stopped at an airport but the initial contact by the officers was terminated by them, the second stop was made only after contraband was discovered in the possession of the defendant's traveling companion, at which point the officers had probable cause to resume their investigation to determine defendant's relationship, if any, to the contraband, the defendant voluntarily accompanied them to the private room and chose to surrender the marijuana in the defendant's possession after the defendant was read the defendant's rights and consented to the search, and the defendant was then arrested and a valid search incident to the arrest revealed that the defendant was in possession of cocaine. *Seals v. State*, 181 Ga. App. 687, 353 S.E.2d 577 (1987).

Probable cause for murder arrest. — There was probable cause for a murder defendant's arrest where police officers had been informed by other residents in the home where the defendant was living that the defendant had admitted killing the victims and that the defendant had shown the residents a tooth from one of the victims. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

Admitted possession or voluntary production of controlled substance gives rise to probable cause. — Even in the absence of consent, a defendant's admitted possession of controlled substances gives rise to probable cause to search the defendant's body and totebag, and in the alternative, defendant's voluntary production of the controlled substances gives rise to probable cause to arrest

defendant for possession of controlled substances. Once probable cause to arrest is established, any search of the person incident to the arrest is valid. *United States v. Moeller*, 644 F.2d 518 (5th Cir.), cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Profiling of drug carrier. — Defendant's fourth amendment rights were not violated when drug agents searched the bag defendant was carrying after defendant got off a train in a Georgia city and defendant fit the profile of a drug courier who a confidential informant told one drug agent would be on the train; defendant's actions in attempting to flee after defendant had consented to speak with another drug agent and the totality of the circumstances in general showed that the drug agents had probable cause to search the bag and, thus, the search was part of a valid arrest. *Higdon v. State*, 261 Ga. App. 729, 583 S.E.2d 556 (2003).

Probable cause based on earlier corroborated allegations. — Affidavit indicating that attesting agent learned several months earlier that defendant had sold marijuana and that this information was corroborated by other unnamed, but multiple sources, was sufficient to establish probable cause for purposes of a search warrant. *Welch v. State*, 231 Ga. App. 74, 498 S.E.2d 555 (1998).

Information obtained from reliable confidential informant. — Probable cause existed for a warrantless search of the defendant because: (1) a reliable confidential informant told a police officer that the defendant was transporting cocaine, specifically described the vehicle the defendant would be operating, identified the passenger who would be accompanying the defendant, and identified the route the defendant would be taking; (2) the officers found the vehicle being driven by the defendant traveling in the direction described by the informant, and the defendant was accompanied by the person who had been identified by the informant; (3) the defendant was not completely cooperative when asked to step out of the vehicle; and (4) a search of the defendant revealed a small plastic bag which appeared to contain cocaine residue. *Meadows v. State*, 247 Ga. App. 634, 545 S.E.2d 76 (2001).

Probable cause supported the issuance of a search warrant since: (1) a reliable confi-

dential informant informed a law enforcement officer about seeing a quantity of an off-white chunky substance in the defendant's residence within the past 72 hours and that the defendant represented the substance as methamphetamine; (2) the informant had provided information in the past month that led to the seizure of controlled substances and the arrest of individuals; (3) the informant rode with the officer to the defendant's home and pointed it out; and (4) the informant gave more detail by alerting the officer that the defendant carried a handgun. *Claire v. State*, 247 Ga. App. 648, 544 S.E.2d 537 (2001).

Police bulletin description plus additional evidence. — Because the descriptions in a police bulletin clearly were sufficient to justify detaining the defendant based upon the reasonable suspicion that the defendant was wanted for past criminal conduct and the arrest did not occur until after the legitimate discovery of additional evidence caused the officers' reasonable suspicion to ripen into probable cause for defendant's arrest, the arrest being proper, the officers' subsequent search of the defendant's car was justified as being incident to a lawful arrest. *Thomas v. Newsome*, 821 F.2d 1550 (11th Cir.), cert. denied, 484 U.S. 967, 108 S. Ct. 461, 98 L. Ed. 2d 401 (1987).

Detailed directions to, and description of, defendant's home. — There was a reasonable basis for probable cause where the affidavit contained detailed directions to the defendant's address as well as a detailed description of the defendant's house. *Sims v. State*, 207 Ga. App. 353, 427 S.E.2d 842 (1993).

Clearly defined paths between known contraband and defendant's house gave reasonable cause to believe that contraband was present in house. *Brooks v. State*, 140 Ga. App. 371, 231 S.E.2d 138 (1976).

Probable cause based on prior arrest of driver for driving with suspended license. — There was probable cause for arrest because, upon approaching a vehicle, a police officer recognized the driver as someone the officer had previously stopped and found to be driving with a suspended license, and when asked for the license, the driver stated that the driver did not have one and the officer confirmed via a radio call that the license was indeed suspended. *Hightower v. State*,

166 Ga. App. 177, 303 S.E.2d 515 (1983).

Handwriting samples described sufficiently. — Where, because of their nature, only a generic description of handwriting samples sought in warrant was possible, there was sufficient probable cause for issuance of the warrant. *Lowe v. State*, 203 Ga. App. 277, 416 S.E.2d 750, cert. denied, 203 Ga. App. 906, 416 S.E.2d 750 (1992).

Giving of false name as probable cause. — Defendant's giving of a false name to a Drug Enforcement Administration agent constituted probable cause for the defendant's arrest. *Moran v. State*, 170 Ga. App. 837, 318 S.E.2d 716 (1984).

Facts sufficient to find probable cause to arrest defendant for battery. — Where, upon arriving at the scene, an officer observed the reported victim bleeding from the head and saw the defendant outside the victim's shop, and where the defendant became hostile when the officer attempted to ask the defendant what had happened, the officer had probable cause to arrest the defendant for a battery upon the victim as well as a battery upon the officer in that the defendant acted in a hostile manner and resisted arrest. *Newsome v. State*, 149 Ga. App. 415, 254 S.E.2d 381 (1979).

Violation of building code regulation sufficient. — Plaintiffs violated building code regulation by transporting a house through the streets of the county without having obtained a permit or given the county the required 24 hours notice, and damaging a traffic light in the process. In the course of investigating the offense and determining how and whether to cite the plaintiffs, the police officer detained them and although the police officer perhaps could have acted somewhat more quickly in making a determination and perhaps could have been more solicitous of the discomfort that the plaintiffs purportedly suffered by having to sit in a hot car during the process, neither the officer nor the county violated the plaintiffs' constitutional rights. *Lyle v. Dodd*, 857 F. Supp. 958 (N.D. Ga. 1994).

Facts constituting probable cause to search vehicle for non-tax-paid distilled spirits. See *United States v. Ramey*, 464 F.2d 1240 (5th Cir. 1972).

Probable cause for stop of vehicle near burglary site. — Because a police officer, answering a burglary call at a house located

Probable Cause (Cont'd)**5. Probable Cause Found (Cont'd)**

on a narrow, sparsely populated, little travelled dirt road at 11:40 P.M., stopped a truck the police officer noticed driving by the burglarized home, and upon stopping the truck, noticed the smell of alcohol upon the defendant driver and arrested the driver for driving under the influence, although no traffic violation was observed, the officer had a reasonable, articulable suspicion to justify stopping defendant, and the defendant's fourth amendment rights were not violated. *Smith v. State*, 182 Ga. App. 58, 354 S.E.2d 681 (1987).

Facts constituting probable cause that vehicle contained non-tax-paid whiskey. — See *United States v. Hill*, 442 F.2d 259 (5th Cir. 1971).

Probable cause based on belief that defendant was driving under suspended license. — Because a police officer learned that defendant's license was suspended and the officer had just seen defendant driving a car, the officer had probable cause to arrest defendant for driving without a license; because the officer could thereafter search defendant incident to arrest, the trial court did not err in denying defendant's motion to suppress. *Edge v. State*, 269 Ga. App. 88, 603 S.E.2d 502 (2004).

6. Probable Cause Not Found

Arrest based upon subjective evaluation not supported by probable cause. — Because accused never denied having something in the accused's boot but said the bulge was money, and the officer, while acknowledging that the bulge could have been currency, made the subjective evaluation that it was contraband, and that subjective evaluation became an integral part of the officer's decision to arrest the accused, the law enforcement officer did not have probable cause to arrest the accused, and the accused's motion to suppress the evidence uncovered in the ensuing search should have been granted. *Rebeiro v. State*, 186 Ga. App. 518, 367 S.E.2d 857 (1988).

Hindsight as basis. — The existence of probable cause cannot be determined on the basis of hindsight, such as a subsequent post-arrest search of defendant which pro-

duces drugs. *Polke v. State*, 203 Ga. App. 306, 417 S.E.2d 22 (1992).

Probable cause nonexistent when rug first seen by officer. — When the officer first viewed the rug, officer only suspected that it was one of the stolen turquoise rugs. It was not immediately apparent to the officer that the rug was stolen property; thus, it cannot be said that the officer had probable cause to seize a rug when it was first seen by the officer. *Hogan v. State*, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

Mere suspicion that two young people look nervous and that "things didn't add up" is insufficient to warrant an arrest. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Spouse's prior drug possession insufficient. — Possession by defendant's spouse of contraband drugs in another county some two weeks prior did not show probable cause. *State v. Suddeth*, 207 Ga. App. 103, 427 S.E.2d 76 (1993).

Facts insufficient to establish probable cause. — Even though a tip, combined with the discovery of defendant and prior information relating to the defendant, gave rise to an articulable suspicion of criminal wrongdoing sufficient to support an investigatory detention, these facts were insufficient under the circumstances to establish probable cause for the defendant's arrest for unlawful possession of drugs. *Polke v. State*, 203 Ga. App. 306, 417 S.E.2d 22 (1992).

A nervous black person standing outside an apartment complex at 7:00 P.M. with the person's hand in the person's pocket did not, standing alone, give rise to an articulable suspicion that the person was engaged in unlawful activity. *State v. Banks*, 223 Ga. App. 838, 479 S.E.2d 168 (1996).

Where a white person in a black neighborhood late at night picked up a black person at a location considered by police to be a high-crime area and then drove slowly through the neighborhood, such behavior was not alone sufficient to indicate that the individuals were or might be engaged in illegal activity. *Hughes v. State*, 269 Ga. 258, 497 S.E.2d 790 (1998).

Where the defendant was arrested without a warrant, but none of the statutory exceptions to the warrant requirement applied, no probable cause existed, and no authority to enter the defendant's dormitory room had

been given, the arrest was illegal and a subsequent confession subject to exclusion. *State v. Guillory*, 236 Ga. App. 230, 511 S.E.2d 591 (1999).

Stopping in a parking lot while lost, being from out-of-state, and being in a car with a tag from another state were not factors that alone were sufficient to suggest criminal activity, and the fact that defendants were parked in a high drug area did not constitute a justification for a brief detention. *State v. Kwiatkowski*, 238 Ga. App. 390, 519 S.E.2d 43 (1999).

An officer who stopped defendant's vehicle for tinted windows had no probable cause to detain the defendant while the officer obtained the services of a drug dog to investigate the sealed package in the trunk for which defendant had withdrawn consent to search; the officer's knowledge that drugs were being transported down the interstate provided no basis whatsoever to establish probable cause as to defendant. *Montero v. State*, 245 Ga. App. 181, 537 S.E.2d 429 (2000).

Probable cause did not support a search warrant since: (1) the affidavit failed to mention that it was based on hearsay evidence from two confidential informants; (2) the affidavit failed to disclose that one informant had a criminal background and was being paid for the information; (3) the affidavit had no information regarding the reliability of the second informant; (4) the attesting officer had no personal knowledge of the reliability of either informant; and (5) there was insufficient corroboration of the information supplied by the informants to otherwise establish their credibility. *Elom v. State*, 248 Ga. App. 273, 546 S.E.2d 50 (2001).

Even though defendant matched a "sex offender profile," because there was no link established between defendant's apartment and the alleged molestation of the victim, the search of defendant's apartment and subsequent search of computer files was illegal. *State v. Staley*, 249 Ga. App. 207, 548 S.E.2d 26 (2001).

Since a trial court found probable cause for a vehicle search based, in part, on the discovery of contraband in the vehicle, and it was unclear whether the trial court would have reached the same result absent this factor, the trial court's order denying the

defendant's motion to suppress in this regard was improper. *Quick v. State*, 279 Ga. App. 835, 632 S.E.2d 742 (2006).

Facts insufficient to provide reasonable cause to believe defendant had committed burglary. — The fact the appellant's automobile was seen late at night, 500 yards from the location of a recent burglary, did not in and of itself provide reasonable cause to believe that the defendant had committed the burglary or that the defendant's automobile contained stolen property. *State v. Avret*, 156 Ga. App. 527, 275 S.E.2d 113 (1980).

Reasonable suspicion not probable cause. — Where the drug enforcement officer identified travel characteristics of defendant consistent with drug trafficking; an incorrect phone number was given to a Miami ticket agent; the defendant showed manifestations of nervousness and gave inconsistent answers regarding whom defendant was visiting in Miami; and a roll of plastic wrap was found in defendant's backpack, while these factors may give rise to a reasonable suspicion of illicit drug activity, they were insufficient, even when combined, to constitute probable cause to believe a suspect is transporting drugs. *State v. Williams*, 242 Ga. App. 34, 528 S.E.2d 554 (2000).

Reasonableness

Factors for determining reasonableness. — In determining the reasonableness of a particular law enforcement practice, a court must weigh the public interest promoted by the practice against its intrusion upon the personal rights of the individual protected by the fourth amendment. Some of the factors that the court should consider are the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980).

Unreasonableness depends on facts. — Reasonableness in terms of search and seizure is not determined by the hindsight of appellate court judges after weeks of academic deliberation; it is determined by the foresight of the police officer on the scene who must act in the public interest in a very short space of time. The reasonableness of the officer's action must be judged in relation to the circumstances then existing and is in the first instance a question for the trial

Reasonableness (Cont'd)

judge to determine. *Croker v. State*, 114 Ga. App. 43, 150 S.E.2d 294 (1966).

The test of reasonableness cannot be stated in rigid and absolute terms and each case is to be decided on its own facts and circumstances. *Watts v. Cannon*, 224 Ga. 797, 164 S.E.2d 780 (1968).

Whether a search and seizure is unreasonable within the meaning of the fourth amendment depends upon the facts and circumstances of each case. *United States v. Cassell*, 542 F.2d 279 (5th Cir. 1976), cert. denied, 430 U.S. 985, 97 S. Ct. 1684, 52 L. Ed. 2d 380 (1977).

Whether a search and seizure is unreasonable within meaning of U.S. Const., amend. 4 depends upon facts and circumstances of each case. *Martasin v. State*, 155 Ga. App. 396, 271 S.E.2d 2 (1980).

The standard against which U.S. Const., amend. 4 requires that we judge the validity of a search or seizure is one of reasonableness in light of the totality of the circumstances. *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980).

It was reasonable for police officers, knowing that premises were to be the subject of the immediate execution of a search warrant, to detain temporarily a vehicle containing the defendant which had just left the property, in order to identify the occupants and see if one of them was the person they had just overheard discussing gambling and drugs on the phone. *Garmon v. State*, 235 Ga. App. 671, 510 S.E.2d 350 (1998).

"Reasonable" not construed in abstract. — The word "reasonable" with respect to arrests is not to be construed in the abstract or in a vacuum unrelated to the field to which it applies. Standards which might be reasonable for the apprehension of bank robbers might not be reasonable for the arrest of narcotics peddlers. *United States v. Nooks*, 446 F.2d 1283 (5th Cir.), cert. denied, 404 U.S. 945, 92 S. Ct. 299, 30 L. Ed. 2d 261 (1971).

Reasonableness a question for judge. — In the first instance the reasonableness of a search is a question for the trial judge to determine. *Croker v. State*, 114 Ga. App. 43, 150 S.E.2d 294 (1966).

What may be unreasonable search of house may be reasonable in the case of a

motorcar; but even in the case of motorcars, the test is still whether the search is unreasonable. *Croker v. State*, 114 Ga. App. 43, 150 S.E.2d 294 (1966).

Stop was reasonable in light of the verification of the information supplied by the tipster, coupled with the agents' observations of defendant's behavior upon exiting the plane and defendant's hostility upon being advised of the reason for the stop. *Gordon v. State*, 242 Ga. App. 50, 528 S.E.2d 838 (2000).

Searches**1. In General**

When search occurs. — A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *Thomas v. State*, 203 Ga. App. 529, 417 S.E.2d 353, cert. denied, 203 Ga. App. 908, 417 S.E.2d 353 (1992).

Reasonableness determines legality of search. — Test of whether search was legal, is whether search was reasonable. *Andreu v. State*, 124 Ga. App. 793, 186 S.E.2d 137 (1971).

Police officers' pat-down search of the defendant, after detaining the defendant as the defendant left the site of a house about to be searched pursuant to a search warrant, was reasonable and justified under the circumstances. *Garmon v. State*, 235 Ga. App. 671, 510 S.E.2d 350 (1998).

Because the defendant was detained after leaving a residence at which a search warrant was about to be executed, and because the police, having ascertained the defendant's identity, relied on information regarding prior drug involvement to initiate a "free air search," there was sufficient articulable suspicion to justify the search. *Garmon v. State*, 235 Ga. App. 671, 510 S.E.2d 350 (1998).

Reasonable articulable suspicion existed to stop defendant in an investigative detention after a motel manager notified the police that drugs were being sold from a specific motel room, an officer placed the motel room under surveillance, defendant approached the motel room door while looking to see if anyone was observing, defendant walked away when the officer approached, and defendant refused to take hands out of pants pockets after the officer caught up with the defendant; therefore, the

bag of crack cocaine found on the ground where defendant had been ordered to lie down was admissible evidence. *Edwards v. State*, 253 Ga. App. 837, 560 S.E.2d 735 (2002).

Reasonableness of search is not determined by hindsight of appellate court judges after weeks of academic deliberation; it is determined by the foresight of the police officer on the scene who must act in the public interest in a very short space of time. The reasonableness of the officer's action must be judged in relation to the circumstances then existing and is in the first instance a question for the trial judge to determine. *Andreu v. State*, 124 Ga. App. 793, 186 S.E.2d 137 (1971); *Meneghan v. State*, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Requirements of reasonable search. — Even though the execution of a warrant is directed to all peace officers, a search pursuant to it meets the requirements of the United States and Georgia Constitutions if it was limited in its scope to physically described persons in a specific vicinity, and the description sufficiently permitted a prudent officer with a search warrant to be able to locate the person and place definitely and with reasonable certainty. *Fomby v. State*, 120 Ga. App. 387, 170 S.E.2d 585 (1969), cert. denied, 397 U.S. 1008, 90 S. Ct. 1236, 25 L. Ed. 2d 421 (1970).

General searches are prohibited. *Hogan v. State*, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

Grounds for search must satisfy objective standards which ensure that invasion of personal privacy is justified by legitimate governmental interests. The governmental interests to be served in the detection or prevention of crime are subject to traditional standards of probable cause to believe that incriminating evidence will be found. *Bowers v. State*, 151 Ga. App. 46, 258 S.E.2d 623 (1979), aff'd, 245 Ga. 367, 265 S.E.2d 57 (1980).

To violate U.S. Const., amend. 4, a search must be: (1) an unreasonable search; and (2) by a state or federal officer. A search by a private individual for purely private reasons does not fall within fourth amendment proscriptions. *United States v. McDaniel*, 574 F.2d 1224 (5th Cir. 1978), cert. denied, 441 U.S. 952, 99 S. Ct. 2181, 60 L. Ed. 2d 1057 (1979).

Search requires state conduct. — Public utility's termination of plaintiff's employment pursuant to the results of a urinalysis drug screening test were not actionable under U.S. Const., amend. 4 as it was conducted by a private actor under no governmental compulsion to do so. *Parker v. Atlanta Gas Light Co.*, 818 F. Supp. 345 (S.D. Ga. 1993).

Right of privacy balanced against right of search. — When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a police officer or a government enforcement agent. *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961).

Necessity for kind of search made is weighed heavily in balance against expectation of privacy. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975).

There can be no ready test for determining reasonableness of a search other than by balancing the need to search against the invasion which the search entails. In determining the reasonableness of a search, the social utility of the search must be balanced against the individual's reasonable expectation of privacy. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975).

Where a fourth amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. *Chandler v. Miller*, 952 F. Supp. 804 (N.D. Ga. 1994).

No standing to challenge search and seizure. — Where defendants deny having any right of possession or interest in the searched building or the items seized, they have no standing to challenge the search or seizure. *Byers v. State*, 204 Ga. App. 552, 420 S.E.2d 23 (1992), cert. denied, 507 U.S. 928, 113 S. Ct. 1305, 122 L. Ed. 2d 694 (1993).

Balancing of employer's and agency's interests. — The employer's right under U.S. Const., amend. 4 to be free from unreasonable searches must be offset against the weight to be accorded Occupational Safety and Health Administration's need to determine if the regulations it has issued to the

Searches (Cont'd)**1. In General (Cont'd)**

industry are too oppressive. *West Point-Pepperell, Inc. v. Marshall*, 496 F. Supp. 1178 (N.D. Ga. 1980), rev'd on other grounds, 689 F.2d 950 (11th Cir. 1982).

Reasonableness of search and nexus of seized items thereto. — Where an investigation of the accused was underway in connection with the accused's forging and uttering stolen bonds, the accused's use of a bank account in an assumed name, and the accused's forged endorsements of stolen bonds, and where the accused was connected in an affidavit to such a scheme, and where documents seized pursuant to a search warrant were used as handwriting exemplars, the nexus of the seized documents to the search and to their use as handwriting exemplars was ample. *United States v. Munroe*, 421 F.2d 644 (5th Cir. 1970), cert. denied, 400 U.S. 851, 91 S. Ct. 79, 27 L. Ed. 2d 89 (1970).

Reasonable suspicion based on specific and articulate facts. — Because the police officer had reasonable suspicion based on specific and articulable facts that defendant was engaged in criminal activity, the brief holdover of defendant until the canine unit arrived did not amount to a violation of defendant's rights. *United States v. Gonzalez*, 952 F. Supp. 813 (M.D. Ga. 1997), aff'd, 189 F.3d 483 (11th Cir. 1999).

Search need not precede formal arrest if probable cause exists absent the result of the search and if formal arrest follows on the heels of the search. *United States v. Elsoffer*, 671 F.2d 1294 (11th Cir. 1982); *Berry v. State*, 163 Ga. App. 705, 294 S.E.2d 562 (1982).

Extent of search. — A search may be as extensive as reasonably required to locate the objects of the search. When searching for documents, some perusal may be needed to determine their relevance, and removal of documents for subsequent review can be appropriate. *United States v. Lambert*, 887 F.2d 1568 (11th Cir. 1989).

Knocking on outer doors as search. — Where a police officer enters upon private property only to the extent of knocking on outer doors, the fourth amendment is not violated. *Dean v. State*, 200 Ga. App. 752, 409 S.E.2d 667, cert. denied, 200 Ga. App. 895, 409 S.E.2d 667 (1991).

Abandoned property. — The constitutional protection of the fourth and fourteenth amendments does not apply to property which has been abandoned. Thus, if a defendant has abandoned property, there is no entitlement to protection of that property by the fourth or fourteenth amendments from an illegal search or seizure. *Gresham v. State*, 204 Ga. App. 540, 420 S.E.2d 71 (1992).

Not all containers and packages found by police during search deserve protection of U.S. Const., amend. 4. Thus, some containers (for example a kit of burglar's tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. *Dressler v. State*, 158 Ga. App. 11, 279 S.E.2d 454 (1981).

Stolen goods found during lawful search for other items. — Once officers lawfully conducting a search for marijuana ascertained that the contents of a bag was silverware of various patterns and one of the officers believed the patterns were consistent with certain silverware reported stolen as well as the fact that it was concealed in a container which reasonably could hold marijuana and was located in a place where one does not expect to find silverware, this was sufficient to arouse the suspicion that the silverware was stolen and justify its seizure. *Whittington v. State*, 165 Ga. App. 763, 302 S.E.2d 617 (1983).

Disclaimer of contraband found on companion after it is in possession of government did not preclude search. — Where defendant's disclaimer of a companion and the companion's luggage followed the search, the fact that defendant's disclaimer occurred after the contraband was in the possession of the government did not preclude a finding of abandonment of the defendant's expectations of privacy with respect to the luggage, since at the time the defendant denied knowing the companion the defendant was not aware that the cocaine had been discovered, and during the suppression hearing the defendant admitted that the defendant never intended to acknowledge an ownership interest in the bag or retake possession unless the companion reached the companion's final destination without incident. *United States v. McKennon*, 814 F.2d 1539 (11th Cir. 1987).

Incrimatory matter does not legalize unlawful search. — If one is unlawfully searched, fact that incriminatory matter is found will not render the search legal. *Willis v. State*, 122 Ga. App. 455, 177 S.E.2d 487 (1970).

Illegal search taints all evidence obtained. — An illegal search of the defendant's watch pocket tainted all evidence obtained as a result of the search and the trial court erred when it denied the defendant's motion to suppress evidence found in an inventory search of the defendant's car arising out of the arrest which had followed the illegal search. *Corley v. State*, 236 Ga. App. 302, 512 S.E.2d 41 (1999).

An after-the-search procedural deficit is not a violation of any right under U.S. Const., amend. 4. *United States v. Baty*, 486 F.2d 240 (5th Cir. 1973), cert. denied, 416 U.S. 942, 94 S. Ct. 1948, 40 L. Ed. 2d 294 (1974).

Request for identification by a police officer does not constitute a "custodial search." *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Search not done at point of detention. — Search is not rendered illegal by fact that it was not done at point of detention. *Davis v. State*, 135 Ga. App. 931, 219 S.E.2d 598 (1975).

Police may assume belongings on premises are part of it. — Without notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within premises lawfully subject to search under a warrant are part of those premises for the purpose of executing the warrant. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Broadscale search of premises in executing arrest warrant. — Police officers who entered a home while executing an arrest warrant for the homeowner's child had no authority to conduct a broadscale search, looking into cabinets and drawers. *Nash v. Douglas County*, 733 F. Supp. 100 (N.D. Ga. 1989).

Search in executing probation arrest warrant. — Contraband seized in a search of defendant's home upon execution of a probation arrest warrant should have been suppressed because the warrant was invalid, having been issued on the basis of an earlier

illegal search of defendant. *Boatright v. State*, 225 Ga. App. 181, 483 S.E.2d 659 (1997).

Searches of persons not named in search warrant but found on premises to be searched are illegal absent independent justification for a personal search. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Probable cause required to search visitor's belongings. — An analysis which focuses entirely on whether a belonging is in the physical possession of a nonresident visitor to premises searchable under a warrant, while it serves to protect the zone of privacy around the visitor's person, ignores the substantial interest the visitor has in the privacy of all the visitor's possessions, wherever located. To overcome that interest, the federal and state Constitutions require a warrant supported by probable cause. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Notice that items belong to visitor to searched premises. — Whether the police had notice that they were searching the personal effects of a visitor to searched premises must be determined on the facts of each case. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Pat down search of passenger in a stopped vehicle. — Trial court erred in denying a motion to suppress evidence by a passenger in a vehicle that was stopped for a traffic violation because the state failed to meet its burden of being able to articulate a reasonable basis for the officer conducting a pat-down search of the passenger in that searching passengers who exit a stopped vehicle as a common practice was not sufficient grounds to justify the pat-down search of defendant. *Milby v. State*, 256 Ga. App. 429, 569 S.E.2d 256 (2002).

Consent search by owner uncovers illegal drugs of visitor. — Trial court did not err in denying a motion to suppress evidence where officers found marijuana in a bag under a bed in a trailer after the trailer's owner consented to the search and the person who owned the bag and was visiting the trailer at first denied ownership of the bag. *Osment v. State*, 256 Ga. App. 591, 569 S.E.2d 262 (2002).

Frisk must be confined to search for weapons. — A frisk involves the patting-down of a

Searches (Cont'd)**1. In General (Cont'd)**

person's outer clothing by a police officer. Unlike a full search, a frisk is conducted solely for the purpose of insuring the safety of the officer and of others nearby, not to procure evidence for use at a subsequent trial; it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer. *Clark v. State*, 208 Ga. App. 896, 432 S.E.2d 220 (1993).

Because a police officer was unable to provide specific facts to justify a concern that the item in defendant's pocket was a weapon, defendant's fourth amendment rights were violated when the officer reached into defendant's pockets; consequently, the trial court erred in denying defendant's motion to suppress. *Castleberry v. State*, 275 Ga. App. 37, 619 S.E.2d 747 (2005).

Search of persons arriving on premises being searched. — The pat down or "frisk" of the defendant when the defendant arrived at the scene of a police search, given all of the facts known to the police on the scene, i.e., that the defendant carried a gun and that earlier arrestees were frightened of the defendant, did not violate U.S. Const., amend. 4. *United States v. Bonds*, 829 F.2d 1072 (11th Cir. 1987).

Personal belongings brought by owner on visit to friend's house retain their constitutional protection until their owner meaningfully abdicates control or responsibility. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Search by merely testing locks not illegal. — A law officer does not commit an illegal search when, with keys taken from the accused, the law officer tests the locks, but does not then enter the premises, never crosses the threshold of the premises, does not open the door, does not see or hear anything inside, receives no response to the law officer's knock, and then makes an affidavit and obtains a search warrant. *Thomas v. State*, 145 Ga. App. 69, 243 S.E.2d 250 (1978).

Normal security sweep prompting intrusion. — Officers who find an apparently closed business unlocked during a normal security sweep may conduct a limited intrusion

on the business premises for the sole purpose of securing the area and ensuring no intruders are present. *Banks v. State*, 229 Ga. App. 414, 493 S.E.2d 923 (1997).

Searches of prisoners' cells. — No one can rationally doubt that room searches represent an appropriate security measure and neither the district court nor the Court of Appeals has prohibited such searches, and even the most zealous advocate of prisoner's right would not suggest that a warrant is required to conduct such a search. *Riden v. State*, 151 Ga. App. 654, 261 S.E.2d 409 (1979).

A trespass does not of itself constitute an illegal search. *Ehlers v. Bogue*, 626 F.2d 1314 (5th Cir. 1980), cert. denied, 451 U.S. 909, 101 S. Ct. 1979, 68 L. Ed. 2d 298 (1981).

Observations of defendant from adjacent field not illegal search. — Observations of defendant, a known liquor violator, from an adjacent property owner's field about 50 yards away, by the use of binoculars, did not constitute an illegal search. *United States v. Grimes*, 426 F.2d 706 (5th Cir. 1970).

First-tier encounter. — Encounter between defendant, who was sitting with another person in a parked car at night near the edge of a wooded area, and three police officers who approached the car was a first-tier encounter that did not require an articulable suspicion, and contraband on defendant's person that defendant proffered in a consensual search was admissible at trial. *Carrera v. State*, 261 Ga. App. 832, 584 S.E.2d 2 (2003).

Reasonable cause sufficient to carry on clandestine surveillance in public toilets. — Where the police have reasonable cause to believe that public toilet stalls are being used in the commission of crime, and when they confine their activities to the times when such crimes are most likely to occur, they are entitled to institute clandestine surveillance, even though they do not have probable cause to believe that the particular persons whom they may thus catch in flagrante delicto have committed or will commit the crime. The public interest in its privacy must, to that extent, be subordinated to the public interest in law enforcement. *Mitchell v. State*, 120 Ga. App. 447, 170 S.E.2d 765 (1969).

Strip search of juvenile. — Law enforcement officers may subject a juvenile who is

lawfully in custody to a strip search based upon reasonable suspicion that the juvenile is concealing a weapon or contraband, when the strip search is conducted in the least intrusive manner, even where the juvenile is in custody after being arrested for an offense that is not a felony. *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992).

School students. — Even though a teacher had the requisite suspicion to conduct some type of search of the students in the teacher's fifth grade class for missing money, the conduct of strip searches exceeded the bounds of reasonableness, which means that they also exceeded constitutional limits. *Thomas v. Clayton County Bd. of Educ.*, 94 F. Supp. 2d 1290 (N.D. Ga. 1999).

When there is merely generalized suspicion that one member of an entire class is hiding some contraband, the nature of the contraband becomes an important consideration in deciding how intrusive the search should be. *Thomas v. Clayton County Bd. of Educ.*, 94 F. Supp. 2d 1290 (N.D. Ga. 1999).

Searches of students, during which the students were required to remove articles of clothing and to reveal their underwear, following the apparent disappearance of an envelope containing \$26 from the teacher's desk were unconstitutional since the disappearance of \$26 did not present such an extreme threat to school discipline or safety that the students could properly be subjected to intrusive strip searches without individualized suspicion; however, a more limited search of a single student, who entered the restroom in which searches were being conducted, was not unconstitutional. *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001).

Strip searches to discover contraband. — There is no reason to differentiate between strip searches to discover contraband to protect the security of the institution and strip searches within the institution which may lead to contraband (drugs) to be used as evidence of a crime. *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992).

Degree of intrusion into suspect's privacy. — The degree of intrusion into a suspect's privacy is relevant in deciding whether any of the suspect's constitutional rights have been infringed. Thus, intrusions into the human

body, because of their extremely invasive nature, require more justification to satisfy the fourth amendment, than does a limited stop and frisk. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Slight physical intrusion is insignificant if it infringes no privacy interest. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Obtaining of contraband during pat-down. — Because an officer was patting-down defendant's outer garments in search of weapons or contraband and felt what seemed to be contraband in a pocket that was accessible only from the inside of defendant's jacket, the agent acted well within the scope of a reasonable narcotics pat-down by reaching into that inside pocket and removing what was later determined to be cocaine hydrochloride. *United States v. Smith*, 649 F.2d 305 (5th Cir. 1981), cert. denied, 460 U.S. 1068, 103 S. Ct. 1521, 75 L. Ed. 2d 945 (1983).

Officer who exceeds a pat-down search without first discovering an object which feels reasonable, like a knife, gun, or club, must be able to point to specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down. Only then can judges satisfy the fourth amendment's requirement of a neutral evaluation of the reasonableness of a particular search by comparing the facts with the officer's view of those facts. *Holtzendorf v. State*, 125 Ga. App. 747, 188 S.E.2d 879 (1972).

Search of male defendant's outer clothing and pockets by female police officer was not an unreasonable search in contravention of fourth amendment rights to personal privacy and dignity. Although a male officer was present and could have conducted the search, the search was not of such an intrusive nature that it could not be conducted by a female officer. *Singer v. State*, 156 Ga. App. 416, 274 S.E.2d 612 (1980).

Search of pants pocket of individual who was not named in a warrant but who was on premises believed to be frequented by purchasers of illegal drugs was authorized where the warrant authorized searching the premises and any persons who might reasonably

Searches (Cont'd)**1. In General (Cont'd)**

be involved in the crime of possession of illegal drugs. *Jenkins v. State*, 184 Ga. App. 844, 363 S.E.2d 35 (1987).

Searches of item carried under person's arm and of item in person's pocket have been treated as searches of the person. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Surgical extraction of bullet from defendant's leg. — Where there was no medical reason to remove a bullet from defendant's leg and the procedure required to retrieve the evidence posed an unnecessary risk to defendant's health, the trial court's order requiring surgical removal of the bullet overstepped defendant's fourth amendment right and the court erred in admitting testimony regarding defendant's resistance to removal of the bullet. *Curry v. State*, 217 Ga. App. 623, 458 S.E.2d 385 (1995).

Search of purse found close to defendant. — Police, executing a search warrant in the home of defendant's child, properly searched a purse found a few inches away from defendant, where the child was absent and the purse was by its nature a holding object and one capable of concealment of such items as drugs or weapons. *Bonds v. State*, 188 Ga. App. 135, 372 S.E.2d 448, cert. denied, 188 Ga. App. 911, 372 S.E.2d 448 (1988).

Use of seized property in investigation. — Officers were not required to obtain a warrant to use a cap that was seized from defendant at the time of arrest as a scent article for sniff dogs employed in a search near the crime scene. *Carter v. State*, 224 Ga. App. 367, 480 S.E.2d 376 (1997).

Use of trained dogs. — The use of a "narcotics" dog, especially trained to detect marijuana and narcotics, is an authorized investigative technique. *Lockhart v. State*, 166 Ga. App. 555, 305 S.E.2d 22 (1983); *State v. Montford*, 217 Ga. App. 339, 457 S.E.2d 229 (1995).

Use of a trained drug detection dog, in a location where the dog is entitled to be, to sniff the exterior of a container, is not an unreasonable search. *O'Keefe v. State*, 189 Ga. App. 519, 376 S.E.2d 406, cert. denied, 189 Ga. App. 913, 376 S.E.2d 406 (1988).

A dog sniff of a person's property located

in a public place is not a search within the meaning of the fourth amendment. *Hearn v. Board of Pub. Educ.*, 191 F.3d 1329 (11th Cir. 1999), cert. denied, 529 U.S. 1109, 120 S. Ct. 1962, 146 L. Ed. 2d 794 (2000).

Pistol thrown into vacant lot. — Where the appellant was not trying to hide the pistol but threw it in an overgrown vacant lot, separated from the appellant's back yard by a brick wall and shed, unwarranted search of the area did not intrude upon the appellant's reasonable expectations of privacy. *Simmons v. State*, 164 Ga. App. 643, 298 S.E.2d 313 (1982).

Denial of motion to suppress. — There was no error in denial of a motion to suppress the evidence, where the items seized from the home were obviously relevant to the crime and were properly seized as evidence and the warrants were issued by a neutral and detached magistrate. *Ward v. State*, 262 Ga. 293, 417 S.E.2d 130 (1992), cert. denied, 506 U.S. 1084, 113 S. Ct. 1061, 122 L. Ed. 2d 366 (1993).

2. Warrantless Searches

Per se unreasonableness of warrantless searches. — A search without warrant is prima facie illegal and must be shown to come within some recognized exception before the evidence can be admitted. *Hunter v. State*, 127 Ga. App. 664, 194 S.E.2d 680 (1972).

The United States Supreme Court has held that warrantless searches are per se unreasonable under the fourth amendment subject only to a few specifically established and well-delineated exceptions, with the requirement that those seeking exemption from the rule must show exigency that necessitated search without a judicially approved warrant. *Lowe v. Hopper*, 400 F. Supp. 970 (S.D. Ga.), aff'd, 520 F.2d 1405 (5th Cir. 1975).

Rule that warrantless searches are per se unreasonable does not apply to evidence discovered in inventorying the effects of arrestees or suspects that are properly in possession of law enforcement officers. *Lowe v. Hopper*, 400 F. Supp. 970 (S.D. Ga.), aff'd, 520 F.2d 1405 (5th Cir. 1975).

Searches conducted outside judicial process, without prior approval by judge or magistrate, are per se unreasonable subject only to a few specifically established and

well-delineated exceptions. *State v. Guhl*, 140 Ga. App. 23, 230 S.E.2d 22 (1976), rev'd on other grounds sub nom. *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509 (1977).

Search without warrant is per se unreasonable unless within certain clearly defined exceptions. *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the fourth amendment, subject to a few specifically established and well-delineated exceptions, which must be shown by those who seek the exemption to be necessary under the exigencies of the situation. *Brown v. State*, 181 Ga. App. 768, 353 S.E.2d 572 (1987).

Warrantless searches must come under recognized exception. — Generally, searches conducted without the prior approval of a judge or magistrate must be justified under one of the specifically established and well-delineated exceptions to the warrant requirement. *McDonald v. State*, 156 Ga. App. 143, 273 S.E.2d 881 (1980).

Searches conducted without prior approval of judge or magistrate must be justified under one of the specifically established and well-delineated exceptions to the warrant requirement. *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980).

Warrantless conduct by police. — Questions as to whether warrantless conduct by the police is lawful under the fourth amendment are not strictly determined by common-law property law concepts, but are determined by whether the police action was reasonable under all the circumstances. *Perry v. State*, 204 Ga. App. 643, 419 S.E.2d 922 (1992).

Burden on government to show that warrantless search is within one of the exceptions to the warrant requirements of U.S. Const., amend. 4. *Lowe v. Hopper*, 400 F. Supp. 970 (S.D. Ga.), aff'd, 520 F.2d 1405 (5th Cir. 1975).

Requirement of warrant not absolute. — U.S. Const., amend. 4 has never been held to require that every valid search and seizure be effected under authority of search warrant. Search and seizure incident to lawful

arrest is a practice of ancient origin and has long been an integral part of the law enforcement procedures of the United States and of the individual states. *Cash v. State*, 222 Ga. 55, 148 S.E.2d 420 (1966).

U.S. Const., amend. 4 has never been held to require that every valid search and seizure be effected under authority of a search warrant. *Watts v. Cannon*, 224 Ga. 797, 164 S.E.2d 780 (1968).

To make a search reasonable on the spot it must either be incident to arrest or contain other elements sufficient in themselves to authorize the peremptory action, and, as to the latter, probable cause may be a contributing or even a sufficient factor. *Hunter v. State*, 127 Ga. App. 664, 194 S.E.2d 680 (1972).

Warrantless search of a passenger in an automobile was unreasonable where the officer testified that the officer felt no particular threat from the passenger during the officer's questioning and pat-down of the driver, and saw nothing unusual or threatening. *United States v. Hale*, 934 F. Supp. 427 (N.D. Ga. 1996).

Probable cause requirements for warrantless searches. — The probable cause requirements for a search without a warrant are the same requirements necessary for the issuance of a warrant by a magistrate. *Morgan v. Kiff*, 230 Ga. 277, 196 S.E.2d 445 (1973), overruled on other grounds, *Jacobs v. Hopper*, 238 Ga. 461, 233 S.E.2d 169 (1977).

Warrantless seizures with respect to automobile and home. — Whatever justification for seizing an automobile without a warrant may be spelled out of its fugitive and ambulatory abilities, none may be advanced to excuse the compulsory search of and seizure in a private home without one. *Ray v. United States*, 84 F.2d 654 (5th Cir. 1936).

Warrantless entry into a home. — Search of private dwelling without warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. *Ray v. United States*, 84 F.2d 654 (5th Cir. 1936).

Absent exigent circumstances or consent, the entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant. *Thompson v. State*, 248 Ga. 343, 285 S.E.2d 685 (1981).

Searches (Cont'd)**2. Warrantless Searches (Cont'd)**

Probable cause, however well founded, cannot provide justification for a warrantless intrusion of a person's home absent a showing that the exigencies of the situation made that course imperative. *Phillips v. State*, 167 Ga. App. 260, 305 S.E.2d 918 (1983).

Warrantless entry into a home merely to question someone in the investigation of a misdemeanor offense and without probable cause to search or arrest is unreasonable, absent consent or exigent circumstances. *Griffith v. State*, 172 Ga. App. 255, 322 S.E.2d 921 (1984).

Where officers did not have a search warrant for the plaintiff's residence when they entered the house, nor did they have probable cause to believe that a crime was taking place at the plaintiff's house, as such, the officers should have known that entry risked violating the residents' constitutional rights. *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995).

Police officer violated the fourth amendment by entering defendant's home without a warrant and without defendant's consent to question defendant about a report received from a concerned citizen that defendant had been seen by the citizen just minutes before driving erratically across lanes of traffic. *Threatt v. State*, 240 Ga. App. 592, 524 S.E.2d 276 (1999).

Trial court erred in denying defendant's motion to suppress the evidence after police officers found about one gram of methamphetamine in defendant's residence upon entering defendant's residence without a warrant. Although as the police officers approached they saw defendant, through an open door, start to run away, their entry into defendant's residence was not justified by any exigent circumstances; thus, defendant's fourth amendment rights were violated. *Bolton v. State*, 258 Ga. App. 217, 573 S.E.2d 479 (2002).

Consent to search. — Suppression motion was properly denied after defendant voluntarily consented to police officers searching defendant's bedroom and the officers found a firearm in plain view; moreover, the officers did not threaten defendant into giving defendant's consent merely by telling defendant that they could obtain a warrant based

on their earlier seizure of marijuana in another part of the house. *Butler v. State*, 272 Ga. App. 557, 612 S.E.2d 865 (2005).

Search of the defendant's motel room did not violate Ga. Const. 1983, Art. I, Sec. I, Para. XIII or U.S. Const., amend. 4; comparing the officers' testimony, that the defendant gave them permission to enter the motel room and to search the pants that were lying on the floor, with the defendant's girlfriend's uncertain testimony, the trial court did not err in crediting the officers' testimony, and since the officers searched defendant's wallet after they arrested defendant for possession of methamphetamine, the search of the wallet was authorized as a search incident to an arrest. *Johnson v. State*, 281 Ga. App. 7, 635 S.E.2d 278 (2006).

Visitor's belongings. — Personal belongings brought by their owner on a visit to a friend's house retain their constitutional protection until their owner meaningfully abdicates control or responsibility. *State v. Browning*, 209 Ga. App. 197, 433 S.E.2d 119 (1993).

Search of probationer's home was not reasonable because it was not based upon "reasonable grounds" to believe that contraband would be found at the home and because it was conducted by a law enforcement official without any communication with a probation officer. *Fox v. State*, 272 Ga. 163, 527 S.E.2d 847 (2000).

Conduct not unreasonable. — The conduct of the detective in entering onto private land through a gate and driving on a dirt road located along a power line easement to investigate the self-confirmed complaint of loud noise and the suspected fighting, was a legitimate intrusion and not unreasonable conduct within the meaning of the fourth amendment. *Perry v. State*, 204 Ga. App. 643, 419 S.E.2d 922 (1992).

A court's decision to admit evidence obtained in a warrantless search was affirmed where it was based on a police officer's fear that the defendant had a gun and was getting it when defendant retrieved a box and reached inside it, since this was a reasonable belief under the circumstances of the police having received a complaint about drugs, the limited entry to see whether this was a gun was therefore justified, and the drugs which were then seen in plain view were properly seized. *Owens v. State*, 236 Ga. App. 534, 512 S.E.2d 394 (1999).

There was no search in violation of the fourth amendment since: (1) police officers had a right to be in the defendant's yard in order to investigate; (2) the use of flashlights by the officers was not improper; and (3) the act of bending down by the officers to see contraband under a car did not violate any legitimate expectation of privacy. *Williams v. State*, 249 Ga. App. 119, 547 S.E.2d 679 (2001).

Apartment where crime was committed. — Because the police arrived at the crime scene, discovered the victim of a shooting, and observed evidence of an apparent burglary that had taken place at the apartment, the police were authorized in making a prompt warrantless search of the defendant's entire apartment in order to secure the crime scene. *Isbell v. State*, 179 Ga. App. 363, 346 S.E.2d 857 (1986), cert. denied, 479 U.S. 1098, 107 S. Ct. 1319, 94 L. Ed. 2d 172 (1987).

Hot pursuit is grounds for warrantless entry. — A warrantless entry of a home is justified if the police are in hot pursuit of a fugitive. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Discretionary, warrantless searches of businesses unconstitutional. — City ordinance which permitted discretionary searches of businesses after closing hours without a warrant and did not provide a reasonable deterrence against forced entries was unconstitutional because it failed to meet the ultimate fourth amendment standard of reasonableness. *Yingsum Au v. State*, 258 Ga. 419, 369 S.E.2d 905 (1988).

Finding of drugs pursuant to search following burglary. — Where warehouse manager had searched defendant's compartment after observing evidence of a break-in and discovered illegal drugs in the compartment, police officer's subsequent search of compartment and seizure of drugs without a warrant was valid. *State v. Johnston*, 171 Ga. App. 224, 319 S.E.2d 83 (1984).

Warrantless entry into a warehouse. — Agents could not have reasonably believed that lessee had authority over premises to consent to warrantless search, where lessee did not purport to possess any authority over the premises, but instead informed the agents that lessee had no key or other means of access and that lessee had never been inside the warehouse or seen its contents.

Indeed the fact that the agents had to cut the padlock to enter the warehouse belied any claim that they reasonably believed lessee had authority to enter it. *State v. Stewart*, 203 Ga. App. 829, 418 S.E.2d 110 (1992).

Belief that article concealed in dwelling. — Belief, however well founded, that article sought is concealed in dwelling house furnishes no justification for search of that place without a warrant. Such searches are unlawful notwithstanding facts unquestionably showing probable cause. *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961).

Reasonable belief that person needs immediate aid as grounds for entry and search. — U.S. Const., amend. 4 does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

When police come upon scene of homicide they may make prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises and they may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Effect of defective warrant in warrantless search. — If the police officers having sufficient probable cause to stop and search a moving vehicle choose not to search it immediately but to do so later, the fact that a defective warrant has issued between the time of the seizure and the search will not destroy the validity of that search as a reasonable warrantless search. *State v. Bradley*, 138 Ga. App. 800, 227 S.E.2d 776 (1976).

After accessing a defendant's residence from a person who was not authorized to allow access and making no attempt to question anyone's authority to allow access by use of an automatic door opener, the subsequent warrantless search of the defendant's residence was unjustified and, likewise, the subsequent search by warrant was illegal. *State v. Gray*, Ga. App. , S.E.2d , 2007 Ga. App. LEXIS 431 (Apr. 16, 2007).

Warrantless search absent cause for arrest under ordinance. — If there is no cause for

Searches (Cont'd)**2. Warrantless Searches (Cont'd)**

arrest within the purview of a city ordinance, then a warrantless search and seizure are not legally supportable. *Harper v. State*, 135 Ga. App. 924, 219 S.E.2d 636 (1975).

Warrantless search of purse is valid where exigent circumstances exist. — Exigent circumstances, including the fact that officers spied a gun on the console of the defendants' car, authorized them to search a purse carried by one of the defendants to eliminate the possibility of its containing a weapon dangerous to themselves. *Burroughs v. State*, 190 Ga. App. 467, 379 S.E.2d 175, cert. denied, 190 Ga. App. 897, 379 S.E.2d 175 (1989).

O.C.G.A. §§ 44-12-133 and 44-12-137, authorizing a warrantless inspection of pawn shop records, do not violate the fourth amendment. *Howell v. Roberts*, 656 F. Supp. 1150 (N.D. Ga. 1987).

Warrantless search as a condition of probation. — A probation condition allowing warrantless searches during the term of probation without probable cause was valid. Even if not specifically stated, the condition carried with it the implied requirement that there be at least reasonable grounds for any such search. *Ellis v. State*, 221 Ga. App. 103, 470 S.E.2d 495 (1996).

"Plain view" doctrine permits warrantless search and seizure. — The "plain view" doctrine authorizes seizure of illegal or evidentiary items visible to a police officer only if the officer's access to the object itself has some prior fourth amendment justification. *State v. David*, 269 Ga. 533, 501 S.E.2d 494 (1998).

Violation negated by consent to search. — Although a police officer should not have leaned into defendant's apartment to look for stolen items when a person in the apartment answered the door, the police lawfully seized items the officer saw because defendant subsequently gave them consent to conduct a search. *Smith v. State*, 262 Ga. App. 614, 585 S.E.2d 888 (2003).

Suppression of evidence held erroneous. — The trial court erred in granting a motion to suppress drugs discovered in an authorized nonconsensual warrantless search of an automobile. *State v. Dopson*, 204 Ga. App. 51, 418 S.E.2d 623, cert. denied, 204 Ga. App. 922, 418 S.E.2d 623 (1992).

There was no violation of the defendant's fourth amendment rights where (1) officers went to the defendant's automobile paint shop on the basis of information that drugs were being sold and used at that location; (2) as the officers approached the shop, which was located just behind the defendant's residence, the defendant and another individual fled from a side entrance, carrying something in their hands; and (3) the officers pursued, and after detaining the defendant, found a plastic container containing methamphetamines and weighing scales which the defendant, after being informed of Miranda rights, admitted were the defendant's property; the defendant's rights were not violated when the officers pursued the defendant onto the curtilage of the defendant's property once the defendant started running away from them. *Stewart v. State*, 236 Ga. App. 888, 513 S.E.2d 778 (1999).

3. Vehicles

Rationale for warrantless searches of cars. — For the purposes of U.S. Const., amend. 4, there is a constitutional difference between houses and cars. This constitutional difference stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal, contact with automobiles will bring local officials in "plain view" of evidence, fruits, or instrumentalities of crime, or contraband. *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980).

State rule same as federal rule. — For purposes of searching a vehicle contemporaneously with the lawful arrest of an individual, the state rule is the same as the federal rule. Such a search, legal under federal law, is legal under state law. *Daniel v. State*, 199 Ga. App. 180, 404 S.E.2d 466 (1991).

Warrantless search of automobile, in the absence of exigent circumstances, violates U.S. Const., amend. 4. *United States v. Michael*, 622 F.2d 744 (5th Cir. 1980), rev'd on other grounds, 645 F.2d 252, (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Phrase "automobile exception" connotes a legitimate warrantless search of this otherwise constitutionally protected area whenever: (1) probable cause to believe that the

automobile contains contraband or evidence of a crime conjoins with (2) exigent circumstances making the warrant procedure impractical and causing the resort to an immediate warrantless search to be reasonable and necessary. *McDonald v. State*, 156 Ga. App. 143, 273 S.E.2d 881 (1980).

Test of legality of warrantless search of automobile. — If a search of an automobile is made by a police officer without a warrant, the test of its legality is whether the search was reasonable. *Meneghan v. State*, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

A warrantless automobile search is constitutional if the officers, acting as a result of their combined knowledge, have probable cause to make the search and if exigent circumstances justify the failure to secure a warrant. The ultimate test is that the search must be reasonable under the circumstances, as viewed objectively. *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980).

Probable cause. — Automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. *United States v. Hill*, 442 F.2d 259 (5th Cir. 1971).

Search of a movable vehicle is authorized without a search warrant, provided there is sufficient probable cause for such search. *Satterfield v. State*, 127 Ga. App. 528, 194 S.E.2d 295 (1972).

A vehicle that has the capacity to convey its occupants and possible contraband contents to a place of refuge from a warranted search, may be searched without a warrant provided there is probable cause to suspect the commission of a crime or the possession of contraband. *United States v. Summerville*, 477 F.2d 393 (5th Cir. 1973).

Although the search of a dwelling is not authorized without a proper search warrant, when the officers have ample time to procure one, a search of a movable vehicle is an exception, provided there is sufficient probable cause for such search. *Walker v. State*, 130 Ga. App. 860, 205 S.E.2d 49 (1974).

In order for police authorities to search automobiles on highway, there must be probable cause for the search where no

consent has been granted. The officer in making a limited protective search during a reasonable investigatory stop of a vehicle must have specific facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Nix v. State*, 138 Ga. App. 122, 225 S.E.2d 714 (1976).

A police officer was authorized to open a trunk to insure that no one was in the trunk who might pose a threat to the safety of the officers, where the car matched an armed robbery "Be on the lookout" and its unlocked trunk was moving after the car had stopped. *Williams v. State*, 236 Ga. App. 102, 511 S.E.2d 216 (1999).

Where an officer knew that the defendant had sold cocaine to a confidential informant on other occasions and the officer was on surveillance when the defendant arrived to make another sale to the same informant, the officer had probable cause to believe the vehicle contained illegal drugs and a warrantless search was lawful under the automobile exception. *Benton v. State*, 240 Ga. App. 243, 522 S.E.2d 726 (1999).

Since the officer initially stopped defendant when defendant hastily pulled over near an intersection in a high drug traffic area, defendant's subsequent out-of-context and inconsistent responses to the officer's questions, nervousness, and reports that the person leaning in defendant's window sold drugs all combined to support the officer's suspicion that defendant may have been purchasing illegal drugs. *Almond v. State*, 242 Ga. App. 650, 530 S.E.2d 750 (2000).

Totality of circumstances. — Search of defendant's car was supported by probable cause independent of defendant's arrest as the officer saw defendant attempting to secrete something under the seats of the car, and the officer saw defendant in an area known for drug activity; although these factors alone did not constitute probable cause to search defendant's car, together they did. *Sanders v. State*, 259 Ga. App. 422, 577 S.E.2d 94 (2003).

If vehicle is not moving or readily movable, probable cause must be determined by magistrate and a warrant must issue. *State v. Bradley*, 138 Ga. App. 800, 227 S.E.2d 776 (1976).

Vehicle stopped on highway "movable". — Where car was stopped on highway, it

Searches (Cont'd)**3. Vehicles (Cont'd)**

remained readily mobile, thus justifying a warrantless search of a loose panel where probable cause existed due to the driver's previous drug conviction and claim that driver had borrowed the car. *United States v. Butler*, 102 F.3d 1191 (11th Cir. 1997), cert. denied, 520 U.S. 1219, 117 S. Ct. 1712, 137 L. Ed. 2d 836 (1997).

Impoundment of vehicle. — If an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search. *United States v. McDonald*, 317 F. Supp. 879 (N.D. Ga. 1970).

For constitutional purposes, there is no difference between, on the one hand, seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under U.S. Const., amend. 4. *United States v. McDonald*, 317 F. Supp. 879 (N.D. Ga. 1970); *Whitlock v. State*, 124 Ga. App. 599, 185 S.E.2d 90 (1971); *State v. Watts*, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

If the vehicle of one arrested might be searched on the spot, there is a choice between leaving it guarded while someone goes for a warrant or taking it in custody while the warrant is being obtained, and, if the latter, a search of the vehicle at the time the vehicle is brought in or during the same morning will not be held unreasonable if it would not be unreasonable if performed on the spot; but it cannot be held for several days and then searched without a warrant. *Hunter v. State*, 127 Ga. App. 664, 194 S.E.2d 680 (1972).

Vehicle stopped upon probable cause may be searched without warrant even though vehicle is no longer mobile, and a warrantless search is permitted even after the vehicle has been moved to police headquarters. *United States v. Ramey*, 464 F.2d 1240 (5th Cir. 1972).

Where U.S. Const., amend. 4 permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured, there is little to choose in terms of

practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. *Caito v. State*, 130 Ga. App. 831, 204 S.E.2d 765 (1974).

There is little to choose in terms of practical consequences between immediate search without warrant and the car's immobilization until a warrant is obtained. *Davis v. State*, 135 Ga. App. 931, 219 S.E.2d 598 (1975).

When officers have probable cause to search and seize a moving vehicle, they may either seize and hold it until the probable cause issue can be presented to a magistrate or they may carry out an immediate warrantless search. If a vehicle is moving, probable cause can be determined by a police officer, and the vehicle can be seized and searched without a warrant either immediately or later even though a search warrant might have been obtained between the seizure and the search. *State v. Bradley*, 138 Ga. App. 800, 227 S.E.2d 776 (1976).

Police officers with probable cause to search an auto on the scene where it was stopped may constitutionally do so later at the station house without first obtaining a warrant. *Glover v. State*, 139 Ga. App. 162, 227 S.E.2d 921 (1976).

The impoundment of a vehicle prior to the issuance of a warrant to search it is not permissible when the driver of the motor vehicle is arrested and a reliable friend is present, authorized, and capable to remove the vehicle which is capable of being safely removed. *Whisnant v. State*, 185 Ga. App. 51, 363 S.E.2d 341 (1987).

The impoundment and inventory search of a car were proper, where each of the persons in the vehicle appeared to be intoxicated, and no one present was capable of safely removing the vehicle. *Stotts v. State*, 199 Ga. App. 316, 404 S.E.2d 635, cert. denied, 199 Ga. App. 907, 404 S.E.2d 635 (1991).

Because defendant was arrested for the misdemeanor offense of obstructing a police officer, and the violation was in no way related to defendant's vehicle which was legally parked in a safe and secure place on private property, impoundment and the subsequent search of the vehicle were pretextual and improper. *State v. Lowe*, 224 Ga. App. 228, 480 S.E.2d 611 (1997).

Trial court did not err in denying defendant's motion to suppress evidence found during the inventory of defendant's car, which was parked on private property, as: (1) defendant was arrested, at night, for carrying a concealed weapon while walking away from a motel after a clerk had reported defendant to the police as a suspicious person; (2) the motel clerk testified that the motel's policy was to tow unclaimed cars parked in their lot; (3) a detective testified that it was the police department's policy to impound a suspect's car so that it would not be stolen or towed by the motel; (4) it was the police department's policy to inventory the contents of the car before impounding it, to protect the department from a suspect later claiming that valuable items were missing from the suspect's car; and (5) the detective's decision to impound the car was reasonable within the meaning of the fourth amendment. *Johnson v. State*, 263 Ga. App. 443, 587 S.E.2d 775 (2003).

Impound search of defendant's car was reasonably necessary to protect the car and its contents where defendant, who was arrested for driving under the influence, was the lone occupant of defendant's car, the car was parked at the side of the road at 4 a.m., defendant did not ask for an alternative disposition to impoundment, and absent a reasonable request, officers were not obligated to offer impound alternatives to those they placed under arrest. *Evans v. State*, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

Right to search automobile not dependent on right to arrest. — When the search and seizure is made under the automobile exception, the right to search and the validity of the seizure are not dependent on the right to arrest, but rather are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. *McDonald v. State*, 156 Ga. App. 143, 273 S.E.2d 881 (1980).

Search incident to arrest. — Where a driver was lawfully arrested for operating a car without a license and for not having proof of insurance, a police officer did not exceed the permissible scope of a search incident to arrest when officer searched the car. *Vega v. State*, 236 Ga. App. 319, 512 S.E.2d 65 (1999).

Defendant had standing to raise a challenge to a search of a vehicle, in which

defendant was riding as a passenger, because defendant could challenge the prolonged detention and the subsequent vehicle search; however, the taint of the illegal detention was thereafter purged by the intervening arrest of defendant on outstanding warrants, which then justified the officer's lawful search incident to an arrest and accordingly, marijuana found in the passenger compartment of the car was not subject to suppression under the principles established by U.S. Const., amend. 4, Ga. Const. 1983, Art. I, Sec. I, Para. XIII, and under O.C.G.A. § 17-5-1. *State v. Cooper*, 260 Ga. App. 333, 579 S.E.2d 754 (2003).

Consented search. — Post-stop contact evolved into a consensual encounter where defendant had a clear understanding that defendant was free to go and was not under any compulsion to remain to obey the officer's request. *Daniel v. State*, 277 Ga. 840, 597 S.E.2d 116 (2004).

Trial court to address whether search of vehicle was authorized as an incident of a lawful detention. *State v. Jarrells*, 207 Ga. App. 192, 427 S.E.2d 568 (1993).

It is not unreasonable to search car which is validly held for use as evidence in a forfeiture proceeding. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Scope of search of lawfully stopped vehicle. — If probable cause justifies the search of a lawfully stopped vehicle, then it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. *United States v. Grillo*, 705 F. Supp. 576 (M.D. Ga. 1989).

The broad scope of authority granted to police officers in conducting searches of automobiles pursuant to the search incident to arrest exception extends to the entire passenger compartment of the automobile and any closed containers therein. *Bagwell v. State*, 214 Ga. App. 15, 446 S.E.2d 739 (1994).

Officer's act in approaching stopped vehicle. — Trial court did not err in denying the first juvenile and second juvenile's motion to suppress, as the police officer did not illegally stop their vehicle; rather, the officer followed them until they stopped the vehicle in a driveway. The officer's acts in stopping the officer's vehicle and approaching their stopped vehicle was a consensual encounter that did not involve an unreasonable search

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and seizure, and when the officer smelled alcohol and noticed the first juvenile's bloodshot eyes, it was then that the officer had reasonable suspicion to detain the juveniles in order to investigate the situation further. *In the Interest of A.A.*, 265 Ga. App. 369, 593 S.E.2d 891 (2004).

Determining identification number. — Inspections of vehicles by police officers, who are entitled to be on the property where the vehicle is located, which in no way damage the vehicle, and which are limited to determining the correct identification numbers of the vehicle, are not searches within the meaning of U.S. Const., amend. 4. *United States v. Jones*, 432 F.2d 773 (5th Cir. 1970); *United States v. Wood*, 500 F.2d 681 (5th Cir. 1974).

Opening an automobile door to obtain the identification number does not constitute a "search." *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), *aff'd*, 481 F.2d 1402 (5th Cir. 1973).

Inspection of vehicle identification numbers was not a search prohibited by U.S. Const., amend. 4 because police officers were on the defendant's business premises pursuant to a valid search warrant and the vehicle identification numbers were on the dashboards, readily visible through the windshields. *State v. Shaw*, 170 Ga. App. 404, 317 S.E.2d 298, *aff'd*, 253 Ga. 382, 320 S.E.2d 371 (1984), *cert. denied*, 469 U.S. 1212, 105 S. Ct. 1183, 84 L. Ed. 2d 331 (1985).

The fact that police officers are required to open a car's door in order to locate the vehicle identification number does not make the viewing an unreasonable search under U.S. Const., amend. 4. Nothing in U.S. Const., amend. 4 prohibits such an inspection or an investigatory registration check which follows. *United States v. Kitowski*, 729 F.2d 1418 (11th Cir. 1984).

Merely looking into the window of an automobile is not a search. *United States v. Gazaway*, 297 F. Supp. 67 (N.D. Ga. 1969); *State v. Key*, 164 Ga. App. 411, 296 S.E.2d 60 (1982).

Reasonable expectation of privacy. — Pickup truck passenger had a reasonable expectation of privacy so as to enable the passenger to challenge the seizure of contra-

band in a closed bag "laying on the seat in the middle of the driver's seat" of the truck. *State v. Corley*, 201 Ga. App. 320, 411 S.E.2d 324 (1991).

Rental cars. — The driver of a rental car, whose name was on the rental agreement, had standing to challenge an automobile search; however, the passenger did not have standing. *United States v. Gonzalez*, 952 F. Supp. 813 (M.D. Ga. 1997), *aff'd*, 189 F.3d 483 (11th Cir. 1999).

Search of abandoned car valid. — When following a high speed chase legally initiated by the police, the defendant fled the defendant's car on foot, a police officer's search of the automobile's trunk was not an unreasonable search prohibited by U.S. Const., amend. 4, since the defendant could have no reasonable expectation of privacy with respect to an automobile which the defendant abandoned to the police. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Search of car abandoned by fleeing defendant. — Because a fleeing defendant, pursued by the police, abandoned the defendant's car on a public street and started running, the defendant lost the constitutional protection against the search and seizure of the car. *Whitlock v. State*, 124 Ga. App. 599, 185 S.E.2d 90 (1971).

Search of automobile for contraband. — If a search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. *United States v. Blackwell*, 430 F.2d 1270 (5th Cir. 1970); *United States v. Rodgers*, 442 F.2d 902 (5th Cir. 1971); *United States v. Ramey*, 464 F.2d 1240 (5th Cir. 1972).

Where regulations prohibit the transportation of certain dangerous drugs in the possession of a driver, inspection of vehicles would encompass what is actually a search for these drugs. Trucks can be searched by inspectors without a warrant and without any necessity for consent further than that which exists by virtue of its operation under the public permit. *Braddock v. State*, 127 Ga. App. 513, 194 S.E.2d 317 (1972).

An automobile in which contraband goods are concealed and transported may be searched without a warrant provided the

police have probable cause for believing that the automobile contains contraband. The reason for this rule is obvious. An automobile, unlike a home or place of business, is mobile and can be quickly moved out of the locality or jurisdiction; therefore, a search without a warrant is allowed where it is impractical to obtain a warrant. *Meneghan v. State*, 132 Ga. App. 380, 208 S.E.2d 150 (1974).

Where a law enforcement officer has probable cause to believe that a vehicle (as opposed to a particular container within the vehicle), while in transit, contains contraband; i.e., where the objective facts known to the officer would justify issuance of a search warrant authorizing that the vehicle be searched, the "automobile exception" to the warrant requirement of the fourth amendment applies and a warrantless search of the entire vehicle, including all containers and packages that may contain contraband, is not unconstitutional. *Love v. State*, 254 Ga. 697, 334 S.E.2d 173 (1985).

As an exception to the warrant requirements of the fourth amendment, police may conduct a warrantless search of an automobile when such facts and circumstances exist as would lead a reasonably prudent person to believe the automobile contained contraband. *Durden v. State*, 199 Ga. App. 397, 405 S.E.2d 50, cert. denied, 199 Ga. App. 905, 405 S.E.2d 50 (1991).

Evidence in the record, which consisted of testimony provided by the officers involved in a surveillance, regarding their observations, surveillance techniques, and experience with drug sales, as well as the general modes of operation of persons involved in drug sales, was sufficient to support the denial of defendant's motion to suppress, when the evidence was coupled with the fact that the detention of defendant lasted, at most, fifteen minutes and did not amount to an unreasonable and impermissible seizure of defendant's person. Further, the officers were authorized to stop defendant's vehicle as one involved in a drug sale, while acting in concert with another vehicle and showing an obvious interest in the endeavor. *Hickman v. State*, 279 Ga. App. 558, 631 S.E.2d 778 (2006).

Denial of the defendant's motion to suppress evidence was proper because the evidence at the suppression hearing showed

that an officer's suspicions were aroused during a traffic stop due to the defendant's erratic behavior and the fact that, on the floorboard behind the driver's seat of the defendant's car, the officer observed a bag similar to others the officer had seen used to transport illegal drugs; after the officer filled out the citation and returned it to the defendant to sign, the officer asked the defendant for consent to search the car which the defendant gave. *Dowd v. State*, 280 Ga. App. 563, 634 S.E.2d 509 (2006).

Trooper's detection of odor of marijuana smoke coming from within automobile, together with totality of circumstances, was sufficient to provide probable cause to search automobile for marijuana. *Holmes v. State*, 163 Ga. App. 753, 294 S.E.2d 719 (1982).

Detention of automobile with unlicensed driver in vicinity of burglary valid. — Detention of an automobile and its occupants was lawful, where police officers were aware that the driver was not properly licensed and the officers, who were responding to a burglary call, saw the automobile enter the street from the driveway of a house where a burglary was reported to have occurred. *Clarrington v. State*, 178 Ga. App. 663, 344 S.E.2d 485 (1986).

Evidence may be seized from car fleeing robbery and found obstructing traffic. — Where car suspected by police to have been used in a robbery is followed, eludes police, and is found obstructing traffic with its windows open and the doors unlocked, a finding that defendant did not retain a legitimate expectation of privacy in the automobile was authorized and defendant was not entitled to grant of motion to suppress evidence subsequently seized from the car. *Gardner v. State*, 172 Ga. App. 677, 324 S.E.2d 535 (1984).

Movement of vehicle does not preclude an otherwise permissible search. — The fact that a vehicle is first moved to another location does not render the search of its trunk impermissible if the bailee-defendant is placed under lawful arrest and the vehicle could have been legally searched at the time of such arrest. *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Viewing and photographing of ashes in automobile justified. — The police officer's

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viewing of ashes in the defendant's car through the windshield did not constitute a search and to the extent that the opening of the car door and photographing of the ashes constituted a warrantless search and/or seizure, this was justified by the exigencies of the case because the officer had reasonable cause to believe that the officer would find evidence pertaining to an arson under investigation. *Catchings v. State*, 256 Ga. 241, 347 S.E.2d 572 (1986).

Search of prison employee's vehicle. — Where a sign was posted at the entry of a prison, giving notice that all vehicles passing the guard line of the prison were subject to search, prison officials had authority to search the vehicle of an employee parked inside the guard line. By driving the automobile onto the premises, defendant consented to such a search. *Howard v. State*, 185 Ga. App. 465, 364 S.E.2d 600 (1988).

Police officer, entitled to be on property where car is located, may search a vehicle to determine the identity of its owner. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Traffic stop for failing to wear seatbelt. — A motorist arrested following a traffic stop for failing to wear a seatbelt and after consenting to a search of the car, had not been unlawfully detained in violation of the fourth amendment, given the trooper's reasonable articulable suspicion of drug possession and the trooper's reasonable inquiry. *Evans v. State*, 262 Ga. App. 712, 586 S.E.2d 400 (2003).

Even though automobile could not be quickly removed from the scene of an accident under its own propulsion, it was clearly "movable" for purposes of the automobile exception to the warrant requirement in that it would have to be towed from the intersection to prevent its obstruction of traffic. *Fluker v. State*, 171 Ga. App. 415, 319 S.E.2d 884 (1984).

Search of motor vehicle improper. — Because the defendant was arrested on a violation of a municipal ordinance unconnected with the defendant's car, and the car was legally and safely parked on private property, it was not clearly erroneous for the trial court to find that a search of the car was not

a lawful search incident to arrest; further, the trial court was authorized to find that the impoundment of the vehicle was not reasonably necessary and to grant the defendant's motion to suppress evidence seized from the car. *State v. Bell*, 259 Ga. App. 328, 577 S.E.2d 39 (2003).

Because the trial court had ample evidence to support its conclusion that the reason police officers supplied as the basis to stop the defendant's vehicle, specifically, an alleged computer insurance inquiry, was "suspect and insufficient," it did not clearly err in disbelieving the evidence; hence, the court properly granted the defendant's motion to suppress the evidence seized from the vehicle as a result of the stop. *State v. Starks*, 281 Ga. App. 15, 635 S.E.2d 327 (2006).

Automobile exception to warrant requirement did not apply. — Evidence that was found during a warrantless search of defendant's automobile after the police hauled it away for the later search should have been suppressed because the automobile exception to the warrant requirement did not apply since: (1) defendant's car was legally parked in defendant's residential parking space; (2) defendant and any alleged cohorts did not have access to the vehicle; and (3) the police lacked probable cause to search the car because their claim of probable cause was based on information from an informant and on a "controlled" telephone call, but there was no indication of the informant's reliability and no testimony regarding what was said during the telephone call. *State v. Lejeune*, 276 Ga. 179, 576 S.E.2d 888 (2003).

Seizures

Test of lawful seizure is whether it was made incident to a lawful arrest or pursuant to a lawful search warrant. *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

Finding of "seizure" as threshold inquiry. — In determining whether a given contact between a police officer and a citizen violated a defendant's fourth amendment rights, the court must first determine whether the encounter was a "seizure" within the meaning of U.S. Const., amend. 4. *Moran v. State*, 170 Ga. App. 837, 318 S.E.2d 716 (1984).

No definitive standard for determining whether seizure has occurred. — The Supreme Court has not yet provided a definitive standard for determining when a seizure under U.S. Const., amend. 4 has occurred. *United States v. Setzer*, 654 F.2d 354 (5th Cir. 1981), cert. denied, 459 U.S. 1041, 103 S. Ct. 457, 74 L. Ed. 2d 609 (1982).

Test for determining when seizure has occurred. — Whenever police officer accosts an individual and restrains the freedom to walk away, the officer has “seized” that person. *United States v. Gazaway*, 297 F. Supp. 67 (N.D. Ga. 1969); *Brisbane v. State*, 233 Ga. 339, 211 S.E.2d 294 (1974); *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975); *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978); *Vaughn v. State*, 247 Ga. 136, 274 S.E.2d 479 (1981).

It must be recognized that whenever a police officer accosts an individual and restrains that individual’s freedom to walk away, the officer has “seized” that person, and a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is a “search.” *Holtzendorf v. State*, 125 Ga. App. 747, 188 S.E.2d 879 (1972).

When an encounter is effected at gunpoint or when there is physical restraint, there can be little question that a seizure has occurred; any restraint of movement will do. *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910, 100 S. Ct. 2998, 64 L. Ed. 2d 861 (1980).

A person has been seized within the meaning of U.S. Const., amend. 4 only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that there was no freedom to leave. *United States v. Fry*, 622 F.2d 1218 (5th Cir. 1980); *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *State v. Reid*, 247 Ga. 445, 276 S.E.2d 617 (1981); *Dupree v. State*, 247 Ga. 470, 277 S.E.2d 18 (1981); *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981); *State v. Bryant*, 203 Ga. App. 69, 416 S.E.2d 368 (1992).

Any restraint on movement is sufficient to constitute a seizure. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may the court conclude that a seizure has occurred. *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980).

The proper standard for determining when a seizure has occurred is whether, under the totality of the circumstances, a reasonable person would have thought there was no freedom to leave. *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), rev’d on other grounds, 690 F.2d 869 (11th Cir. 1982).

A person is seized only when, by means of physical force or a show of authority, freedom of movement is restrained. *State v. Reid*, 247 Ga. 445, 276 S.E.2d 617 (1981).

A person is not “seized” unless an officer applies physical force, however slight, or the person submits to the officer’s show of authority; where defendant was in a state of flight when cocaine was discarded, it was not the fruit of an illegal arrest. *Hunt v. State*, 205 Ga. App. 490, 423 S.E.2d 24 (1992).

Arrestee who was not subjected to physical force and who did not yield or submit when the deputies commanded the arrestee to come out of the bathroom was not seized. *Wilson v. Northcutt*, 987 F.2d 719 (11th Cir. 1993); *Smith v. State*, 217 Ga. App. 680, 458 S.E.2d 704 (1995).

When a seizure exceeds the limited intrusion of an investigative stop, it must be justified by the probable cause standard or be based on consent. Such a seizure occurs when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that there was no freedom to leave. *McQuarter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Under U.S. Const., amend. 4 the determination of the reasonableness of a seizure is a conclusion of law. *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981).

Determination of reasonableness of seizure. — Where the seizure under U.S. Const., amend. 4 is less intrusive than traditional arrest, determination of the reasonableness of that seizure involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980).

Whether a given contact between the police and citizens constitutes a “seizure”

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within the meaning of U.S. Const., amend. 4 — and, if so, is “reasonable” — is determined by balancing the government interest involved against the nature of the intrusion on the individual. *Bothwell v. State*, 250 Ga. 573, 300 S.E.2d 126, cert. denied, 463 U.S. 1210, 103 S. Ct. 3545, 77 L. Ed. 2d 1393 (1983).

Seizures reasonable under certain circumstances. — Seizures under circumstances where the object is open to view or seizures contemporaneous with the commission of the crime and the arrest fall into categories held not to constitute an unreasonable search under U.S. Const., amend. 4. *Roach v. Mauldin*, 277 F. Supp. 54 (N.D. Ga. 1967), aff'd, 391 F.2d 907 (5th Cir. 1968), cert. denied, 393 U.S. 1095, 89 S. Ct. 884, 21 L. Ed. 2d 786 (1969).

In determining legality of particular seizure, court must ascertain facts known by police officer at the moment of the seizure. *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981).

Necessity of actual knowledge of restraint. — Actual knowledge that one has been restrained is an essential element of a fourth amendment seizure claim. *Thompson v. Spikes*, 663 F. Supp. 627 (S.D. Ga. 1987).

Being chased is not tantamount to being seized, since seizure requires the application of physical force by the officer or submission by the defendant to the officer's show of authority. *Watson v. State*, 247 Ga. App. 498, 544 S.E.2d 469 (2001).

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen or use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Aguero v. State*, 169 Ga. App. 462, 313 S.E.2d 735 (1984).

Seizures have been found when an encounter is precipitated by a show of authority, such as when a siren was used to pull a motorist over; when a motorist stepped out of camper, with hands up, in response to an officer's knock on the camper door; or when under other circumstances it was apparent that the individual was not free to ignore the

officer and proceed on the individual's way. *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910, 100 S. Ct. 2998, 64 L. Ed. 2d 861 (1980).

Merely approaching does not constitute seizure. — Merely approaching an individual and requesting that individual give consent for a search does not constitute a seizure and need not be supported by an articulable suspicion. *State v. Westmoreland*, 204 Ga. App. 312, 418 S.E.2d 822 (1992).

Effect of initial approach without suspicion. — No reasonable suspicion was required for an officer's approach to a car, where the officer approached the vehicle to tell the defendant to park correctly and thus was lawfully in the presence of defendant so as to invoke the plain view doctrine. Consequently, the marijuana seeds and leaves seized by the officer were admissible. *State v. Bryant*, 203 Ga. App. 69, 416 S.E.2d 368 (1992).

Offering a ride home to defendant, who had just been issued a speeding ticket and had a suspended license, was not a fourth amendment seizure of defendant. *Disharoon v. State*, 263 Ga. App. 787, 589 S.E.2d 339 (2003).

No “seizure” where person may walk away. — As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no “seizure,” i.e., no intrusion upon that person's liberty or privacy as would under the constitution require some particularized and objective justification. *Smith v. State*, 187 Ga. App. 14, 369 S.E.2d 307 (1988); *State v. Bryant*, 203 Ga. App. 69, 416 S.E.2d 368 (1992).

Three encounters between the defendant and the police officers were noncoercive communications that did not rise to the level of a seizure where the officers generally asked questions of the defendant, where defendant was not under any police compulsion to remain and answer the officers' questions, where the officers were in uniform, but did not reach for the defendant or have their hands near their weapons, and where they did not arrest defendant prior to defendant's flight and capture. *Copeland v. State*, 213 Ga. App. 39, 443 S.E.2d 869 (1994).

No “seizure” where officers identify themselves and suspect not blocked. — Where suspect believed to be concealing

illegal drugs on the suspect's person was approached by law enforcement agents who were casually dressed and did not display weapons, where the officers identified themselves, spoke in a deferential and conversational tone, and stood at suspect's side in order not to block the suspect's path, there was no "seizure" of the suspect during the encounter. *Allen v. State*, 172 Ga. App. 663, 324 S.E.2d 521 (1984).

No "seizure" occurs when citizen elects to cooperate with police. — When an individual is free to choose whether to enter or continue an encounter with police and elects to do so, there is no seizure. *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910, 100 S. Ct. 2998, 64 L. Ed. 2d 861 (1980).

Not all police-citizen contacts are seizures subject to the proscriptions of the fourth amendment. *United States v. Smith*, 649 F.2d 305 (5th Cir. 1981), cert. denied, 460 U.S. 1068, 103 S. Ct. 1521, 75 L. Ed. 2d 945 (1983).

Not all personal intercourse between police officers and citizens involves seizures of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may it be said that a seizure has occurred. *State v. Reid*, 247 Ga. 445, 276 S.E.2d 617 (1981).

Not all personal intercourse between police officers and citizens involves seizures of persons. *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981).

Not every contact between citizen and police is a "seizure" within the meaning of U.S. Const., amend. 4. *United States v. Williams*, 647 F.2d 588 (5th Cir. 1981).

The central consideration in determining whether a police-citizen contact falls within the purview of U.S. Const., amend. 4 is whether in the view of all the circumstances surrounding the incident, a reasonable person would have believed that there was no freedom to leave. *United States v. Smith*, 649 F.2d 305 (5th Cir. 1981), cert. denied, 460 U.S. 1068, 103 S. Ct. 1521, 75 L. Ed. 2d 945 (1983).

Only when the officer, by means of physical force or a show of authority, has in some way restrained the liberty of a citizen may one conclude that a "seizure" has occurred. *Bothwell v. State*, 250 Ga. 573, 300 S.E.2d

126, cert. denied, 463 U.S. 1210, 103 S. Ct. 3545, 77 L. Ed. 2d 1393 (1983); *State v. Bryant*, 203 Ga. App. 69, 416 S.E.2d 368 (1992).

So long as a citizen is not restrained in any way or so long as his or her cooperation is not obtained by coercion, force, or other use of authority, a mere police-citizen contact is generally not within the protections of U.S. Const., amend. 4. Thus, neither probable cause nor reasonable suspicion is required to justify such a stop. *United States v. Moeller*, 644 F.2d 518 (5th Cir.), cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

The fourth amendment in no way prohibits voluntary interaction between citizens and police, and it is only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen that a "seizure" has occurred. *Bothwell v. State*, 250 Ga. 573, 300 S.E.2d 126, cert. denied, 463 U.S. 1210, 103 S. Ct. 3545, 77 L. Ed. 2d 1393 (1983); *Hudgins v. State*, 188 Ga. App. 798, 374 S.E.2d 566 (1988).

Defendant was not seized where a police officer stopped to question defendant in an "extremely high crime, high drugs" area and used a conversational tone of voice, did not draw a weapon, and did not get out of the car until defendant told the officer that defendant had a shooter in defendant's pocket. *Whisenant v. State*, 239 Ga. App. 259, 521 S.E.2d 204 (1999).

Three tiers of police-citizen encounters. — There are three tiers of police-citizen encounters: (1) communication between police and citizens involving no coercion or detention and therefore without the compass of the fourth amendment; (2) brief "seizures" that must be supported by reasonable suspicion; and (3) full-scale arrests that must be supported by probable cause. *State v. Bryant*, 203 Ga. App. 69, 416 S.E.2d 368 (1992).

Request for identification not seizure. — Where a federal agent stopped a suspect in a public concourse, identified self as a federal agent, and requested but did not demand the suspect's identification, no "seizure" occurred. *Voight v. State*, 169 Ga. App. 653, 314 S.E.2d 487 (1984).

Approaching individual and asking questions not "seizure". — A law enforcement

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officer's act of merely approaching an individual, asking to see the individual's identification, and posing to the individual a few questions is not a "seizure" and need not be justified by the existence of an articulable suspicion. *State v. Akinsonwon*, 200 Ga. App. 287, 407 S.E.2d 434 (1991).

Trial court properly refused to suppress evidence based on defendant's initial seizure as a deputy initiated a first-level police-citizen encounter when the deputy approached defendant's stopped car and asked defendant to get out; it was only after the deputy smelled alcohol on defendant and noticed defendant's bloodshot eyes that the deputy acted upon a reasonable suspicion that defendant might be intoxicated. *Johnson v. State*, 268 Ga. App. 426, 602 S.E.2d 177 (2004).

Request for information in a public place not a "seizure". — Defendant was not "seized" where there was no evidence that a reasonable person in the defendant's position would have believed there was no freedom to leave at the time the defendant was asked by a police officer in a parking lot if the defendant had any drugs in the defendant's possession. *Ward v. State*, 193 Ga. App. 137, 387 S.E.2d 150, cert. denied, 193 Ga. App. 911, 387 S.E.2d 150 (1989).

The initial approach of the arresting officer to the defendant's vehicle, and the officer's subsequent inquiry as to defendant's well-being, did not constitute a fourth amendment seizure. At most there was a police-citizen verbal encounter involving no coercion or detention within the meaning of *Verhoeff v. State*, 184 Ga. App. 501, 362 S.E.2d 85 (1987). *O'Donnell v. State*, 200 Ga. App. 829, 409 S.E.2d 579, cert. denied, 200 Ga. App. 896, 409 S.E.2d 579 (1991); *Stokes v. State*, 238 Ga. App. 230, 518 S.E.2d 447 (1999).

Given the lack of apparent purpose for defendant's actions, the consistencies such actions had with drug sale activity, the fact that such actions occurred in a known drug crime area, and the fact that such actions occurred at what had been reported as a frequent drug crime locale, officers had sufficient reasonable, articulable suspicion to support a brief detention of defendant in order to determine what was going on. *State*

v. Ledford, 247 Ga. App. 412, 543 S.E.2d 107 (2000).

Crack cocaine found on the defendant was admissible into evidence because the defendant's fourth amendment rights were not violated by police officers, responding to a telephone tip from an informant about drug sales, approached the defendant and two other individuals, whom the officers knew to be underage, and asked them about their drinking alcohol. When the defendant and one of the other individuals attempted to flee, but were apprehended, the crack cocaine found on the defendant and the crack cocaine and money found on the other individual were admissible against defendant at trial for possessing cocaine with intent to distribute. *Smith v. State*, 264 Ga. App. 533, 591 S.E.2d 442 (2003).

Defendant held seized when stopped and questioned by police. — When police officers alighted from their car, stopped the defendant and a companion, questioned them, and demanded to see the contents of a paper bag, the youths were at the time seized or arrested within the meaning of U.S. Const., amend. 4. *Holtzendorf v. State*, 125 Ga. App. 747, 188 S.E.2d 879 (1972).

Inarticulate hunches are insufficient to justify seizure. — Feelings that something is "wrong" or "amiss," like inarticulate hunches, are not sufficient to justify a seizure under the fourth amendment. *State v. Combs*, 191 Ga. App. 625, 382 S.E.2d 691 (1989).

Articulable suspicion not found. — Discovery of a large, unexplained sum of money, standing alone, does not constitute articulable suspicion of criminal activity which would justify seizure of an individual. *Quinn v. State*, 268 Ga. 70, 485 S.E.2d 483 (1997).

Detention in jail. — The sheriff's office violated the fourth and fourteenth amendments when, without probable cause, deputies seized defendant and took defendant to a jail and locked defendant in a cell for approximately 30 to 45 minutes before the defendant was taken to the sheriff's office where Miranda warnings were given and defendant was questioned. *State v. Harris*, 256 Ga. 24, 343 S.E.2d 483 (1986).

Seizure is not unreasonable simply because police have taken precaution to arm themselves in light of unknown danger.

Franklin v. State, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

Use of deadly force. — As a matter of law, an officer who uses deadly force against a person who threatens the officer or others with serious harm or who the officer has probable cause to believe has already inflicted serious harm on others does not thereby commit an unreasonable seizure or deprivation of life or liberty without due process. The use of deadly force by police officers in such circumstances is not, as a matter of law, unreasonable or excessive. *O’Neal v. DeKalb County*, 667 F. Supp. 853 (N.D. Ga. 1987), aff’d, 850 F.2d 653 (11th Cir. 1988).

Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the fourth amendment. *Patterson v. Fuller*, 654 F. Supp. 418 (N.D. Ga. 1987).

Plaintiff had a clearly established constitutional right not to be seized by means of deadly force unless the police officer had probable cause to believe that plaintiff posed a threat of serious physical harm, either to the officer or to others. *Thompson v. Spikes*, 663 F. Supp. 627 (S.D. Ga. 1987).

Police officer’s decision during burglary investigation to shoot unidentified assailant after advising assailant to drop assailant’s gun, without identifying self as a police officer, was not unreasonable in light of assailant’s pointing and using gun at officer. *Linder v. Richmond County*, 844 F. Supp. 764 (S.D. Ga.), aff’d, 38 F.3d 574 (11th Cir. 1994).

Excessive force not found. — Plaintiff’s claim of excessive force based on police officer’s “rough, rude” treatment whereby plaintiff received an injured eye was groundless, as not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates an arrestee’s constitutional rights. *Newsome v. Webster*, 843 F. Supp. 1460 (S.D. Ga. 1994).

Police officer’s alleged “grabbing” and “dragging” away of intoxicated defendant who struck officer for preventing defendant from interfering, at the direction of the attending emergency medical technicians at the scene of defendant’s child’s car wreck, did not constitute excessive force. *Hodges v. Waters*, 843 F. Supp. 1470 (S.D. Ga. 1994).

Because 40 law enforcement officers who provided the official personnel to check the identifications of night club patrons were the reasonable means to assist a revenue agent in conducting an administrative search, plaintiffs failed to state the violation of a constitutional right in the context of excessive force. *Crosby v. Paulk*, 187 F.3d 1339 (11th Cir. 1999).

Shooting held not seizure. — Where there is no evidence that a police officer intended to shoot plaintiff’s decedent or that the officer did so volitionally, the shooting does not constitute a “seizure” within the meaning of the fourth amendment. *Matthews v. City of Atlanta*, 699 F. Supp. 1552 (N.D. Ga. 1988).

Actions of police officers who, responding to emergency call, were attacked by decedent, and, against the family’s wishes, entered the house to subdue the decedent, were fired upon and fired back, resulting in the decedent’s death, while constituting a “seizure,” were neither unreasonable nor offensive to the fourth amendment. *Menuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994).

Legality of seizure of contraband whiskey. — Untaxed whiskey is contraband, the very possession of which is illegal, so that the law enforcement authorities are entitled to seize and not return it, wherever found, regardless of constitutional requirements. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Validity of warrantless seizure of car where police know of present illegal use. — Warrantless seizure of a car parked on private property, because the car had been used for illegal purposes, violates fourth amendment rights where the police know that it is presently being used for illegal purposes and a warrant could have been readily obtained. *United States v. Pruett*, 551 F.2d 1365 (5th Cir. 1977).

Validity of officer’s seizure of luggage from third party. — Where an officer requested and seized defendant’s luggage, as a protective custody action, from an individual in whose automobile the luggage had been placed prior to the defendant’s arrest, the officer’s acts were not improper and issues of probable cause and time to obtain a warrant did not arise. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979), cert. denied, 444 U.S.

Seizures (Cont'd)

886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Tapping on shoulder. — In view of all the circumstances, the physical contact of merely tapping the defendant on the shoulder from the outset to get the defendant's attention alone does not constitute a seizure such that a reasonable person would believe one was not free to leave. *State v. Reid*, 247 Ga. 445, 276 S.E.2d 617 (1981).

Hearing required prior to seizure of film. — A prior adversary judicial hearing designed to focus searchingly on the question of obscenity must be held before the state may seize any motion picture film. Any seizure of an allegedly obscene film should be preceded by a state court finding of obscenity in an adversary judicial hearing. *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969) *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

After some years of confusion in the law, it now appears that a prior adversarial hearing to determine obscenity is not a constitutional prerequisite for seizure of materials as evidence in a criminal prosecution. *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972) (but see, *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969)).

Placement of driver in police car and taking of driver's license constituted seizure. — When a police officer takes possession of a driver's license and suggests that the owner sit in the backseat of the patrol car (from which the driver cannot alight without outside assistance), the driver has effectively been "seized," and the protection of the fourth amendment comes into play. *Alexander v. State*, 166 Ga. App. 233, 303 S.E.2d 773 (1983).

Requirement of certain vehicle documents not illegal seizure. — Requiring a person to send the revenue commissioner the certificate of title and the manufacturer's serial plate of a motor vehicle disposed of as wreckage or salvage does not constitute an illegal seizure of private property without just compensation in violation of U.S. Const., amend. 4, since the only purportedly valuable property involved is the title certificate and the serial plate, and such quasi-public documents do not constitute property within the protection of the constitutional provision. *McDonald v. State*, 222

Ga. 596, 151 S.E.2d 121 (1966).

Seizure of package opened by employees of defendant's condominium complex. — Police officer, who had seen the contents of an unsealed package which had been opened by employees of defendant's condominium complex and who had probable cause to believe that what the officer saw was cocaine, was authorized to seize the package without resort to a warrant. *Ehrlich v. State*, 189 Ga. App. 294, 375 S.E.2d 272, cert. denied, 189 Ga. App. 911, 375 S.E.2d 272 (1988).

Seizure of a pawn ticket from defendant's pocket did not violate the defendant's fourth amendment rights, where there was probable cause for the defendant's arrest on a charge of "loitering or prowling" in a high-crime area at 1:30 A.M. *Pinkston v. State*, 189 Ga. App. 851, 377 S.E.2d 864, cert. denied, 189 Ga. App. 913, 377 S.E.2d 864 (1989).

Requiring traffic violator to drive car to correctional center. — Requiring a motorist cited for a traffic violation to drive the car to a correctional center, in accordance with standard procedure for booking out-of-state motorists and requiring them to post bond, did not constitute an unlawful detention of the motorist or the automobile. *O'Keefe v. State*, 189 Ga. App. 519, 376 S.E.2d 406, cert. denied, 189 Ga. App. 913, 376 S.E.2d 406 (1988).

Seizure of suicidal individual. — Visibly intoxicated decedent who wielded a gun and threatened to commit suicide was not seized in violation of the decedent's constitutional rights, as the officer's actions were reasonable under the circumstances. *Merideth v. Grogan*, 812 F. Supp. 1223 (N.D. Ga. 1992), *aff'd*, 985 F.2d 579 (11th Cir. 1993).

Detention of weapons. — Police officers who were executing a search warrant for certain documents came upon a weapon and, in the interest of safety, removed the weapon from the premises for the duration of the search. Then, in the course of running a computer check on the occupants, which was permitted, the officers obtained information which led them to believe that the fact that the defendant had had possession of the weapon made the weapon evidence of a crime, since the information obtained related to the defendant's prior criminal record, which might have included

a felony conviction. The detention of the weapon after that point without a warrant, therefore, did not violate the defendant's constitutional rights. *United States v. Burke*, 613 F. Supp. 576 (N.D. Ga. 1985), reversed on other grounds, 784 F.2d 1090 (11th Cir. 1986), cert. denied, 476 U.S. 1174, 106 S. Ct. 2901, 90 L. Ed. 2d 987 (1986).

Use of improperly seized evidence in forfeiture proceedings. — An object illegally seized cannot in any way be used either as evidence or as a basis for jurisdiction; accordingly, evidence derived because of a violation of the fourth amendment cannot be used in a forfeiture proceeding. An improper seizure, however, does not jeopardize the government's right to secure forfeiture if the probable cause to seize the vehicle can be supported with untainted evidence. *United States v. \$80,080.00 in United States Currency*, 779 F. Supp. 169 (N.D. Ga. 1991).

Temporary detention of individuals leaving searchable area. — It was reasonable under the fourth and fourteenth amendments for a police officer, knowing that certain persons and premises were the subject of an immediately executable search warrant, to detain temporarily a vehicle containing occupants who just departed the premises to see if one of them was a person named in the warrant. *Fritzius v. State*, 225 Ga. App. 642, 484 S.E.2d 743 (1997).

Defendant was not seized under the fourth amendment when the officers first entered the motel room where defendant's companion invited the officers into the room and agreed to talk with them, and defendant and defendant's companion had a "normal conversation" with the officers about drug problems at the motel; this encounter was a first-tier encounter. *Keilholtz v. State*, 261 Ga. App. 1, 581 S.E.2d 660 (2003).

Arrests

1. In General

Purpose of arrest warrant. — An arrest warrant is issued by magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense. Thus, it primarily serves to protect an individual from an unreasonable seizure. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Arrest does not require formal words or stationhouse booking. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Time of arrest is a question of fact which depends upon evaluation of testimony by the trial judge. *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

It is not when the officer formally proclaims a person to be in custody but when one is effectively restrained and is cognizant thereof that an arrest is considered to have taken place. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

To constitute an arrest there must be actual or constructive detention with intention to do so and so understood by the person restrained. Whether a defendant is in custody is determined both by the defendant's subjective feeling as to arrest and the nature of police intentions and actions in light of the surrounding circumstances. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

If there is significant interference with the defendant's liberty, fact that the police did not intend to make a formal arrest or did not think that their actions constituted an arrest is irrelevant to compliance with the standards of U.S. Const., amend. 4. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Arrest is accomplished whenever liberty of another to come and go as one pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force, and the arrest is complete. *Bowers v. State*, 151 Ga. App. 46, 258 S.E.2d 623 (1979), aff'd, 245 Ga. 367, 265 S.E.2d 57 (1980).

Arrest is accomplished whenever liberty of another to come and go as the individual pleases is restrained, no matter how slight such restraint may be. *Vaughn v. State*, 247 Ga. 136, 274 S.E.2d 479 (1981).

Because defendant's car was hemmed in by police vehicles, the keys had been removed from the vehicle, and the defendant was sitting in the back of a marked patrol car, defendant was arrested (though maybe not

Arrests (Cont'd)**1. In General (Cont'd)**

formally) the instant the defendant's car was stopped on the street. *United States v. Brown*, 822 F. Supp. 750 (M.D. Ga. 1993), aff'd, 50 F.3d 1037 (11th Cir. 1995).

Intent to detain. — The subjective intention of the law enforcement officer to detain the respondent, had the respondent attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent. *Dupree v. State*, 247 Ga. 470, 277 S.E.2d 18 (1981).

Arrest which meets standards of probable cause described in *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964), is valid whether or not former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20) is violated. *Vaughn v. State*, 247 Ga. 136, 274 S.E.2d 479 (1981).

Effect of Miranda warnings following arrest on less than probable cause. — There is no per se rule that Miranda warnings in and of themselves suffice to cure violation involved in obtaining inculpatory statements during custodial interrogation following a formal arrest on less than probable cause. *Little v. State*, 153 Ga. App. 574, 266 S.E.2d 265, cert. denied, 449 U.S. 861, 101 S. Ct. 164, 66 L. Ed. 2d 77 (1980).

Person is arrested or seized when officer stops and questions person and runs national crime check on person. To justify it, the state must be able to point to specific and articulable facts, which, together with rational inferences drawn therefrom, reasonably warrant the intrusion. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Arrest by task force member lawfully operating outside member's own county. — Defendant's fourth amendment right to be free from unreasonable searches and seizures clearly was not violated merely because the defendant's arrest was effected by a county law enforcement officer who, though a member of a duly constituted task force lawfully operating in another county, had not been sworn as a deputy in that other county. *State v. Giangregorio*, 181 Ga. App. 324, 352 S.E.2d 193 (1986).

Validity of arrest where one of two officers outside the officer's jurisdiction. — If an arrest is effected by two officers, one of whom is a deputy sheriff of the county in

which the arrest takes place, and the other is outside jurisdiction, the arrest is made under lawful authority as long as all other constitutional standards are met. *Coley v. State*, 135 Ga. App. 810, 219 S.E.2d 35 (1975).

Proof that arrest was legal is not made by statement of witness that arrest was made under warrant. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

Defendant not under arrest prior to search of car and home. — A person who came into police station to pay traffic ticket and was questioned after being given Miranda rights because that person fit the description of a suspect, and who was then transported to the county police department to take a lie detector test, was not under arrest because that person went voluntarily. Defendant was not arrested until after a search of the defendant's car, with the defendant's permission and a search of the defendant's home with a warrant and with the defendant's wife's cooperation, turned up incriminating evidence. This finding was made even though one of the initial detaining officers did not regard the suspect as free to leave. *Vaughn v. State*, 247 Ga. 136, 274 S.E.2d 479 (1981).

Evidence insufficient to find defendant was under arrest. — Because the only evidence of any restraint upon appellant prior to giving a statement was the appellant's testimony at the end of trial and after the admission of the confession, where the appellant testified that the appellant did not understand that the appellant was free to leave, and where there was ample testimony by law enforcement officers that appellant was free to leave at any time, the appellant was not under arrest. *Vaughn v. State*, 247 Ga. 136, 274 S.E.2d 479 (1981); *Blanchard v. Blanchard*, 261 Ga. 11, 401 S.E.2d 714 (1991).

Illegal detention (without a valid probable cause hearing) does not preclude indictment by grand jury. — Illegal arrest or detention does not void a subsequent conviction, and the failure to provide counsel at a probable cause hearing may not be raised after conviction by petitioners for writ of habeas corpus. *State v. Houston*, 234 Ga. 721, 218 S.E.2d 13 (1975).

Basis for stopping occupants of vehicle insufficient. — A person's rights under U.S.

Const., amend. 4 are infringed when they are stopped only on the basis that it was after midnight and that they turned off the main road onto a side road and were then arrested after the discovery of marijuana. *Brooks v. State*, 129 Ga. App. 109, 198 S.E.2d 892 (1973).

An arrest may be made upon hearsay evidence; and indeed, the reasonable cause necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Arrest based on unfounded assumption unauthorized. — Neither the law of Georgia nor the Constitution authorize an arrest on account of an unfounded assumption that a private citizen has already effected an arrest for shoplifting. *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980).

Where suspect voluntarily exits home, arrest outside home constitutional. — Where a suspect is telephonically requested to exit the suspect's home and voluntarily does so, the suspect's arrest, outside the suspect's home, by officers who have probable cause to believe that the suspect has participated in a felony is constitutionally valid. *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

The defendant's arrest occurred on the front porch of the defendant's house, after the defendant had complied with the request of a police officer to step outside. An arrest under such circumstances did not constitute an arrest that was made inside the defendant's home. *Keyser v. State*, 187 Ga. App. 95, 369 S.E.2d 309, cert. denied, 187 Ga. App. 908, 369 S.E.2d 309 (1988).

Where defendant willingly agreed to accompany police to the police station, was not under arrest when defendant did so, was not handcuffed, was advised defendant was free to go at any time, and rode to the police station in an unmarked car without a "cage," no fourth amendment violation occurred when the detectives entered the defendant's workplace or when the defendant accompanied the officers to the police station. *Singleton v. State*, 195 Ga. App. 119, 393 S.E.2d 6 (1990).

Municipal liability for confinement. —

The defendant, who was arrested without a warrant, charged with, inter alia, possession of a controlled substance, and confined in the city jail, was deprived of liberty without due process where the defendant requested a lab analysis and, pursuant to the practice of the municipal court, the case was reset, delaying the determination of probable cause until over two months later. The city, who was the responsible custodian of those confined in the jail, was liable. *Lambert v. McFarland*, 612 F. Supp. 1252 (N.D. Ga. 1984).

Apprehension of suspect in public place. —

If probable cause exists, no warrant is required to apprehend a suspected felon in a public place. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Emergency arrest at scene of homicide. —

When the police come upon the scene of a homicide, they may make a prompt warrantless search to see if there are other victims or if a killer is still on the premises. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency, and the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Delay v. State*, 258 Ga. 229, 367 S.E.2d 806, cert. denied, 488 U.S. 850, 109 S. Ct. 132, 102 L. Ed. 2d 105 (1988).

Police justified in arresting defendant, and in detaining companion, before defendant's identity confirmed. — See *United States v. Kapperman*, 764 F.2d 786 (11th Cir. 1985).

Mistaken arrest of wrong person. — When the police have probable cause to arrest one party, and they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest. *Garcia v. State*, 200 Ga. App. 741, 409 S.E.2d 683 (1991).

No wrongful arrest under circumstances. —

A prudent person could have suspected that a driver of an automobile stopped by a police officer was a rapist, based on the victim's description of the assailant, despite discrepancies between the alleged rapist and the driver, and based on the victim's personal identification of the driver as the assailant. There was therefore no wrongful arrest. *Goodson v. City of Atlanta*, 763 F.2d 1381 (11th Cir. 1985).

Arrests (Cont'd)**1. In General (Cont'd)**

Protection of interests of persons not named in warrant. — An arrest warrant is not adequate to protect interests under U.S. Const., amend. 4 of persons not named in the warrant when their homes are searched without their consent and in the absence of exigent circumstances. *United States v. Gaultney*, 656 F.2d 109 (5th Cir.), mandate modified, 664 F.2d 1241 (5th Cir. 1981).

Booking for "investigation" did not render arrests invalid as a matter of law, there being a valid basis for the arrests. *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985).

Arrest made pursuant to an invalid bench warrant was illegal, where records clearly showed that the warrant had been recalled several months prior to the arrest. *State v. Stringer*, 258 Ga. 605, 372 S.E.2d 426 (1988).

Lawful to arrest and search suspect fleeing from an unlawful initial arrest. — Even assuming that the initial arrest of a defendant in a police-citizen airport encounter was unlawful, the defendant had no right to flee and to strike the law enforcement officer in an effort to escape; probable cause existed for a second arrest for resisting arrest, and a search of the defendant incident to the second arrest was lawful. *United States v. Bailey*, 691 F.2d 1009 (11th Cir. 1982), cert. denied, 461 U.S. 933, 103 S. Ct. 2098, 77 L. Ed. 2d 306 (1983).

Arrest under valid warrant proper even with knowledge of expiration of limitations period. — Where deputies arrested a jail visitor after a computer search revealed outstanding arrest warrants on bad check charges, even if the deputies knew the statute of limitations had expired at the time they served the warrants, they were entitled to qualified immunity in a civil rights action; the deputies had no responsibility to determine the viability of a statute of limitations defense when executing a valid arrest warrant. *Pickens v. Hollowell*, 59 F.3d 1203 (11th Cir. 1995).

Bulge in clothing. — Officer's observation of an odd-sized and shaped bulge in a suspect's sock and the suspect's false response to an inquiry about the object in the sock provided probable cause for the suspect's warrantless arrest. Accordingly, the search incident to that arrest was not violative of

U.S. Const., amend. 4 or the fourteenth amendment. *Reid v. State*, 179 Ga. App. 144, 345 S.E.2d 635 (1986).

Because police officers properly detained defendant on the basis of a telephone tip regarding suspected drug activity, observation of a bulge at the defendant's waist authorized a limited search for weapons, and the defendant's arrest was justified when the bulge turned out to be apparent contraband. *Roberts v. State*, 193 Ga. App. 96, 386 S.E.2d 921 (1989).

Arrest following withdrawal of consent to search. — The trial court did not err in denying defendant's motion to suppress the contraband on which the conviction was based, where the cocaine was seized during a search of the defendant conducted following the defendant's arrest at the Atlanta airport for giving a false name to a law enforcement officer, although the agent had not arrested defendant for giving a false name at the time that offense had allegedly occurred but waited until defendant had withdrawn defendant's consent to the search, since there was probable cause to arrest defendant for the offense of giving a false name to a law enforcement officer and consequently the subsequent search of defendant's person was permissible as a search incident to a valid arrest. *Taylor v. State*, 181 Ga. App. 703, 353 S.E.2d 619 (1987).

Claims relating to excessive force in the course of an arrest are properly analyzed under the fourth amendment's "objective reasonableness" standard. *Turton v. City of Atlanta*, 738 F. Supp. 1419 (N.D. Ga. 1990).

Pregnant woman claiming excessive force. — There was no excessive force sufficient to indicate an officer violated any clearly established constitutional right where a plaintiff, a woman in her eighth month of pregnancy, passed a road block without permission which provided the officer with arguable probable cause, drove away from the scene, parked and ran into a building, and the officer, catching her in the building, only firmly held her and contacted her abdomen in the process; the act of physically holding back a misdemeanor suspect who was attempting to leave the scene, even given her pregnant condition, was not disproportionate although the woman later miscarried. *Moore v. Gwinnett County*, 967 F.2d 1495 (11th Cir. 1992), cert. denied, 506 U.S. 1081,

113 S. Ct. 1049, 122 L. Ed. 2d 357 (1993).

Excessive force found. — Officers were not justified in using any force to arrest plaintiffs who were not suspected of committing a serious crime, did not pose an immediate threat to anyone, and did not actively resist arrest. *Thornton v. City of Macon*, 132 F.3d 1395 (11th Cir. 1998).

Reasonable to place arrestee in “body chains.” — A policy requiring that every person taken into custody by the federal marshals service be placed in “body chains” without regard to the nature of the crime charged reasonably balanced the government’s legitimate interest in protecting the safety of the marshals, innocent bystanders, and the arrestee, as well as the government’s interest in preventing the escape of an arrestee, against the arrestee’s liberty interest. *King v. Thornburg*, 762 F. Supp. 336 (S.D. Ga. 1991).

Exculpatory evidence. — Detectives had no affirmative duty to make the district attorney aware of an exculpatory lab report, where there was no evidence two of the detectives ever saw the report, or had a clearly established duty to ferret it out, and where the third detective did receive the report, but it was not clearly established that the detective was required to turn over exculpatory evidence to a prosecutor since the detective had reason to believe that the prosecutor already had the evidence. *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994).

Misleading or pressuring grand jury. — An arrest pursuant to a grand jury indictment may violate the fourth amendment if the grand jury was misled or experienced undue pressure. *Mastroianni v. Bowers*, 160 F.3d 671 (11th Cir. 1998).

Warrant supported by probable cause. — Defendant’s motion to suppress was properly denied as to an arrest warrant as the warrant was supported by probable cause since a witness identified the defendant and stated that the defendant was present at the murder scene and another witness confirmed the identification through a photo lineup and testified to observing the defendant carry out the actual crime; even if the affidavit contained allegedly misleading information that one witness was the victim’s cousin and that the defendant was identified by witnesses via a six-photo lineup was redacted, the remaining information was still

sufficient to support the probable cause finding. *Waters v. State*, 281 Ga. 119, 636 S.E.2d 538 (2006).

2. Warrantless Arrest

Validity of warrantless arrest. — The constitutional validity of arrest without a warrant depends upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense. *Lynn v. State*, 130 Ga. App. 646, 204 S.E.2d 346 (1974); *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976); *Duffy v. State*, 156 Ga. App. 847, 275 S.E.2d 658 (1980); *Timmons v. State*, 166 Ga. App. 489, 304 S.E.2d 453 (1983); *State v. Grant*, 257 Ga. 123, 355 S.E.2d 646 (1987).

Former Code 1933, § 27-207 (see O.C.G.A. § 17-4-20) provides for three exceptions to requirement that warrant be obtained prior to arrest. These exceptions are: (1) the offense is committed in the officer’s presence; (2) the offender is endeavoring to escape; (3) for some other cause there is likely to be a failure of justice for want of an officer to issue a warrant. The federal constitutional standard, on the other hand, is not as stringent. *Vaughn v. State*, 247 Ga. 136, 274 S.E.2d 479 (1981).

Defendant’s suppression motion was properly denied as: (1) the police personally heard an individual say to the informant on the telephone that the individual had a kilogram of cocaine in the individual’s hotel room that the individual intended to sell to the informant if the informant would come to that certain hotel at a certain time, where that individual would be waiting on the third-floor balcony to throw the informant a key; (2) when the informant arrived at the designated hotel at the designated time, the police observed the defendant standing on the third-floor balcony and further observed the defendant respond favorably to the informant’s request not to throw down the key and instead to come to the back door to let the informant in; (3) the police did not arrest the defendant until the defendant

Arrests (Cont'd)**2. Warrantless Arrest (Cont'd)**

appeared at that back door; and (4) the information received from an untested informant might have been helpful and corroborating, but the personal observations and perceptions of the police alone more than sufficed to supply the probable cause needed for a warrantless arrest. *Fleming v. State*, 282 Ga. App. 373, 638 S.E.2d 769 (2006).

Reasonableness of warrantless arrests. — U.S. Const., amend. 4 protects citizens from unreasonable searches and seizures and from the issuance of warrants without probable cause; it does not prohibit an arrest without a warrant, when there is reasonable or probable cause for the arrest. *Dailey v. United States*, 261 F.2d 870 (5th Cir. 1958), cert. denied, 359 U.S. 969, 3 L. Ed. 2d 836, 79 S. Ct. 881 (1959).

Attenuation of arrest. — Assuming, without deciding, that defendant was subjected to a warrantless arrest without probable cause at the time defendant was handcuffed and placed in the police vehicle, it was clear that any taint arising therefrom became attenuated; therefore, the trial court did not err by overruling defendant's motion to exclude evidence of defendant's confession. *Paradise v. State*, 212 Ga. App. 166, 441 S.E.2d 497 (1994).

Where arrest is without warrant, crime must be committed in presence of officer and the officer must have evidence of the same obtained through the use of the officer's senses. *Barron v. State*, 109 Ga. App. 786, 137 S.E.2d 690 (1964).

Arrest without warrant in misdemeanor case is lawful where offense is committed in arresting officer's presence and where the officer has probable cause to believe that it is being committed. *Stephens v. Lindsey*, 304 F. Supp. 203 (S.D. Ga. 1969).

U.S. Const., amend. 4 does not prohibit warrantless arrests for misdemeanors committed outside presence of the arresting state officer. *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

Matters of warrantless detentions and arrests must be handled on case-by-case basis looking at the totality of circumstances to determine if a reasonable and articulable suspicion or some exigent circumstance ex-

isted to authorize the intrusion. *Frankum v. State*, 174 Ga. App. 660, 331 S.E.2d 52 (1985).

Information that accused charged with serious crime. — O.C.G.A. § 17-13-34, which authorizes a warrantless arrest of a person by officers in this state upon reasonable information that the accused is charged in the courts of a state with a crime punishable by death or imprisonment for more than a year, is justified under the fourth, fifth, and fourteenth amendments, in that it is based upon a standard which comports with the constitutional standard of probable cause as set forth in *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Ledesma v. State*, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

Facts insufficient to support probable cause for arrest. — Under the Tate standard, defendant's breath test results, obtained while defendant was in custody, were properly suppressed as the arresting officer lacked probable cause to arrest defendant for driving under the influence where: (1) defendant had a single-car accident; (2) defendant had two clues for intoxication in the HGN test, while the other four clues were inconclusive or indicated no intoxication; (3) defendant's alco-sensor test results were positive for alcohol; (4) the trial court found that all of the alleged indicia of impairment were caused by the accident or lacked credibility; and (5) defendant adequately explained the accident to the officer. *State v. Gray*, 267 Ga. App. 753, 600 S.E.2d 626 (2004).

Arrest without warrant is lawful where arresting officer has probable cause to believe that a felony has been or is being committed. *Cook v. Smith*, 303 F. Supp. 90 (S.D. Ga. 1969), aff'd, 427 F.2d 1172 (5th Cir. 1970).

Warrantless arrests based on probable cause and made in a public place are permissible under U.S. Const., amend. 4. *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982).

Warrantless arrest in home. — Officers need not always have warrant to enter house for arrest of felon. If they have probable cause to arrest for a felony and the exigencies of the situation make it imperative that they proceed without waiting to obtain a

warrant, the arrest is not constitutionally invalid. *United States v. Gaultney*, 581 F.2d 1137 (5th Cir. 1978), cert. denied, 446 U.S. 907, 100 S. Ct. 1833, 64 L. Ed. 2d 259 (1980).

Arrest clearly violates U.S. Const., amend. 4 where it takes place in home without warrant and without either exigent circumstances or consent. *Thompson v. State*, 248 Ga. 343, 285 S.E.2d 685 (1981).

Warrantless arrest inside home allowable only with suspect's consent or under exigent circumstances. *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

A warrantless seizure that occurred in a defendant's home did not violate the fourth amendment to the Constitution of the United States, where the evidence showed that the defendant committed the violation of driving with defective equipment in the officer's presence and, when the officer first tried to issue a citation for the offense in the yard, the defendant ignored the officer and retreated toward the defendant's house, where the officer caught the defendant in the doorway. *Brock v. State*, 196 Ga. App. 605, 396 S.E.2d 785 (1990).

Pending danger of injury to an infant being held by the defendant provided exigency authorizing the warrantless arrest of the defendant in the defendant's home. *McCauley v. State*, 222 Ga. App. 600, 475 S.E.2d 669 (1996).

An officer who entered a home in hot pursuit of defendant who had committed a traffic violation in the officer's presence was authorized to make a warrantless arrest. *State v. Nichols*, 225 Ga. App. 609, 484 S.E.2d 507 (1997).

Where police entry into defendant's residence was without probable cause or exigent circumstances, a statement taken from defendant at the time was not admissible at trial. *State v. Sims*, 240 Ga. App. 391, 523 S.E.2d 619 (1999).

Statements made by the defendant outside the defendant's home during custodial interrogation were admissible regardless of whether the defendant's arrest inside the home without a warrant was illegal. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

Where an individual commits an offense in his or her home and that offense is committed in the presence of a law enforcement officer, the officer is authorized to

arrest the individual in the home without a warrant only where the officer's entry into the home is by consent or where there are exigent circumstances. *Carranza v. State*, 266 Ga. 263, 467 S.E.2d 315 (1996).

Flight accompanied by other suspicious circumstances will sometimes authorize a warrantless arrest even though the officers do not at the time know that the particular crime for which the arrestee is brought to trial has been committed. *Morton v. State*, 132 Ga. App. 329, 208 S.E.2d 134 (1974).

Flight in connection with other circumstances sufficient to constitute probable cause for arrest without a warrant. *Green v. State*, 127 Ga. App. 713, 194 S.E.2d 678 (1972); *State v. Smalls*, 203 Ga. App. 283, 416 S.E.2d 531 (1992).

Where persons in the suspected group fled as the police approached, and others, including defendant, attempted to leave the scene more slowly, circumstances gave rise to an articulable suspicion that a criminal act may have been occurring so as to authorize a brief investigatory stop. *State v. Smalls*, 203 Ga. App. 283, 416 S.E.2d 531 (1992).

Entry of house not justified by "hot pursuit" of vehicle. — Where police officers had chased a speeding yellow motorcycle and subsequently found the motorcycle leaning against the side of defendant's house, the "hot pursuit" doctrine did not justify entry of the house in order to effect an arrest. *Hamrick v. State*, 198 Ga. App. 124, 401 S.E.2d 25 (1990).

Because of mobility of automobiles, officers not always required to delay their arrest in order to obtain warrants, especially if there is a likelihood that the suspect will escape resulting in a failure of justice if the suspect is not arrested that moment. *Coley v. State*, 135 Ga. App. 810, 219 S.E.2d 35 (1975).

No distinction between felonies and misdemeanors. — Under federal constitutional standards as to warrantless arrests, no distinction exists between felony and misdemeanor in respect to probable cause and good faith belief. *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

Using results of unlawful search to justify warrantless arrest. — Where the defendant has committed no crime in the presence of the arresting officer, and the latter has no valid warrant, the arrest without a warrant

Arrests (Cont'd)**2. Warrantless Arrest (Cont'd)**

will not justify the search, the result of which forms the basis of the charge. *Harper v. State*, 135 Ga. App. 924, 219 S.E.2d 636 (1975).

Alleged arrest warrant. — State violated defendant's rights by serving and arresting defendant on an alleged bench warrant in the defendant's home, and thereafter obtaining a search warrant for a suspected controlled substance spotted during the arrest, because this arrest warrant was never physically produced in the criminal proceedings nor its existence otherwise confirmed by the record. *Baez v. State*, 206 Ga. App. 462, 425 S.E.2d 882 (1992).

In making a warrantless arrest, police officers not required to predict how courts will interpret or how they will decide as to the validity of a law. *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

Judicial determination of reasonableness of warrantless arrest. — Where the constitutional validity of a warrantless arrest is challenged in a criminal case, it is the function of the court to determine whether the facts available to the officer at the moment of arrest would warrant a person of reasonable caution in a belief that an offense had been committed. *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

Corroboration of an individual's mere presence at a designated public location is not corroboration of otherwise unreliable rumors of criminal activity so as to authorize an immediate warrantless arrest. *Polke v. State*, 203 Ga. App. 306, 417 S.E.2d 22 (1992).

Warrantless arrest based on informer's hearsay. — An informer's hearsay forms the basis for the warrantless arrest if the reliability of the informant is shown and the evidence establishes that the informant had obtained the information in a reliable manner so as to give the arresting officer probable cause to believe the defendant was committing a crime. *Crowley v. State*, 140 Ga. App. 208, 230 S.E.2d 358 (1976).

Belief that felony committed. — Without warrant police officer may arrest one believed by officer on reasonable cause to have been guilty of a felony. *United States v. Williams*, 573 F.2d 348 (5th Cir. 1978).

City shoplifting policy eliminated constitutionally derived right of all persons to be free from arrest without a warrant by a police officer except in those instances in which the police officer has probable cause to believe the person had committed or was committing a crime. *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980).

Facts insufficient to warrant arrest for shoplifting. — Assuming that a police officer is constitutionally authorized to arrest without a warrant on a misdemeanor — a proposition which is extremely doubtful — in light of obviously used condition of the allegedly new \$3.99 shoes that individual was accused of taking and that officer looked at, the officer as a matter of common sense could not have believed accused had committed the offense of shoplifting and did not have good faith probable cause to arrest individual for shoplifting. *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980).

Possession of large sums of money certainly may be suspicious, but it is not itself a crime and does not constitute probable cause for an immediate warrantless arrest for possession of contraband. *Polke v. State*, 203 Ga. App. 306, 417 S.E.2d 22 (1992).

Initial investigative search was authorized. — When the arresting officer stopped defendant, officer had reasonable articulable grounds for suspicion, based on the description given by both the victim and a man who was using a pay telephone at the scene of the crime, that defendant was the person who assaulted the victim, and the officer was authorized to make a protective patdown search to maintain the status quo while questioning appellant. *Dorsey v. State*, 203 Ga. App. 397, 416 S.E.2d 879 (1992).

Warrants**1. In General**

Purpose of warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

A search warrant is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place. Therefore, it safeguards an individual's interest in the privacy of the

home and possessions against the unjustified intrusion of the police. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

The warrant traditionally has represented independent assurance that search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. *State v. Guhl*, 140 Ga. App. 23, 230 S.E.2d 22 (1976), rev'd on other grounds sub nom. *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509 (1977).

Presumption of validity. — A search warrant, regular and proper on its face, is presumptively valid, and the burden is on the person who moves to suppress evidence to show that the affiant engaged in misconduct in executing the affidavit or that material misrepresentations were knowingly or recklessly included in the affidavit. *Hunter v. State*, 198 Ga. App. 41, 400 S.E.2d 641 (1990), cert. denied, 198 Ga. App. 898, 400 S.E.2d 641 (1991).

Standards for warrant under fourth and fourteenth amendments. — Proscriptions of U.S. Const., amend. 4 are enforced against states through U.S. Const., amend. 14, and the standard for obtaining a search warrant is the same under the two amendments. *Carson v. State ex rel. Price*, 221 Ga. 299, 144 S.E.2d 384 (1965).

Authority to issue warrant not specified. — This constitutional guaranty does not specify who has authority or jurisdiction to issue search warrant. *Pruitt v. State*, 123 Ga. App. 659, 182 S.E.2d 142 (1971).

The city court would have had jurisdiction to issue a search warrant for any part of the City of Atlanta, whether in Fulton or DeKalb County; however, no part of the City of Atlanta extends to Coweta County and thus city court did not have jurisdiction to issue a search warrant for a house located there. *State v. Kirkland*, 212 Ga. App. 672, 442 S.E.2d 491 (1994).

Practicality of procuring a search warrant is not a sine qua non to reasonableness of a search. Some flexibility will be accorded law officers. *Thomas v. State*, 118 Ga. App. 359, 163 S.E.2d 850 (1968), cert. denied, 394 U.S. 943, 89 S. Ct. 1273, 22 L. Ed. 2d 477 (1969).

Arrest warrants and search warrants compared. — While an arrest warrant and a search warrant both serve to subject the

probable cause determination of the police to judicial review, the interests protected by the two warrants differ. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Requirement of warrant for search of private property. — Except in certain classes of cases, a search of private property is unreasonable if it is not conducted pursuant to a valid search warrant. *Romano v. Home Ins. Co.*, 490 F. Supp. 191 (N.D. Ga. 1980).

No reasonable grounds for issuing warrant. — The Supreme Court enunciated four instances when an officer cannot be said to have reasonable grounds for believing a warrant was properly issued: (1) The warrant is facially defective; (2) the judge who issued the warrant has wholly abandoned the judicial role; (3) the affidavit was so lacking in indicia of probable cause as to render a belief that it was valid to be unreasonable; and (4) the magistrate was misled by information the affiant either knew or reasonably should have known to be false. *Bell v. State*, 204 Ga. App. 528, 419 S.E.2d 729 (1992).

Judicial preference is accorded searches under a warrant. *United States v. Morris*, 491 F. Supp. 222 (S.D. Ga. 1980), aff'd, 647 F.2d 568 (5th Cir. 1981).

"Anticipatory" search warrants are not per se illegal. *State v. Baker*, 216 Ga. App. 66, 453 S.E.2d 115 (1995).

Warrant required to enter home absent consent or exigency. — In the absence of consent or exigent circumstances, entry into a home to conduct a search or make an arrest is unreasonable under U.S. Const., amend. 4 unless done pursuant to a warrant. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Searches by private individuals. — The warrant requirement of U.S. Const., amend. 4 is intended solely as a restraint upon the activities of sovereign authority, and a search conducted by a private individual for purely private reasons does not fall within the protective ambit of U.S. Const., amend. 4. If, under the circumstances of the case, the private party acted as an instrument or agent of the government, the ostensibly private search must meet the amendment's standards; the decisive factor is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by

Warrants (Cont'd)**1. In General (Cont'd)**

other than sanctioned means. *United States v. Robinson*, 504 F. Supp. 425 (N.D. Ga. 1980).

"Staleness" of warrant. — The requirement for timely execution of a search warrant under former Code 1933, § 27-306 (see O.C.G.A. § 17-5-25) indicates the legislative intent, as well as constitutional demand, that probable cause relate to current and not stale information. *Fowler v. State*, 121 Ga. App. 22, 172 S.E.2d 447 (1970).

An unreasonable delay before securing a search warrant, after receiving information from an informant, where the probable cause must be based solely on the information given, will cause the invalidity of the warrant because it is based on "stale" information. *Logan v. State*, 135 Ga. App. 879, 219 S.E.2d 615 (1975).

Time alone is inadequate to resolve questions of staleness of information in warrants because the ultimate question is whether, under the facts and circumstances of a particular case, information about evidence is so fresh that there is probable cause to believe the evidence still exists in the same place or is so stale that such a conclusion of probable cause is unreasonable. *McDade v. State*, 175 Ga. App. 204, 332 S.E.2d 672 (1985).

Five years after an alleged murder, police searching defendant's parents' home found a vice (in which defendant had allegedly placed the victim's head) with blood evidence on it; the trial court erred in finding that information in the search warrant affidavit was stale, as the vise was not perishable, and it was reasonable to expect it to still be there. *State v. Lejeune*, 277 Ga. 749, 594 S.E.2d 637, cert. denied, 543 U.S. 861, 125 S. Ct. 187, 160 L. Ed. 2d 103 (2004).

Search cannot exceed warrant's scope. — A search in execution of a warrant may not exceed in scope the particular article or things to be seized. *Lockhart v. State*, 166 Ga. App. 555, 305 S.E.2d 22 (1983).

A search in execution of a warrant may not exceed in scope the particular article or things to be seized, so, where a warrant authorized seizure of the following: "Cruelly treated animals who are sick and are not being treated medically, animals in over-

crowded and diseased environment, business records which document condition of animals, euthanizing drugs," there was no judicial authorization for seizure of drugs other than euthanizing drugs, business records which did not document the condition of animals, and any animal which was not in perfect health. *Military Circle Pet Ctr. No. 94, Inc. v. State*, 181 Ga. App. 657, 353 S.E.2d 555, aff'd in part, rev'd in part, 257 Ga. 388, 360 S.E.2d 248 (1987).

Officer cannot use a warrant as pretext for launching full scale investigation as to the origins of an item which is not incriminating on its face. *Hogan v. State*, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

Objects on premises named in search warrant. — Without notice of some sort of the ownership of a belonging, police are entitled to assume that all objects within premises lawfully subject to search under a warrant are part of those premises for the purpose of executing the warrant. *Hayes v. State*, 141 Ga. App. 706, 234 S.E.2d 360 (1977).

Where the facts are consistent with the searching officer's belief that a suitcase that turned out to belong to defendant, a visitor, was part of the premises lawfully subject to search under the warrant, the trial court did not err in denying defendant's motion to suppress as to the cocaine found in the luggage. *Brown v. State*, 181 Ga. App. 768, 353 S.E.2d 572 (1987).

Search of containers within larger container. — U.S. Const., amend. 4 does not require additional search warrant for each container within a larger container when the warrant covers the search of the larger for a specified item. *United States v. Morris*, 491 F. Supp. 222 (S.D. Ga. 1980), aff'd, 647 F.2d 568 (5th Cir. 1981).

Items not named in search warrant, but seized in connection with crime under investigation, are proper. *Dudley v. United States*, 320 F. Supp. 456 (N.D. Ga. 1970).

Seizure of item not named in search warrant is permissible when article itself relates to another crime being committed in the presence of officers at time of search. When possession of an article itself constitutes a crime and is, therefore, tantamount to the commission of a crime in the presence of the searching officers, it may be seized, although not mentioned in the search warrant. *Dudley v. United States*, 320 F. Supp. 456 (N.D. Ga. 1970).

If the searching officers have probable cause to believe that an article not named in the warrant, but found in an otherwise lawful search, will aid in apprehension or conviction of a specific and particular offense, it may be seized. *Dudley v. United States*, 320 F. Supp. 456 (N.D. Ga. 1970).

There must be a bona fide search for the item sought to be found, as it is listed on the search warrant, but if, in the course of an authorized search, another contraband is found on the party or premises searched, the officer is authorized to seize it, for the search, though not productive of that which was sought, was legal. *Bostwick v. State*, 124 Ga. App. 113, 182 S.E.2d 925 (1971).

Where probable cause exists, seizure of items other than those described in search warrant is authorized. *State v. Causey*, 132 Ga. App. 17, 207 S.E.2d 225 (1974).

Evidence obtained from premises not named in warrant inadmissible. — Where a search warrant has no description of the premises to be searched other than the street address, and the street or number is incorrectly given, it is error for a trial judge to overrule a motion to suppress the evidence produced, even where the officers who conducted the search went to the correct address because of personal observation of the premises prior to the search. *Bell v. State*, 124 Ga. App. 139, 182 S.E.2d 901 (1971).

Person with unknown status to premises searched under warrant. — Although a search warrant carries with it the limited authority to detain the occupants of the premises while a proper search is conducted, that authority does not extend to a person whose status with respect to the premises is unknown, who has already left the premises, and who the police know is not named in the warrant. *Emery v. State*, 249 Ga. App. 114, 548 S.E.2d 23 (2001).

Search of persons arriving on premises being searched. — The right to search those coming in while a search of the premises is going on, not being expressly authorized by the warrant, must be shown by the grounds of probable cause or must have been authorized under the provisions of former Code 1933, § 27-309 (see O.C.G.A. § 17-5-28). *Logan v. State*, 135 Ga. App. 879, 219 S.E.2d 615 (1975).

Searches of persons not named in search warrant but found on premises to be

searched are illegal absent independent justification for a personal search. *Hayes v. State*, 141 Ga. App. 706, 234 S.E.2d 360 (1977).

Use of properly seized item in another prosecution. — Item named in warrant, and therefore properly seized, may be basis for prosecution of another offense. *Dudley v. United States*, 320 F. Supp. 456 (N.D. Ga. 1970).

Arrest warrant alone suffices to enter suspect's own residence to effect suspect's arrest. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

It is the general rule that a warrant is required to search the curtilage, and the yard immediately surrounding one's dwelling is well within the curtilage. *Black v. State*, 119 Ga. App. 855, 168 S.E.2d 916 (1969).

Warrant to search house extended to driveway and vehicle within the driveway. — When a search warrant was issued allowing a search of defendant's house, this extended by implication to areas within the curtilage of the dwelling, and to a vehicle parked within that curtilage. *Solis v. State*, 268 Ga. App. 493, 602 S.E.2d 166 (2004).

Invoking warrant as authority to enter homes of third parties. — An arrest warrant, to the extent that it is invoked as authority to enter the homes of third parties, suffers from the same constitutional infirmity pertinent to the general warrants that occurred in England and the writs of assistance used in the American colonies. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Arrest warrant authorizes invasion of privacy of own home, but not that of third party. — Because an arrest warrant authorizes the police to deprive a person of the person's liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest the person in the person's home. However, when the police seek to use an arrest warrant as legal authority to enter the home of a third party to conduct a search, this reasoning is inapplicable. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

An arrest warrant, as opposed to a search warrant, is inadequate to protect the fourth amendment interests of persons not named in the warrant, when their homes are

Warrants (Cont'd)**1. In General (Cont'd)**

searched without their consent and in the absence of exigent circumstances. *Otwell v. State*, 201 Ga. App. 71, 410 S.E.2d 178 (1991).

Lack of signature on copy of search warrant. — Where one of three copies of a search warrant was not signed but at least one copy was signed at the time it was issued, the warrant is not invalid if the magistrate did make a judicial finding of the existence of probable cause prior to issuing the warrant. *Braden v. State*, 135 Ga. App. 827, 219 S.E.2d 479 (1975).

Conclusion of witness that paper is warrant allowing legal arrest not proper proof.

— The conclusion of a witness that a given paper is a warrant under which an arrest may legally be made is not proper proof that such a paper is in fact a warrant by virtue of which a legal arrest has been made, so as to authorize the admission of evidence obtained by means of an arrest under such paper or alleged warrant. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

Production of photocopy of search warrant was sufficient to evidence valid search where issuing magistrate testified that the magistrate had searched the files and had not found the original warrant, and the police officer who executed the warrant similarly found only the photocopy in the officer's file. *Early v. State*, 170 Ga. App. 158, 316 S.E.2d 527 (1984).

Affidavit alone insufficient to support search warrant. — A warrant affidavit complying with § 17-4-41 is not alone sufficient to demonstrate the validity of an arrest warrant, because probable cause must still be shown to the issuing magistrate. *Devier v. State*, 253 Ga. 604, 323 S.E.2d 150 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Trial court properly found that the supporting affidavit for the search warrant for a search of defendant's apartment was insufficient to establish probable cause, as the affidavit contained mainly unsupported hearsay from an informant with no information corroborating the informant's veracity; accordingly, the trial court properly suppressed evidence that was seized from defendant's apartment pursuant to the search

warrant. *State v. Lejeune*, 276 Ga. 179, 576 S.E.2d 888 (2003).

Search warrant may not be granted simply because police officer states police officer has received reliable information from a credible person. There must be some evidence of reliability other than the conclusory statement of the police officer that the informer is reliable, to justify the grant of a search warrant. *Davis v. Smith*, 430 F.2d 1256 (5th Cir. 1970).

Arrest warrant based on victim's statement. — Although the magistrate did not have an exculpatory witness's statement, the magistrate did have the victim's statement and other evidence offered by law enforcement which was sufficiently reliably trustworthy to find that probable cause existed to justify arrest. *Rock v. Lowe*, 893 F. Supp. 1573 (S.D. Ga. 1995), aff'd without op., 79 F.3d 1161 (11th Cir. 1996).

Magistrate may issue warrant based on police officer's knowledge of suspect's reputation. — A police officer's knowledge of a suspect's reputation is a practical consideration of everyday life upon which a magistrate may properly rely in issuing a search warrant. *Law v. State*, 165 Ga. App. 687, 302 S.E.2d 570, aff'd, 251 Ga. 525, 307 S.E.2d 904 (1983).

Warrants authorizing the seizure of materials presumptively protected by U.S. Const., amend. 1 may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may focus searchingly on the question of obscenity. *State v. Kramer*, 260 Ga. App. 546, 580 S.E.2d 314 (2003).

Hearsay can be basis for issuance of warrant so long as there is substantial basis for crediting the hearsay. *Ward v. State*, 234 Ga. 882, 218 S.E.2d 591 (1975).

An affidavit supporting a search warrant may be based on hearsay information as long as there is a substantial basis for crediting the hearsay. *Deal v. State*, 199 Ga. App. 184, 404 S.E.2d 343 (1991).

Validity of warrant based on probability of current violation of lottery law. — If occurrences are such as to indicate the probability of the violation of the lottery law at a current date, a warrant is valid. *Logan v. State*, 135 Ga. App. 879, 219 S.E.2d 615 (1975).

Mere threat to obtain search warrant does not amount to coercion. United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978).

Valid warrants require determinations only of matters of fact. — If the warrant calls for the search and seizure of intoxicating liquors at a described location, the executing officer may be required to determine as a matter of fact which of several different containers found on the premises searched contain intoxicating liquors or which contain other beverages of a nonintoxicating character. In the very nature of things, the officer cannot be relieved of making this determination, and so long as the determination that the officer is required to make is a determination of a matter of fact as distinguished from a determination of a matter of opinion, the warrant is valid. *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968).

Failure of the police to knock and give verbal notice of their authority and purpose in the execution of a search warrant may be excused where the police have reasonable grounds to believe that forewarning would either greatly increase their peril or lead to the immediate destruction of the evidence. *Scull v. State*, 122 Ga. App. 696, 178 S.E.2d 720 (1970); *Martin v. State*, 165 Ga. App. 760, 302 S.E.2d 614 (1983).

Unannounced entry by Georgia Bureau of Investigation agents is authorized where evidence can be otherwise easily destroyed and where agents request the judge who issued the search warrant to include a no-knock provision. *Cox v. State*, 160 Ga. App. 199, 286 S.E.2d 482 (1981).

2. Who May Issue

Neutral and detached magistrate required. — Magistrate who issues warrant must be neutral and detached, and must be capable of determining whether probable cause exists for the requested arrest or search. *State v. Guhl*, 140 Ga. App. 23, 230 S.E.2d 22 (1976), rev'd on other grounds sub nom. *Mitchell v. State*, 239 Ga. 3, 235 Ga. 509 (1977); *Vaughn v. State*, 160 Ga. App. 283, 287 S.E.2d 277 (1981).

Rule under U.S. Const., amend. 4 that warrant be issued by neutral and detached magistrate requires severance and disengagement from activities of law enforcement. *Thomason v. State*, 148 Ga. App. 513,

251 S.E.2d 598 (1978); *Vaughn v. State*, 160 Ga. App. 283, 287 S.E.2d 277 (1981).

A justice of the peace or anyone else issuing a warrant should not participate in the searches so as to avoid giving the appearance of not being a detached and neutral magistrate. *McAllister v. State*, 157 Ga. App. 158, 276 S.E.2d 669 (1981).

Validity of search warrants issued by justice of peace. — Although the United States Supreme Court has held that the issuance of a search warrant by a justice of the peace violates the protections of U.S. Const., amend. 4, that holding will not be applied retroactively so as to exclude evidence obtained under such a warrant where the warrant was issued according to law and in complete good faith. *State v. Patterson*, 143 Ga. App. 225, 237 S.E.2d 707 (1977).

Magistrate not disqualified because of possible additional compensation. — The argument that a magistrate who, in the event a search warrant is issued, might possibly receive additional compensation in the form of a fee for holding a subsequent committal hearing is not "neutral and detached" in the initial decision to issue the warrant is without merit. *Anderson v. State*, 166 Ga. App. 459, 304 S.E.2d 550 (1983).

Mayor's financial interest not disqualification as judge in committal court. — The rule which forbids a "trial" before a mayor who is responsible for that city's finances and whose court, through fines, forfeitures, and fees, provides a substantial portion of the mayor's city's revenue does not extend to a committal court which deals only with probable cause to bind a defendant over for trial. *McLarty v. State*, 176 Ga. App. 433, 336 S.E.2d 273 (1985).

Judge who also serves as county coroner is not per se disqualified from issuing a search warrant in the capacity as ex officio justice of the peace. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

Judge who had not served as deputy sheriff for approximately eight years at the time the search warrant in question was issued was not disqualified to issue warrant. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

Mere personal associations with police officers, without more, do not disqualify a magistrate from issuing a search warrant. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

Warrants (Cont'd)**2. Who May Issue (Cont'd)**

Prior issuance of blank warrants. — Where defendant contended the search warrant was invalid because the executing magistrate was not neutral and detached, because the magistrate admitted, after first having denied, that at sometime in the past in an unrelated incident or incidents, the magistrate had signed blank warrants to accommodate an officer when the magistrate was to be at a family dinner, it was held that the incident suggested by defendant was an isolated incident or incidents in the past and that there was no evidence except remote speculation that the magistrate's posture in issuing the search warrant in this case was not neutral and detached. *Lang v. State*, 168 Ga. App. 693, 310 S.E.2d 276 (1983).

Right to alter warrant. — Since only a judicial officer may issue a search warrant, the right to alter, modify, or correct that warrant is necessarily vested only in that authority. *Delaney v. State*, 135 Ga. App. 612, 218 S.E.2d 318 (1975).

When new or modified warrant required. — Once officers concluded the defendant was to be searched at a later time for a different batch of drugs, they were bound to return to a judicial officer to seek a new or modified warrant. *Delaney v. State*, 135 Ga. App. 612, 218 S.E.2d 318 (1975).

3. Particularity of Description

General warrant is void. — General warrant, one which does not sufficiently specify place or person to be searched, is void. *Willis v. State*, 122 Ga. App. 455, 177 S.E.2d 487 (1970).

Particularity being the sine qua non of valid warrant, general warrant is void. *State v. Cochran*, 135 Ga. App. 47, 217 S.E.2d 181 (1975).

General exploratory warrants are void. By definition, a general warrant is one which does not sufficiently specify the person, place, or thing to be searched. *Lockhart v. State*, 166 Ga. App. 555, 305 S.E.2d 22 (1983).

Test for determining sufficiency of description in warrant. — To be valid, a search warrant must contain a description of the person and premises to be searched with such particularity as would enable a prudent

person executing the warrant to locate the person and premises definitely and with reasonable certainty. *Mercer v. State*, 146 Ga. App. 143, 245 S.E.2d 492 (1978); *State v. Blews*, 148 Ga. App. 73, 251 S.E.2d 10 (1978); *Anderson v. State*, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

United States Const., amend. 14 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, requiring that "no warrant shall issue except upon probable cause . . . particularly describing the place, or places to be searched, and the persons or things to be seized" is met if the description sufficiently permits a prudent officer with a search warrant to be able to locate the person and place definitely and with reasonable certainty. *Cuevas v. State*, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980).

A search warrant is not invalid for want of description of the premises to be searched if the description sufficiently permits a prudent officer executing the warrant to locate the place definitely and with reasonable certainty, and without depending upon the officer's discretion. *Chambless v. State*, 165 Ga. App. 194, 300 S.E.2d 201 (1983).

Description indefinite if officer can exercise selective discretion. — A search warrant is constitutionally inadequate if the description of the premises to be searched is so indefinite that under the authority of the warrant an officer can exercise a selective discretion in determining where the officer will search. *State v. Blews*, 148 Ga. App. 73, 251 S.E.2d 10 (1978).

Writ should not leave executing officer in doubt or require officer to exercise personal discretion. It will be deemed sufficient if the information permits the officer to locate the premises without the aid of other information. *Mercer v. State*, 146 Ga. App. 143, 245 S.E.2d 492 (1978).

Description which is exclusive is sufficient. — If a search warrant, read as a whole, points out the place to the exclusion of all others, and on inquiry leads the officers unerringly to it, it meets the description requirement. *Chambless v. State*, 165 Ga. App. 194, 300 S.E.2d 201 (1983).

Elaborate specificity in a warrant is not necessary. — A description is sufficiently particular when it enables a searcher to reasonably ascertain and identify the items

authorized to be seized. *United States v. Moody*, 763 F. Supp. 589 (M.D. Ga. 1991), *aff'd*, 977 F.2d 1420 (11th Cir. 1992), *cert. denied*, 507 U.S. 944, 113 S. Ct. 1348, 122 L. Ed. 2d 729 (1993).

Affidavit which described how one of defendant's rape victim's identified defendant, gave the description of defendant that all the rape victims gave of defendant, described the car that defendant was driving, described the gun replica that defendant used, under the totality of the circumstances, was sufficient to support a search warrant and it was not error for the trial court to admit the evidence obtained in the execution of the warrant. *Collins v. State*, 267 Ga. App. 784, 600 S.E.2d 802 (2004).

Effect of practical necessities of search milieu on particularity of description. — U.S. Const., amend. 4 describes the maximum extent to which U.S. Const., amend. 4 permits the particularity of description in a search warrant to be encroached by the practical necessities of the search environment. *Wallace v. State*, 131 Ga. App. 204, 205 S.E.2d 523 (1974).

"Buy money" need not be attached. — Failure to attach a photocopy of "buy money" to an affidavit did not violate the particularity requirement, where the warrant specified "monies derived from the sale of controlled substances." *Smith v. State*, 207 Ga. App. 463, 428 S.E.2d 403 (1993).

Exploratory rummaging prohibited. — The fourth amendment requires that a warrant particularly describe the place to be searched and the items or persons to be seized; exploratory rummaging is prohibited. *United States v. Jenkins*, 901 F.2d 1075 (11th Cir.), *cert. denied*, 498 U.S. 901, 111 S. Ct. 259, 112 L. Ed. 2d 216 (1990).

Description of contraband may be given in less detail than other articles. *State v. Causey*, 132 Ga. App. 17, 207 S.E.2d 225 (1974).

Mere statement of affiant's conclusion. — A warrant is clearly insufficient on its face to show probable cause if it merely states the bold conclusion of the affiant district attorney that the defendant had exhibited two named films which were obscene material. *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

Search warrant is "general" as to particular defendant when the defendant is neither listed by name specifically nor described

generally, and no additional indicia of probable cause are provided at the scene of the search. *State v. Cochran*, 135 Ga. App. 47, 217 S.E.2d 181 (1975).

Generally, inclusion of name of person to be arrested on arrest warrant constitutes a sufficient description to satisfy the requirement of U.S. Const., amend. 4 that the person to be seized be described with particularity. *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980).

Failure to name a person in a search warrant is not fatal. — Search warrants are not directed at persons; they authorize the search of "places" and the seizure of "things," and as a constitutional matter they need not even name the person from whom the things will be seized. *Bing v. State*, 178 Ga. App. 288, 342 S.E.2d 762 (1986).

Search of unnamed persons involved in crime on named premises. — A search warrant to search designated premises will not authorize the search of every individual who happens to be on the premises, but a warrant which identifies the premises and its owners or occupants is not void as a general warrant because it authorizes the search of other persons found there who may reasonably be involved in the commission of the crime for which the warrant is issued. *Willis v. State*, 122 Ga. App. 455, 177 S.E.2d 487 (1970).

Warrant's description of place searched is not required to meet technical requirements or have the specificity sought by conveyancers; the warrant need only describe the place to be searched with sufficient particularity to direct the searcher, to confine the searcher's examination to the place described, and to advise those being searched of the searcher's authority. *United States v. Burke*, 784 F.2d 1090 (11th Cir.), *cert. denied*, 476 U.S. 1174, 106 S. Ct. 2901, 90 L. Ed. 2d 987 (1986).

Omission of county from description in copy of warrant. — Where a copy of a warrant which omits the name of the county is used to be directed to the executing officers, and where the affidavit included the name of the county along with the other description, the omission of the name of the county does not affect the substantial rights of U.S. Const., amend. 4. *Cuevas v. State*, 151 Ga. App. 605, 260 S.E.2d 737 (1979), *cert. denied*, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980).

Warrants (Cont'd)

3. Particularity of Description (Cont'd)

Adequacy of designation or description known to locality. — A search warrant should be read as a whole, and any designation or description known to the locality that points out the place to the exclusion of all others, and on inquiry leads the officers unerringly to it, satisfies the constitutional requirement. *State v. Blews*, 148 Ga. App. 73, 251 S.E.2d 10 (1978).

Incorrect street number. — Even though a street number is incorrect, where there are other elements of description sufficiently particular, the search warrant may be valid. *Chambless v. State*, 165 Ga. App. 194, 300 S.E.2d 201 (1983).

Where a search warrant fails to name an individual and describes incorrectly the street number, county and city, naming only the street name correctly, it is defective. *State v. Hatch*, 160 Ga. App. 384, 287 S.E.2d 98 (1981).

Failure to specify residential units within dwelling. — Trial court should not have granted a motion to suppress on the ground that the warrant was invalid for failure to specify which of two residential units in the dwelling was to be searched, where a pre-warrant inspection of the exterior of the premises revealed a single entrance and street address and only one mailbox on the front porch, and a pre-warrant search of a city directory indicated no residents in the building other than defendants. *State v. Capps*, 256 Ga. 14, 342 S.E.2d 676 (1986).

If neither the affiant nor investigating officers nor executing officers knew of or had reason to know of a structure's actual multiple occupancy character until execution of the warrant was under way, and the outward appearance of the building reflects a single-occupancy structure, the warrant is not invalid for failure to specify a subunit within the building. *Bing v. State*, 178 Ga. App. 288, 342 S.E.2d 762 (1986).

Warrant that did not specify the subunits of a house subsequently alleged to be a "boarding house" was properly executed for the entire dwelling, because the circumstances showed that multi-family occupancy would not have been obvious to a reasonably diligent law enforcement officer. *Davis v. State*, 198 Ga. App. 310, 401 S.E.2d 326 (1991).

Sufficient identification of apartment. —

When an affidavit used to obtain a search warrant for defendant's apartment falsely stated that an informant told the affiant that the informant had purchased drugs at a particular apartment, the affidavit still supported issuance of the search warrant because law enforcement agents observing defendant's apartment were able to establish that the informant had gone to and come from defendant's apartment immediately prior to being arrested for possession of a quantity of drugs. Defendant's argument that an affidavit used to obtain a search warrant for defendant's apartment did not state a correct address was without merit as the address stated in the affidavit was sufficient because there was no probability that it identified another apartment. *Evans v. State*, 263 Ga. App. 572, 588 S.E.2d 764 (2003).

Warrant held invalid for search of two motel rooms not registered in proper name. —

A search warrant directed to a room in either one or another of two motels at different addresses in the same city and identified only by the statement that they will be registered in the name of a specified person will not authorize a search of two motel rooms in one of the motels registered in the name of another person not identified in the warrant. *Garner v. State*, 124 Ga. App. 33, 182 S.E.2d 902 (1971).

Warrant not overbroad where it authorizes search of "other persons" or "any motor vehicle". — A search warrant is not impermissibly overbroad and general where it authorizes the agents to search "any other person found on said premises who reasonably might be involved in the commission of the aforesaid violation of the laws" as well as "any motor vehicle found on said premises" and both clauses appear in the preprinted portion of the search warrant form, since a warrant which identifies the premises and its owners or occupants is not void as a general warrant because it authorizes the search of other persons found there who may reasonably be involved in the commission of the crime for which the warrant is issued, and the scope of the search is sufficiently limited by the specific language typed in the blank spaces of the form, describing the vehicles by color, make, type, and license plate number and stating they are at the premises described. *Castillo v. State*, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

Warrant sufficient with “person, premises or property.” — Search warrant that authorized the search and seizure of “the person, premises or property” was sufficiently particular; the use of the word “or” did not give the officers unbridled discretion in what to search. *Minter v. State*, 206 Ga. App. 692, 426 S.E.2d 169 (1992).

Search warrant based on anonymous tips and other information allowed. — When law enforcement received two anonymous tips that defendant would be traveling from another state with cocaine in a certain model car licensed in the other state, would be taking a certain route, and would be staying in a certain hotel, the tips’ range of details relating to future acts not easily predicted, combined with information obtained while defendant was lawfully detained that \$150,000.00 was seized from a concealed compartment in defendant’s vehicle and defendant was deceptive during a conversation with a police officer, allowed the issuance of a search warrant for defendant’s house. *Solis v. State*, 268 Ga. App. 493, 602 S.E.2d 166 (2004).

Type and color description of clothing sufficient. — There was no merit in the contention that a search warrant did not properly describe certain clothing identified by the victim and similarly described in the warrant, where the victim described clothing worn by the assailant as to type and color, the type and color description being sufficient to meet the “generic description” required by the law of this state. *Johnson v. State*, 179 Ga. App. 467, 346 S.E.2d 903 (1986).

Exact caliber of pistol not required. — Requirement of U.S. Const., amend. 4 to describe particularly the article to be seized does not intend exclusion of pistol as evidence because the victim assaulted could not tell the exact caliber of the pistol. *Young v. Caldwell*, 229 Ga. 653, 193 S.E.2d 854 (1972).

Description of pornographic material and marijuana sufficient. — Search warrant description that authorized search for pornographic materials and marijuana was sufficient to enable the searching officer to seize the described items with “reasonable certainty.” *Tyler v. State*, 176 Ga. App. 96, 335 S.E.2d 691 (1985).

Description of pornographic materials insufficient. — A search warrant’s description

was so open-ended that the warrant violated both the United States and Georgia Constitutions. As a result, use of the warrant to seize pornographic video tapes was invalid, and the tapes should have been suppressed as the fruits of an illegal search. *Dobbins v. State*, 262 Ga. 161, 415 S.E.2d 168 (1992).

Particularity of warrant held insufficient. — Trial court properly suppressed videotapes that were seized from defendant’s home during the execution of a search warrant, as the description in the warrant that the items sought were videotapes that were instruments used in the crimes of molesting and sexually exploiting children did not meet the particularity requirements of U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, especially in light of the fact that videotapes involved activity protected by U.S. Const., amend. 1, where there was no evidence of any videotape activity involving the victim, and the warrant did not elaborate on what types of videotapes were to be seized, leaving that determination solely to the discretion of the officers, which amounted to an impermissible general warrant; circumstances may make an exact search warrant description of instrumentalities a virtual impossibility and, in those circumstances, the searching officer can only be expected to describe the generic class of items sought, but a warrant authorizing the seizure of “videotapes” with nothing more does not pass constitutional muster. *State v. Kramer*, 260 Ga. App. 546, 580 S.E.2d 314 (2003).

Effect of discrepancy as to time of issuance and time of execution of warrant. — An entry on a warrant showing it to have been issued at 12:55 P.M. on a particular day is certainly in conflict with that showing the warrant to have been executed at 12:00 Noon of the same date, but a court is authorized to find this to have been error either as to the time of issuance or as to the time of execution, and such a finding is implicit in an order overruling the motion to suppress. *Bostwick v. State*, 124 Ga. App. 113, 182 S.E.2d 925 (1971).

Evidence as pathway to incriminating evidence. — Police did not exceed the scope of a search warrant where the warrant specified “receipts” and a furniture receipt was found in defendant’s car leading to defendant’s paramour’s home, where police, in a

Warrants (Cont'd)**3. Particularity of Description (Cont'd)**

consented to search, found incriminating evidence; the police were not required to overlook relevant evidence where they knew defendant's paramour's name and the receipt was a pathway to evidence. *Brown v. State*, 260 Ga. App. 627, 580 S.E.2d 348 (2003).

Investigative Stops**1. In General**

Prohibition of searches and seizures under U.S. Const., amends. 4 and 14, not supported by some objective justification, governs all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Reid v. Georgia*, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980); *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981).

Probable cause not always required for police intrusion. — Circumstances short of probable cause for arrest may justify stopping of pedestrian or motorist for limited questioning. *Merrill v. State*, 130 Ga. App. 745, 204 S.E.2d 632 (1974).

Constitution does not always require standard as strict as probable cause to justify some degree of police intrusion. *United States v. Gonzalez-Vargas*, 496 F. Supp. 1296 (N.D. Ga. 1980).

That police receive information which does not amount to probable cause does not require them to shrug their shoulders and make no inquiry, but rather the circumstances may justify investigation. *State v. Smalls*, 203 Ga. App. 283, 416 S.E.2d 531 (1992).

An anonymous phone call, while not amounting to probable cause, was sufficient to warrant a visual inspection of the public premises for investigation based on the police officers' common experience as to drug activity in such residential areas. *State v. Smalls*, 203 Ga. App. 283, 416 S.E.2d 531 (1992).

Test of reasonableness of detention without arrest. — A court, in assessing reasonableness of a detention where no actual arrest has been made, should look to: (1) whether the officers had a particularized and objective basis for suspecting the plain-

tiff of criminal activity; (2) whether the methods used were the least intrusive means reasonably available to verify or dispel the officers' suspicions in a short period of time; (3) whether the length of the detention was "significant" or otherwise longer than was necessary to effectuate the purpose of the stop; and (4) whether the officers diligently pursued a means of investigation that was likely to confirm or dispel their suspicion quickly. *Thompson v. Spikes*, 663 F. Supp. 627 (S.D. Ga. 1987).

Reasonableness of suspicion of criminal activity. — The question of whether a seizure was supported by a reasonable suspicion of criminal activity requires an evaluation of the articulable facts known to the police officer at the moment of the seizure. *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), rev'd on other ground, 690 F.2d 869 (11th Cir. 1982).

Determination of whether seizure is supported by reasonable suspicion requires evaluation of articulable facts known to the police officer at the time of the seizure. *United States v. Berry*, 636 F.2d 1075 (5th Cir. 1981), aff'd, 670 F.2d 583 (5th Cir. 1982).

A police officer may stop an individual where there is a "reasonable, articulable ground" for detention which can be less than probable cause to make an arrest or conduct a search, but must be more than a mere caprice or arbitrary harassment. *Hambright v. State*, 161 Ga. App. 877, 289 S.E.2d 24 (1982).

Investigative stops of vehicles are analogous to Terry stops, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and are invalid if based upon only an unparticularized suspicion or hunch. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity. This specific, articulable suspicion must be based on the totality of the circumstances — e.g., objective observations, information from police reports, the modes or patterns of certain kinds of law-breakers, and the inferences drawn and deductions made by a trained law enforcement officer. *Cheatham v. State*, 204 Ga. App. 483, 419 S.E.2d 920 (1992).

In determining whether a stop was justified by reasonable suspicion, the court takes

into account the totality of the circumstances including consideration of objective observations, patterns of operations of certain kinds of lawbreakers, and information from police reports because a trained police officer draws inferences and makes deductions from this type of data. *Gonzalez v. State*, 235 Ga. App. 253, 509 S.E.2d 144 (1998).

After a store cashier reported conduct arguably amounting to disorderly conduct and then when the police arrived at the closed store minutes after the cashier's complaint, they found only a black pickup as mentioned by the cashier, with no other vehicles in sight, this provided the basis for an articulable suspicion justifying the stop. *Morris v. State*, 239 Ga. App. 100, 520 S.E.2d 485 (1999).

Initial stop and detention of defendant was not solely dependent upon the restricted power of police to detain occupants of a premises while a warranted search is conducted, but was an authorized Terry stop. *Garmon v. State*, 271 Ga. 673, 524 S.E.2d 211 (1999), affirming *Garmon v. State*, 235 Ga. App. 671, 510 S.E.2d 350 (1998).

Civil forfeiture order was affirmed and suppression motion was properly denied as drugs were found in defendant's possession after an arrest following a Terry stop as the officer had a reasonable suspicion of criminal activity since the officer had been advised of defendant's banishment, which defendant acknowledged to be violating; the officer was charged with enforcing court orders and, although the banishment was illegal, the order had not been challenged at the time of the Terry stop. *Sanders v. State*, 259 Ga. App. 422, 577 S.E.2d 94 (2003).

Officer's pat-down of defendant, during which the officer seized credit cards from defendant's person, was lawful as defendant had been seen in a stolen car, had previously fled police, knew the officer was investigating a crime, put defendant's hands in defendant's pockets, the officer knew defendant had lied about two items in defendant's pockets that could be used as weapons, and the objects the officer felt in defendant's pocket were ones that, in the officer's experience, had been known to have been fashioned into weapons by attaching razor blades to them. *Mohamed v. State*, 276 Ga. 706, 583 S.E.2d 9 (2003).

"Totality-of-circumstances" test. — Where police informant had previously supplied information that led to drug arrests and in the instant case accurately predicted that the defendant would proceed to a specific location after first going to his residence, such circumstances combined with informant's statement that defendant would be in possession of cocaine satisfied "totality-of-the-circumstances" test justifying brief investigative detention. *State v. Watson*, 205 Ga. App. 313, 422 S.E.2d 202 (1992).

State's interests balanced against momentary inconvenience of detention. — In cases where there are some reasonable articulable grounds for suspicion, the state's interest in the maintenance of community peace and security outweigh the momentary inconvenience and indignity of investigatory detention. *Brisbane v. State*, 233 Ga. 339, 211 S.E.2d 294 (1974).

U.S. Const., amend. 4 applies to all seizures of the person, including seizures that involve only brief detention short of traditional arrest. Whenever a police officer accosts an individual and restrains the freedom to walk away, the police officer has seized that person. *Bowers v. State*, 151 Ga. App. 46, 258 S.E.2d 623 (1979), *aff'd*, 245 Ga. 367, 265 S.E.2d 57 (1980).

Police officer has a limited right to an investigative stop of a person or vehicle. Circumstances short of probable cause for arrest may justify the stopping of a pedestrian or motorist for limited questioning. *Bailey v. State*, 158 Ga. App. 96, 279 S.E.2d 334 (1981).

The fourth amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug the officer's shoulders and allow a crime to occur or a criminal to escape. On the contrary, it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Howell v. State*, 160 Ga. App. 479, 287 S.E.2d 294 (1981); *Holley v. State*, 157 Ga. App. 863, 278 S.E.2d 738 (1981); *Williams v. State*, 163 Ga. App. 866, 295 S.E.2d 361 (1982).

Momentary detention and questioning

Investigative Stops (Cont'd)**1. In General (Cont'd)**

are permissible if based upon specific and articulable facts, which, taken together with rational inferences from those facts, justify a reasonable scope of inquiry not based on mere inclination, caprice or harassment. An authorized officer may stop an automobile and conduct a limited investigative inquiry of its occupants, without probable cause, if the officer has reasonable grounds for such action, a founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing. *Holley v. State*, 157 Ga. App. 863, 278 S.E.2d 738 (1981).

Momentary detention and questioning are permissible if based upon specific and articulable facts which, taken together with rational inferences from those facts, justify a reasonable course of inquiry not based on mere inclination, caprice, or harassment. *Bailey v. State*, 202 Ga. App. 427, 414 S.E.2d 330 (1992).

If there is a reasonable suspicion of criminal wrongdoing based on specific and articulable facts from which it can be determined that the police officer's action is not arbitrary and harassing, the officer may make a brief, investigatory detention of the individual to determine identity or to maintain the status quo momentarily while obtaining more information. *Gonzalez v. State*, 235 Ga. App. 253, 509 S.E.2d 144 (1998).

Elements of a Terry stop. — A Terry stop is a brief stop, limited in time to that minimally necessary to investigate the allegation invoking suspicion, and limited in scope to identification, licensing of a driver and a vehicle if appropriate, a protective "patdown" of the outer surface of clothing for weapons if the officer has reasonable apprehension that the person is armed or dangerous, and limited questioning reasonably related to the circumstances that justified the initiation of the momentary stop. *State v. Avret*, 156 Ga. App. 527, 275 S.E.2d 113 (1980).

Legality of scope of "Terry stop". — Once a "Terry stop" has been made, the legality of its scope is determined in each case by balancing the extent of the intrusion against the immediacy and importance of the interest in crime prevention or law en-

forcement which is sought to be advanced. *Vanloo v. State*, 187 Ga. App. 290, 370 S.E.2d 44 (1988).

Weapons search not limited to pat-down.

— *Terry v. Ohio* does not limit a weapons search to a so-called pat-down search. Any limited intrusion designed to discover guns, knives, clubs or other instruments of assault is permissible. Under the circumstances, the officer's act of reaching into the defendant's left-hand pocket was not overly intrusive. The defendant's conduct in pushing the officer's hand away when officer attempted to pat down the pocket, and defendant's subsequent conduct in turning defendant's body sideways, coupled with the fact that the officer had seen the defendant, a suspected drug violator, reach into the console before stepping from the vehicle, would create a reasonable suspicion that the defendant was armed. *Hayes v. State*, 202 Ga. App. 204, 414 S.E.2d 321 (1991).

Where officers acted lawfully in stopping defendant to ask what defendant was doing and defendant attempted to avoid the officers and then nervously reached for defendant's pocket, the officers had a right to stop defendant from going into the pocket and to make a limited search because they reasonably believed that their safety had been compromised. *Pace v. State*, 219 Ga. App. 583, 466 S.E.2d 254 (1995).

Probable cause not required for "stop and frisk". — U.S. Const., amend. 4 does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug one's shoulders and allow a crime to occur or a criminal to escape. A brief stop of a suspicious individual in order to determine identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *United States v. Robinson*, 535 F.2d 881 (5th Cir. 1976); *Reese v. State*, 145 Ga. App. 453, 243 S.E.2d 650 (1978); *State v. Purdy*, 147 Ga. App. 340, 248 S.E.2d 683 (1978); *Jackson v. State*, 155 Ga. App. 386, 271 S.E.2d 32 (1980).

A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. *State v. Purdy*, 147 Ga. App. 340,

248 S.E.2d 683 (1978); *Jackson v. State*, 155 Ga. App. 386, 271 S.E.2d 32 (1980).

Probable cause is not required for police officer to make investigative stop of individual if the officer reasonably suspects that the individual is involved in criminal activity. *United States v. Allison*, 616 F.2d 779 (5th Cir.), cert. denied, 449 U.S. 857, 101 S. Ct. 156, 66 L. Ed. 2d 72 (1980).

Since the intrusion involved in a "stop and frisk" is so much less severe than that involved in traditional "arrests," the general rule requiring probable cause to make arrests reasonable under U.S. Const., amend. 4 does not cover such intrusions. *United States v. Hill*, 626 F.2d 429 (5th Cir. 1980).

Momentary detention and questioning do not have to be based on probable cause to believe there has been criminal wrongdoing. *Bailey v. State*, 202 Ga. App. 427, 414 S.E.2d 330 (1992).

Specific and articulable facts required. — What is demanded of police officer, as agent of state, is a founded suspicion, some necessary basis from which the court can determine that the detention was not arbitrary or harassing. *Brisbane v. State*, 233 Ga. 339, 211 S.E.2d 294 (1974).

Where investigatory detentions made without probable cause have been approved, the police have had some reason to suspect that criminal activity had either taken place, was in progress, or was about to take place at the time of the detention. *Brooks v. State*, 144 Ga. App. 97, 240 S.E.2d 593 (1977).

In some circumstances, officer may detain suspect briefly for questioning although the officer does not have probable cause to believe that the suspect is involved in criminal activity as is required for a traditional arrest. However, the officer must have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *Bowers v. State*, 151 Ga. App. 46, 258 S.E.2d 623 (1979), aff'd, 245 Ga. 367, 265 S.E.2d 57 (1980).

Initial investigative stop, in order to be lawful, must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *United States v. Roundtree*, 596 F.2d 672 (5th Cir.), cert. denied, 444 U.S. 871, 100 S. Ct. 149, 62 L. Ed. 2d 96 (1979); *State v. Misuraca*, 157 Ga. App. 361, 276 S.E.2d 679, cert. denied, 454

U.S. 846, 102 S. Ct. 163, 70 L. Ed. 2d 133 (1981); *Howell v. State*, 160 Ga. App. 479, 287 S.E.2d 294 (1981).

Reasonable suspicion must be based upon specific articulable facts, together with rational inferences from those facts known at the time of the stop to the officers effecting the stop. *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980).

Articulable suspicion for mere verbal encounter not required. — State is not required to show an articulable suspicion to justify initiation of a mere verbal encounter with suspect. *State v. Willis*, 207 Ga. App. 76, 427 S.E.2d 306 (1993).

Officer is entitled to assess the facts in light of the officer's experience. *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980).

Requirement of reasonable suspicion prior to detention. — While in some circumstances a person may be detained briefly, without probable cause to arrest the person, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. *Reid v. Georgia*, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980).

"Random stop" is impermissible and evidence derived from such a seizure and/or search is inadmissible. *United States v. Turner*, 628 F.2d 461 (5th Cir. 1980), cert. denied, 451 U.S. 988, 101 S. Ct. 2325, 68 L. Ed. 2d 847 (1981).

Officer need not indicate subjective fear of defendant or that the officer personally suspected that defendant was armed to justify decision to stop and search defendant. *Graves v. State*, 138 Ga. App. 327, 226 S.E.2d 131 (1976).

Mere unlikelihood insufficient to authorize invasion of privacy. — The mere fact that an officer feels it is unlikely that an individual has regular business where the individual is found is not sufficient alone to authorize an intrusion to an individual's right of privacy. The state must be able to point to specific and articulable facts that, together with rational inferences drawn therefrom, reasonably warrant an intrusion. *Howard v. State*, 150 Ga. App. 847, 258 S.E.2d 652 (1979).

Intrusions into areas of privacy based on exigencies as they appear to officers involved. — Even though acts of peace officers

Investigative Stops (Cont'd)**1. In General (Cont'd)**

in detaining and questioning a citizen are necessarily a curtailment of the citizen's right to go about one's business unmolested (i.e., a seizure of the person) and because investigation and questioning are necessary elements of crime prevention and detection, the exigencies of the situation as they reasonably appear at the time to the officer involved must dictate the extent of intrusion into constitutionally protected areas. *State v. Misuraca*, 157 Ga. App. 361, 276 S.E.2d 679, cert. denied, 454 U.S. 846, 102 S. Ct. 163, 70 L. Ed. 2d 133 (1981).

Justification of officer's restraining individual's freedom. — To justify a police officer's action in accosting an individual and restraining the individual's freedom to walk away, the state must be able to point to specific and articulable facts, which, together with rational inferences drawn therefrom, reasonably warrant the intrusion. If no circumstances at all appear that might give rise to an articulable suspicion (less than probable cause, but greater than mere caprice) that the law has been violated, the act of following and detaining a vehicle and its occupants must be judged as an impermissible intrusion on the rights of the citizen. *Brisbane v. State*, 233 Ga. 339, 211 S.E.2d 294 (1974).

Defendants were not unlawfully detained, where their encounter with plain-clothed police officers was not drawn out or prolonged and defendants were not addressed in a harsh or threatening manner or subjected to physical duress or threat of physical injury. *State v. Jackson*, 201 Ga. App. 810, 412 S.E.2d 593 (1991).

Profile characteristics alone will not give rise to requisite reasonable suspicion necessary to justify investigatory stop. *United States v. Herbst*, 641 F.2d 1161 (5th Cir.), cert. denied, 454 U.S. 851, 102 S. Ct. 292, 70 L. Ed. 2d 141 (1981).

Suspicious looking defendants. — Officer's stop of defendant was not justified on the basis that defendant "looked suspicious" and "like [defendant] was getting ready to run." *Barnes v. State*, 228 Ga. App. 44, 491 S.E.2d 116 (1997).

Information sufficiently reliable to justify "stop and frisk" and subsequent admission. — Where an informant's unverified tip may

have been insufficient for a narcotics arrest or search warrant, the information nevertheless carried enough indicia of reliability to justify the officer's forcible stop and frisk of the defendant, and the fruits of the search were admissible evidence. *Graves v. State*, 138 Ga. App. 327, 226 S.E.2d 131 (1976).

Communication of information between officers. — Reasonable suspicion required to make investigative stop may exist on collective knowledge of police when there is reliable communication between the officer supplying the information and the officer acting on that information. *United States v. Allison*, 616 F.2d 779 (5th Cir.), cert. denied, 449 U.S. 857, 101 S. Ct. 156, 66 L. Ed. 2d 72 (1980).

Communication by citizen to officer. — An investigatory stop of defendant was not justified by the fact that defendant was riding a bicycle in an area where drug use was known to occur, and approached police officers stating, "I believe that you all are looking for me." *State v. Taylor*, 226 Ga. App. 690, 487 S.E.2d 454 (1997).

Officer answering official call has not only a right but a duty to investigate suspicious circumstances. A police officer need not have probable cause before officer can begin investigating persons or circumstances which to the officer appear suspicious. *United States v. Allen*, 472 F.2d 145 (5th Cir. 1973).

Arrests based on reports of witnesses. — When the police received a call to be on the lookout for a car which had been involved in a shooting and the car in question roughly fit the description given for the lookout, this provided the basis for an articulable suspicion justifying the stop. *McGhee v. State*, 253 Ga. 278, 319 S.E.2d 836 (1984).

Informant's tip as probable cause to stop suspect. — While an unverified tip from an unknown informant may not supply probable cause for a search or a warrant, if the information carries enough indicia of reliability, it will authorize a forcible stop of a suspect to maintain the status quo momentarily while obtaining more information. *State v. Rhule*, 197 Ga. App. 47, 397 S.E.2d 556 (1990).

An unsupported anonymous tip leading to police officer's stop of defendant solely on the basis that defendant was arguably in the company of another person who fit the

description provided in the tip, was insufficient to support a search of the defendant. *Archer v. State*, 217 Ga. App. 257, 456 S.E.2d 754 (1995).

Observation of drinking driver. — Merely observing a can of beer in the hand of one who is otherwise driving a car or operating a boat in a safe manner constitutes an articulable suspicion that a violation of O.C.G.A. § 40-6-391 or O.C.G.A. § 52-7-12 may be occurring so as to authorize a brief investigatory stop. *State v. Baker*, 197 Ga. App. 1, 397 S.E.2d 554 (1990).

Police officer, who was responding to a store burglar alarm, had sufficient “articulable suspicions” to stop defendants’ car, where it was after midnight on a snowy evening, no businesses were open in the area, and the car was nearly identical to one described in a police “lookout.” *Evans v. State*, 183 Ga. App. 436, 359 S.E.2d 174 (1987).

Once a stop becomes a seizure, it can be constitutional only if based upon reasonable suspicion. *Bothwell v. State*, 250 Ga. 573, 300 S.E.2d 126, cert. denied, 463 U.S. 1210, 103 S. Ct. 3545, 77 L. Ed. 2d 1393 (1983).

Request for ticket and identification at airport. — Where a federal narcotics agent, who was dressed casually and did not display a weapon, requested, but did not demand, defendant’s ticket and identification at an airport, the agent’s approach was not a seizure. *Rolle v. State*, 198 Ga. App. 507, 402 S.E.2d 106 (1991).

Officers’ approach and questioning of defendant was not a seizure where they asked to see the defendant’s airplane ticket and identification and promptly returned the materials before asking if they could make a patdown search of the defendant’s outer clothing. *Aranda v. State*, 226 Ga. App. 157, 486 S.E.2d 379 (1997).

Police officer’s encounter with defendant became a seizure for fourth amendment purposes because the officer retained defendant’s license and registration and probed into arrested person’s possession of contraband or weapons, and defendant was in a remote area off an interstate highway, hundreds of miles from home, with only the defendant’s van for transportation. Defendant was immobilized without a driver’s license and so the encounter matured from a routine traffic inquiry into an investigative

stop. *Rogers v. State*, 206 Ga. App. 654, 426 S.E.2d 209 (1992).

Request to move to lighted area. — Police officer’s request that defendant move into a better-lighted area was a reasonable protective measure and did not become an illegal arrest. *Chaney v. State*, 207 Ga. App. 72, 427 S.E.2d 63 (1993).

Drawing of weapons by police. — Fact that a police officer had weapon drawn at the time defendant was stopped was reasonable and did not, in and of itself, transform the stop and search into an illegal arrest where upon approaching the defendant the officer believed that a concealed weapon was seen under defendant’s shirt. *Edwards v. State*, 165 Ga. App. 527, 301 S.E.2d 693 (1983).

Where police officers had seen the defendant remove a shiny silver object from the waistband of the defendant’s pants, the mere fact that at least one of the officers had drawn a weapon prior to the actual confrontation with the defendant did not, in and of itself, transform the officers’ authorized investigatory reactions to the defendant’s suspicious activity into an illegal arrest. *State v. Grimes*, 195 Ga. App. 773, 395 S.E.2d 42 (1990).

Investigatory stop is not automatically an arrest simply because officer is armed with shotgun. *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

Questioning suspect despite insufficient probable cause for warrant. — If an officer reasonably concludes that there is insufficient evidence to establish probable cause for the issuance of a warrant because of an incomplete auto license number, and lack of certainty of the time and place of an intercept, this does not require the officer to turn one’s back and walk away and permit a crime to occur. While an unverified tip from an unknown informant may not supply probable cause for a search or a warrant, if the information carries enough indicia of reliability, it will authorize a forcible stop of a suspect to maintain the status quo momentarily while obtaining more information. *State v. Bassford*, 183 Ga. App. 694, 359 S.E.2d 752 (1987).

Search incidental to an investigative stop cannot be justified by any need to prevent the disappearance or destruction of evidence of a crime. *State v. Stephens*, 167 Ga.

Investigative Stops (Cont'd)**1. In General (Cont'd)**

App. 707, 307 S.E.2d 518 (1983).

Investigatory stop does not automatically justify search. — An informant's tip, which provided a police officer with sufficient articulable facts to make an investigatory stop of defendant, did not justify a search where, once the defendant was stopped, the officer conducted no investigation or questioning of the suspect but immediately commenced the search. *Rucker v. State*, 199 Ga. App. 854, 406 S.E.2d 277 (1991).

Officer's authority after valid stop. — Having effected a valid traffic stop, the officer was authorized to request the defendant's name and date of birth since the defendant did not have the defendant's driver's license even though the defendant could provide the officer with the vehicle registration and proof of insurance. *Darby v. State*, 239 Ga. App. 492, 521 S.E.2d 438 (1999).

Brief pat-down of automobile passenger permissible. — A brief pat-down search of an automobile passenger for weapons prior to a search of the automobile was permissible, where the time required to complete the automobile search, and thereby determine whether or not there was probable cause to make an arrest, was probably a matter of minutes. *Lindsey v. Storey*, 936 F.2d 554 (11th Cir. 1991).

Traveler's luggage containing narcotics. — If an officer's observations lead the officer reasonably to believe that a traveler is carrying luggage which contains narcotics, the officer may detain the luggage briefly to investigate the circumstances that initially aroused the officer's suspicion, provided that the detention is properly limited in scope. *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984).

Initial stop held valid. — Under the facts known to the police officer and the physical observations available to the officer at the time of the stop, and considering officer's limited response and actions, the initial stop was not an abuse of state action and not in violation of any rights protected by U.S. Const., amend. 4. *State v. Misuraca*, 157 Ga. App. 361, 276 S.E.2d 679, cert. denied, 454 U.S. 846, 102 S. Ct. 163, 70 L. Ed. 2d 133 (1981).

Police officer was authorized to conduct a brief on-the-scene investigative detention, where officer observed defendant and two companions sitting for no apparent reason in a parked automobile in a remote part of a motel parking lot located in a "high crime area" at 4:45 a.m. *Bozeman v. State*, 196 Ga. App. 743, 397 S.E.2d 30 (1990).

An investigatory stop by GBI agents was proper because (1) the agents were suspicious that the defendant was carrying drugs because they had information that defendant's cousin flew to Fort Lauderdale, a known drug-source city, to get drugs and bring them back to Atlanta, that cousin was traveling with the defendant, and that the drugs were likely strapped to the defendant's body; (2) the agents observed the defendant and the cousin deplane and then wait in and leave the baggage claim area with no checked baggage; and (3) the agents observed the men go to the taxicab stand and prepare to take a taxicab, as predicted by the informant. *Solomon v. State*, 237 Ga. App. 655, 513 S.E.2d 520 (1999).

The defendant's known history of selling drugs within two blocks of the area in question, i.e. defendant's home, defendant's presence from 4:00 P.M. to 1:08 A.M. alone in a chair in defendant's driveway beside a car on a street corner known for heavy drug sales, the presence of a large amount of cash in defendant's pocket, defendant's extreme nervousness at the approach of the officers, and defendant's abruptly volunteered assertions that "What did I do? I ain't got nothing on me." were sufficient to provide reasonable articulable suspicion that the defendant might have been engaged in drug sales so as to permit an investigative detention and questioning. *Williams v. State*, 249 Ga. App. 119, 547 S.E.2d 679 (2001).

Second investigatory stop supported by articulable suspicion. — Defendant's suppression motion was properly denied, even though an officer lacked a reasonable suspicion of criminal activity to support a first investigatory stop, as defendant's flight after the officer's general questions, defendant's suspicious claim that defendant was biking home from a job 10 miles away, and defendant's proximity to a car with flashing lights consistent with a triggered car alarm, supported a second investigatory stop; the evidence defendant sought to suppress was

obtained after the second investigatory stop. *Crowley v. State*, 267 Ga. App. 718, 601 S.E.2d 154 (2004).

Observation of attempt to hide objects. — Police officers had articulable suspicion to justify investigative detention of two youths in a parked car in an empty lot where the youths attempted to hide objects under the car seat when the officers' presence was noted. *State v. Hodges*, 184 Ga. App. 21, 360 S.E.2d 903, cert. denied, 184 Ga. App. 910, 360 S.E.2d 903 (1987).

Blocking suspect's path. — A police officer's action in blocking a suspect's path to ascertain identity and the purpose for being in an area known for drug transactions constituted a brief seizure that had to be supported by reasonable suspicion. *Gonzalez v. State*, 235 Ga. App. 253, 509 S.E.2d 144 (1998).

Pat-down search not justified. — Officer's mere hunch that defendant was involved with drugs and that drugs were linked to violence did not justify a Terry pat-down for weapons. *State v. King*, 227 Ga. App. 466, 489 S.E.2d 361 (1997).

Rights of probationers. — Trial court did not err when it revoked defendant's probation after defendant tried to run from officers and six or seven dime bags of marijuana were found in defendant's pocket; the brief, investigatory detention that led to defendant's arrest was based on a reasonable suspicion, and defendant waived defendant's fourth amendment rights when defendant agreed to the special condition of defendant's probation. *Witcher v. State*, 258 Ga. App. 430, 574 S.E.2d 455 (2002).

2. Vehicle Stops

When stop authorized. — Authorized officer may stop automobile and conduct a limited investigative inquiry of its occupants, without probable cause, if the officer has reasonable grounds for such action. A founded suspicion is all that is necessary. There must be some basis from which the court can determine that the detention was not arbitrary or harassing. *State v. Misuraca*, 157 Ga. App. 361, 276 S.E.2d 679, cert. denied, 454 U.S. 846, 102 S. Ct. 163, 70 L. Ed. 2d 133 (1981).

Test to be used in determining whether a particular vehicular stop passes constitutional muster is whether a reasonable officer,

who is presented with the same facts available to the arresting officer, would have made the stop in the absence of an illegitimate motive. *United States v. Harris*, 716 F. Supp. 1470 (M.D. Ga. 1989), aff'd, 928 F.2d 1113 (11th Cir. 1991).

The two possible justifications for stopping an automobile are when the police officer has probable cause to believe that the driver is committing a traffic violation and when an investigatory stop is supported by articulable suspicion of criminal conduct. *United States v. Skinner*, 957 F. Supp. 228 (M.D. Ga. 1997).

When a police officer sees a traffic offense occur, a resulting traffic stop does not violate the fourth amendment, even if the officer has ulterior motives in making the stop. *State v. Harris*, 236 Ga. App. 525, 513 S.E.2d 1 (1999).

Because it was undisputed that the defendant was driving on a suspended license, it was error for the trial court to hold that the stop was pretextual and therefore invalid. *State v. Harris*, 236 Ga. App. 525, 513 S.E.2d 1 (1999).

A traffic stop was not "pretextual" when an officer saw a traffic offense occur, even if the officer had ulterior motives in initiating the stop, and even if a reasonable officer would not have made the stop under the same circumstances. *Clark v. State*, 243 Ga. App. 362, 532 S.E.2d 481 (2000).

Behavior giving rise to an officer's reasonable suspicion to support a traffic stop need not be a violation of the law; even if the driver's actions do not amount to a per se traffic violation, an officer may have a reasonable, articulable suspicion that a traffic offense was being committed. The question to be decided in reviewing traffic stops is whether the officer's motives and actions at the time of the traffic stop and under all the circumstances, including the nature of the officer's mistake, if any, were reasonable and not arbitrary or harassing. *State v. Keddington*, 264 Ga. App. 912, 592 S.E.2d 532 (2003).

After an officer observed defendant's vehicle parked at a baseball park where there was no activity, saw a wide-eyed, scared look on the face of defendant's passenger, approached the passenger's side of the car, asked the passenger to roll down the passenger's window, and defendant and the passen-

Investigative Stops (Cont'd)**2. Vehicle Stops (Cont'd)**

ger gave conflicting reasons for why they were there, the officer had a reasonable suspicion of criminal activity which allowed the officer to ask the passenger to exit the vehicle. *Akins v. State*, 266 Ga. App. 214, 596 S.E.2d 719 (2004).

Since the defendant ignored the officers' commands during an investigatory stop based on a tipster's report of illegal drug activity, fled from the scene, and led the officers on a chase in violation of O.C.G.A. § 40-6-395(a), any taint arising from the allegedly illegal stop was purged and the defendant's flight provided a legitimate basis for discovery of evidence in the defendant's car. *Prather v. State*, 279 Ga. App. 873, 633 S.E.2d 46 (2006).

Stop held invalid. — Defendant was subjected to an improper Terry stop when the defendant was stopped and ordered to exit the vehicle as the police did not have specific articulable facts sufficient to give rise to a reasonable suspicion that the defendant was engaged in criminal conduct since the defendant was not a subject of a search warrant the officers were executing, the defendant had not committed any traffic violations, and the defendant's vehicle was not within the curtilage of the home subject to the search warrant. *Reynolds v. State*, 280 Ga. App. 712, 634 S.E.2d 842 (2006).

Authority to make routine traffic stop. — The fact that the state trooper who spotted a traffic violation by defendants was trained to be vigilant for drug traffickers would not alter the trooper's authority to make a routine traffic stop. *Coop v. State*, 186 Ga. App. 578, 367 S.E.2d 836, cert. denied, 186 Ga. App. 917, 367 S.E.2d 836 (1988).

Where an arresting officer witnessed a driver breaking even a relatively minor traffic law, denial of a motion to suppress, based on the argument that the stop was pretextual, was required. *State v. Reddy*, 236 Ga. App. 106, 511 S.E.2d 530 (1999).

Defendant was not illegally stopped under U.S. Const., amend. 4 because the deputy observed that the defendant improperly change lanes. *Tri Huynh v. State*, 239 Ga. App. 62, 518 S.E.2d 920 (1999).

Reposing an unfettered discretion in a field officer to stop and start a roadblock at

will (randomly), based on a vague and undocumented articulation of public safety, rendered the roadblock unreasonable. *State v. Manos*, 237 Ga. App. 699, 516 S.E.2d 548 (1999).

When an officer sees a traffic offense occur, a resulting traffic stop does not violate the fourth amendment even if the officer has ulterior motives in initiating the stop, and even if a reasonable officer would not have made the stop under the same circumstances. *Maxwell v. State*, 249 Ga. App. 747, 549 S.E.2d 534 (2001).

Stop of a vehicle that was being operated with a dealer's drive-out tag that appeared faded or weathered was authorized for the purpose of investigating compliance with the state's registration law. *Chiasson v. State*, 250 Ga. App. 63, 549 S.E.2d 503 (2001).

Stop based on obstructed license plate proper. — A police officer properly stopped the defendant's vehicle after noticing that the vehicle had a black plate that bordered and partially concealed its license tag. *Nelson v. State*, 247 Ga. App. 455, 544 S.E.2d 189 (2001).

Stop of vehicle that fit description of vehicle used in recent robbery. — Alabama police were justified in stopping a car that fit the description of a vehicle that two robbers entered after they robbed a victim in Georgia and detaining the occupants until Georgia police arrived with the victim, and the trial court properly denied defendant's motion to suppress evidence which police found in the car and the victim's testimony identifying two defendants who were in the car as the persons who robbed the victim. *Garlington v. State*, 268 Ga. App. 264, 601 S.E.2d 793 (2004).

Car abandoned by fleeing defendant. — Since during the course of the defendant's flight from officers during an investigatory stop, the defendant abandoned the vehicle and ran on foot, the officers were authorized to search the vehicle; the protection of the fourth amendment did not apply to property which had been abandoned. *Prather v. State*, 279 Ga. App. 873, 633 S.E.2d 46 (2006).

Stop based on unknown insurance status not authorized. — Computer's return of "unknown" in response to a query regarding the insured status of a vehicle did not create a reasonable suspicion of criminal activity; thus, an officer's stop of the defen-

dant's car solely on the basis of an "unknown" insurance status was improper, the later search of the car was tainted, and the trial court properly suppressed its results. *State v. Dixon*, 280 Ga. App. 260, 633 S.E.2d 636 (2006).

Probable cause was not necessary to justify brief investigative stop of automobile. *State v. Watson*, 205 Ga. App. 313, 422 S.E.2d 202 (1992).

Duration of stop as affecting reasonableness. — Investigative stop of defendants and their automobile, which lasted approximately 50 minutes, was not impermissible, where officers acted with propriety, particularly in avoiding any questioning of defendants while waiting for the arrival of a narcotics dog. *United States v. Hardy*, 855 F.2d 753 (11th Cir. 1988), cert. denied, 489 U.S. 1019, 109 S. Ct. 137, 10 L. Ed. 2d 198 (1989).

Defendant's detention for 30 minutes while a state trooper waited for the arrival of a drug dog and magistrate constituted an arrest which was supported by probable cause, where the trooper was warranted, under the circumstances, in believing that defendant was transporting contraband in the trunk of a rental automobile. *Schmidt v. State*, 188 Ga. App. 85, 372 S.E.2d 440 (1988), cert. denied, 489 U.S. 1014, 109 S. Ct. 1126, 10 L. Ed. 2d 188 (1989).

Scope and duration of stop not impermissibly expanded. — Trial court erred in suppressing evidence found in a consensual search of a car in which defendant was a passenger as the police officer did not impermissibly expand the scope or the duration of a valid traffic stop for an improperly displayed tag in violation of O.C.G.A. § 40-2-41 by determining the status of the driver's license and whether the driver or defendant had outstanding warrants against them; even though 26 minutes into the stop the officer had not yet written the driver a ticket for the improperly displayed tag, the officer was not required to write the ticket and conclude the stop prior to diligently completing the background checks, which were delayed by the driver's admission that the driver might have had an outstanding warrant in another county that the officer had not discovered, and investigating the officer's reasonable suspicions regarding alcohol and open containers arising out of the officer's knowledge of another officer's en-

counter with the individuals earlier in the evening. *State v. Williams*, 264 Ga. App. 199, 590 S.E.2d 151 (2003).

Officer's request to search defendant's car while a check of defendant's driver's license was in progress was not intrusive, lengthy, or extraneous, and did not unreasonably expand the scope or duration of the valid traffic stop. *State v. Mauerberger*, 270 Ga. App. 794, 608 S.E.2d 234 (2004).

License and registration checks. — Because the driver and passenger were making some movements on the back seat as if to cover up something, an officer had articulable grounds for suspicion, particularly in an area in which recent burglaries had occurred, sufficient to justify a stop for license check and identification. *State v. Purdy*, 147 Ga. App. 340, 248 S.E.2d 683 (1978).

Officer's inspection of driver's operator's license and identification, incidental to stopping the vehicle based on an articulable suspicion of possible criminal behavior, did not violate U.S. Const., amend. 4. *Jackson v. State*, 155 Ga. App. 386, 271 S.E.2d 32 (1980).

Because a police officer was justified in placing the defendant in the patrol car for the duration of the license check after observing the defendant trying to hide something under the seat of the car, the officer's conduct obviously was undertaken to maintain the status quo during the course of a reasonable investigative stop, and thus did not constitute a de facto arrest. *Thomas v. Newsome*, 821 F.2d 1550 (11th Cir.), cert. denied, 484 U.S. 967, 108 S. Ct. 461, 98 L. Ed. 2d 401 (1987).

Where defendants argued that a state trooper had the right pursuant to O.C.G.A. § 40-5-29 (see now O.C.G.A. § 40-2-31) to ask a driver to display the driver's license but that the state trooper did not have the right to demand the vehicle's registration or its rental documents because of the provisions of O.C.G.A. § 40-2-90(b)(2), so that detention was unreasonable, it was held that by its terms, O.C.G.A. § 40-2-90(b)(2) gives visitors to the state the right to use and operate motor vehicles on the public streets and highways for pleasure purposes only for 90 days without registering the vehicle, but this did not restrict a law enforcement officer from performing the officer's duty when

Investigative Stops (Cont'd)**2. Vehicle Stops (Cont'd)**

stopping a visiting motorist for a traffic violation. *Coop v. State*, 186 Ga. App. 578, 367 S.E.2d 836, cert. denied, 186 Ga. App. 917, 367 S.E.2d 836 (1988).

An officer appropriately stopped defendant because, based on officer's prior experience with defendant and officer's knowledge that defendant's license had been suspended, it would not have been unreasonable for the officer to suspect that the license suspension remained in effect and that defendant was violating the law by driving. *Johnson v. State*, 246 Ga. App. 197, 540 S.E.2d 212 (2000).

After defendant showed defendant's registration to an officer who had stopped defendant's vehicle on suspicion that it was not registered, the investigation for which the officer had originally stopped defendant concluded; as the officer's subsequent request to see defendant's driver's license was not based on any reasonable suspicion that defendant lacked one, this request exceeded the scope of the initial detention and evidence that defendant did not have a license was properly suppressed. *State v. Joyner*, 270 Ga. App. 533, 607 S.E.2d 184 (2004).

High-speed pursuit. — In an arrestee's 42 U.S.C. § 1983 suit that alleged that the arrestee's fourth amendment right against the use of excessive force was violated when a sheriff's deputy crashed a cruiser into the car during a high-speed pursuit, rendering the arrestee a quadriplegic, the arrestee's deliberate indifference claim against the county was dismissed on summary judgment because the county's official policy of permitting deputies to use their own judgment in deciding when to make high-speed stops was not unconstitutional. *Harris v. Coweta County*, F. Supp. 2d , 2003 U.S. Dist. LEXIS 27348 (N.D. Ga. Sept. 25, 2003).

Detention to investigate car rental status. — Reasonable suspicion supported the detention of the defendant following the stop of the defendant's vehicle because neither the defendant driver nor the defendant's passenger were wearing seatbelts since a car rental agreement displayed by the defendant had expired, and the officer contacted the car rental agency to ensure that the defendant had not converted the vehicle.

Crenshaw v. State, 248 Ga. App. 505, 546 S.E.2d 890 (2001).

Use of a trained drug detection dog. — Using a dog to sniff for evidence of narcotics is not a search, and may, under proper circumstances, be utilized as part of the investigation conducted within the limited scope of a Terry stop. *State v. Foster*, 209 Ga. App. 143, 433 S.E.2d 109 (1993).

Record supported the trial court's judgment that a vehicle checkpoint that was established to check drivers' licenses, registrations, and proof of insurance was established for a legitimate purpose, that a police officer did not violate defendant's rights when the officer walked a drug detection dog around defendant's car while another officer was checking the validity of defendant's driver's license, and that police had probable cause to search defendant's car after the dog alerted on it. *McCray v. State*, 268 Ga. App. 84, 601 S.E.2d 452 (2004).

Use of drug dog during stop. — After the defendant was validly detained following a traffic stop, the arresting officer was free to have a dog handler walk a drug detection dog around the car, as use of a trained drug detection dog, in a location where it is entitled to be, to sniff the exterior of a car, is not an unreasonable search. *Crenshaw v. State*, 248 Ga. App. 505, 546 S.E.2d 890 (2001).

Canine sniff of vehicle improper. — A canine sniff of the defendant's vehicle, which occurred after the conclusion of the arresting officer's investigation into the dealer's drive-out license tag on the vehicle, was improper as the arresting officer did not have reasonable suspicion of criminal conduct and conducted the canine sniff based on merely a hunch that drugs might be found in a garbage bag seen in the car. *Berry v. State*, 248 Ga. App. 874, 547 S.E.2d 651 (2001), aff'd sub nom. *Gober v. State*, 275 Ga. 356, 566 S.E.2d 317 (2002).

Terry search of auto passenger. — A Terry pat-down search is authorized when the officer reasonably believes that it is necessary to protect the officer from attack, including the search of passengers in vehicles omitted from the original police notifications. *Dowdy v. State*, 209 Ga. App. 311, 433 S.E.2d 293 (1993).

Pat-down of operator justified. — An officer was justified in conducting a pat-down

search of the defendant and defendant's jacket for the officer's safety because: (1) after stopping defendant for operation of a motorcycle without a headlight, the defendant took off the jacket, laid it on the motorcycle and walked over to the officer's car door before the officer had stopped the officer's own vehicle; (2) after telling defendant to step back, take off the helmet and produce a license, the defendant moved back to the motorcycle; and (3) the officer noticed that the defendant's pupils were constricted which, based on the officer's training, meant that the defendant might be under the influence of drugs. *Sikes v. State*, 247 Ga. App. 855, 545 S.E.2d 73 (2001).

Roadblocks. — The trial court improperly suppressed evidence found as a result of a roadblock when it incorrectly relied upon non-binding provisions in a county employee handbook relating to roadblocks in determining the propriety of the roadblock. *State v. Dymond*, 248 Ga. App. 582, 546 S.E.2d 69 (2001).

A license and insurance check roadblock was properly set up and operated, and evidence found as a result of the roadblock was not subject to suppression since, because it was drizzling rain and the road was slick, a determination was made that it was unsafe to allow any cars to back up on the roadway, and cars were allowed to proceed through the roadblock when all the officers on duty were busy with other cars. *Hodges v. State*, 248 Ga. App. 295, 546 S.E.2d 54 (2001).

Driving under the influence roadblock was proper where the decision to set up the roadblock was made by a supervisory officer, where the roadblock served a legitimate purpose, where all vehicles were stopped at the roadblock, where the screening officer had prior training and experience with respect to driving under the influence arrests, where the delay to motorists was minimal, and where the roadblock was well identified by reflective signs with flashing strobe lights, several police cars, and officers dressed in reflective gear; therefore, the police had every right to stop defendant at the roadblock, and a stop of defendant's vehicle after defendant avoided the roadblock was authorized. *Dale v. State*, 267 Ga. App. 897, 600 S.E.2d 763 (2004).

General investigative roadblock to question people regarding a murder in the area

served a "legitimate primary purpose," and was legal; a trial court's denial of defendant's motion to suppress evidence seized from defendant after defendant stopped before reaching the roadblock was proper. *Strickland v. State*, 270 Ga. App. 187, 605 S.E.2d 890 (2004).

Despite the defendant's claim on appeal that evidence was obtained by police conducting an illegal roadblock and that an arbitrary desire to keep officers busy was not a sufficient purpose to justify the roadblock, the trial court properly denied a motion to suppress evidence seized from the roadblock, as its primary purpose was to check for drivers' licenses, seat belts, and vehicle registrations, and not general law enforcement. *Cater v. State*, 280 Ga. App. 891, 635 S.E.2d 246 (2006).

Roadblock based on anonymous tip or hearsay. — Roadblock was not unreasonable or an invasion of fourth amendment rights, even though the reasons for setting it up were founded upon an anonymous tip or hearsay. *Brimer v. State*, 201 Ga. App. 401, 411 S.E.2d 128 (1991).

Proper training of screening officer at roadblock. — A screening officer at a roadblock had sufficient training since the officer: (1) was a ten-year veteran of the police department; (2) had received training in DUI detection at the police academy when the officer first became a police officer and at several of the annual in-service training sessions the officer attended over ten years; and (3) had "on-the-job training" dealing with intoxicated people, making, on average, one DUI arrest per month which the officer calculated to be over one hundred arrests over ten years. *Wrigley v. State*, 248 Ga. App. 387, 546 S.E.2d 794 (2001), cert. denied, 534 U.S. 1129, 122 S. Ct. 1068, 151 L. Ed. 2d 971 (2002).

Roadblock purpose was proper. — A roadblock conducted only by the motorcycle squad, backed up by the DUI countermeasures team, was conducted for a proper purpose, notwithstanding that the roadblock was part of a larger operation aimed at general crime control. *Wrigley v. State*, 248 Ga. App. 387, 546 S.E.2d 794 (2001), cert. denied, 534 U.S. 1129, 122 S. Ct. 1068, 151 L. Ed. 2d 971 (2002).

Defendant's detention and search at a police roadblock was not an unconstitu-

Investigative Stops (Cont'd)**2. Vehicle Stops** (Cont'd)

tional search and seizure because the roadblock was implemented as a safety check-point based on a number of citizen complaints about drunken and reckless drivers in the area. *Hardin v. State*, 277 Ga. 242, 587 S.E.2d 634 (2003).

Roadblock purpose was improper. — Trial court properly granted defendant's motion in limine to suppress evidence gathered from defendant at a roadblock as a substantial basis existed for the trial court's decision that the roadblock violated the fourth amendment since a police officer admitted at the suppression hearing that the roadblock was set up with a primary purpose of general law enforcement, which was a constitutionally impermissible reason for a roadblock since the individualized suspicion of wrongdoing was absent. *State v. Ayers*, 257 Ga. App. 117, 570 S.E.2d 603 (2002).

Roadblock lacked the necessary supervisory approval where a written authorization showed that the roadblock was only authorized for one day, the day after the car occupied by defendant was stopped; a trial court's finding that the roadblock was unauthorized was not clearly erroneous, and without supervisory approval, the roadblock violated the fourth amendment. *State v. Morgan*, 267 Ga. App. 728, 600 S.E.2d 767 (2004).

Alleged avoidance of roadblock. — Officer's mere intuition that defendant was avoiding a roadblock by turning into a residential complex was not sufficient to justify a stop. *Jorgensen v. State*, 207 Ga. App. 545, 428 S.E.2d 440 (1993).

Failure to signal. — Stop of defendant for failure to signal when defendant pulled into the left turn lane was authorized and, following the stop, the officer was entitled to execute a pat-down search for weapons. *Buffington v. State*, 229 Ga. App. 450, 494 S.E.2d 272 (1997).

Erratic driving where the vehicle was impeding the flow of traffic and was weaving within its lane. *Gabbidon v. State*, 184 Ga. App. 475, 361 S.E.2d 861 (1987).

Stop of defendant's vehicle was not unconstitutional, where defendant weaved into the emergency lane on two separate occasions during a one-mile stretch on an interstate

highway, and the officer who stopped the defendant did not make the stop until the defendant weaved the second time. *United States v. Harris*, 716 F. Supp. 1470 (M.D. Ga. 1989), *aff'd*, 928 F.2d 1113 (11th Cir. 1991).

Where a state trooper stopped defendant's vehicle after observing it weave two or three times across the yellow line setting off the shoulder from the travelled portion of the highway, there was adequate support for concluding that the stop was based on an objective violation of a statute for which the state highway patrol regularly made stops, with or without suspicion of drug-related activity. *United States v. Pollock*, 926 F.2d 1044 (11th Cir.), *cert. denied*, 502 U.S. 985, 112 S. Ct. 593, 116 L. Ed. 2d 617 (1991).

Although an anonymous informant's reliability was not established, defendant's traffic violations, including driving at speeds in excess of 65 mph and a subsequent collision with a telephone pole as well as the vehicle driven by agents, all of which occurred in the presence of the agents, were sufficient to authorize an investigatory stop; indeed, they had a duty to stop defendant's vehicle. *Weaver v. State*, 208 Ga. App. 105, 430 S.E.2d 60 (1993).

Information provided by a concerned citizen who witnessed defendant's erratic driving behavior, along with the officer's observations when the officer arrived at the scene, gave the officer reasonable grounds to block defendant's truck. *Sayers v. State*, 226 Ga. App. 645, 487 S.E.2d 437 (1997).

Police officer who witnessed driver weaving from the driver's lane to the curb lane had reasonable information to believe that a criminal offense was being committed, and therefore had probable cause to stop the automobile. *State v. Bowen*, 231 Ga. App. 95, 498 S.E.2d 570 (1998).

Defendant's act of making a sudden and abrupt change in speed followed by a quick unsafe turn and backing maneuver was a sufficiently suspicious and furtive response to a police road check to warrant further investigation. *Castillo v. State*, 232 Ga. App. 354, 502 S.E.2d 261 (1998).

Officer had a reasonably articulable suspicion to stop defendant where officer saw defendant cross completely to the right lane marker and then drift to the left to partially cross the center line. *State v. Kirbabas*, 232 Ga. App. 474, 502 S.E.2d 314 (1998).

An officer properly stopped the defendant's vehicle because the defendant displayed two instances of weaving within the lane and also acted furtively by abruptly changing the course of travel as though to avoid encountering the police, who were visibly present. *Semich v. State*, 234 Ga. App. 89, 506 S.E.2d 216 (1998).

Lane changes without signaling. — The stop of the defendant's vehicle was proper since the arresting officer testified to observing the defendant abruptly change lanes three times without signaling, and that, including the officer's car, there were three or four cars on the roadway when the officer made the observations. *Johnson v. State*, 249 Ga. App. 29, 546 S.E.2d 922 (2001).

Detention pending computer check and arrival of backup. — State trooper's detention of defendant for approximately 33 minutes from time of a vehicle stop to time of signing of a consent to search and for a total period of approximately one and one-half hours from time of stop until defendant was turned over to local police authorities was not unreasonable, where the trooper was awaiting a response to a computer check and the arrival of a backup officer. *Mallarino v. State*, 190 Ga. App. 398, 379 S.E.2d 210 (1989), *aff'd*, 194 Ga. App. 212, 390 S.E.2d 114 (1990).

Asking identity of passenger who resembled escaped prisoner or the prisoner's sibling. — Where, based upon the personal knowledge concerning the escape of a prisoner and the recognition of the passenger in an automobile as being either the prisoner or the prisoner's sibling, an officer had an "articulable suspicion" that the passenger might be an escaped convict and asking the passenger the passenger's name was clearly a "reasonable" action for the officer to take in making an authorized-but-limited investigation concerning the identity of the passenger of the vehicle. *State v. Roberson*, 165 Ga. App. 727, 302 S.E.2d 591 (1983).

Officers may initially stop vehicle for inoperative brake lights. — The observation that the brake stop lights of a vehicle do not operate when stopping for a traffic light is sufficient basis for police officers to make an initial stop of a vehicle. *Wilson v. State*, 167 Ga. App. 148, 306 S.E.2d 16 (1983).

Investigatory stop authorized. — Investigatory stop was authorized given officer's

receipt of a police radio dispatch about suspicious behavior and the officer's own personal observation of such behavior involving the prolonged examination of automobiles by two individuals. *Hopkins v. State*, 209 Ga. App. 337, 433 S.E.2d 423 (1993).

When law enforcement received two anonymous tips that defendant would be traveling from another state with cocaine in a certain model car licensed in the other state, would be taking a certain route, and would be staying in a certain hotel, the tips' range of details relating to future acts not easily predicted allowed police to conduct an investigatory stop of defendant. *Solis v. State*, 268 Ga. App. 493, 602 S.E.2d 166 (2004).

Inconsistencies in the defendant's answers during a valid traffic stop raised an articulable suspicion that the defendant was involved in another crime, and thus deputies were authorized to detain and question the defendant; the vehicle's condition also led the deputies to believe that contraband was hidden in its roof; finally, the defendant consented to a search of the vehicle, so the defendant's motion to suppress cocaine which was found in a compartment of the roof of the defendant's vehicle was properly denied. *Perez v. State*, 280 Ga. App. 241, 633 S.E.2d 572 (2006).

Police officer entitled to stop driver in need of assistance. — A police officer does not need "probable cause" to stop a person where that person is driving at a very low rate of speed, stops on the road and the officer thinks that person needs assistance. *Hightower v. State*, 166 Ga. App. 177, 303 S.E.2d 515 (1983).

Furtive driving actions. — It was error to grant defendant's motion to suppress evidence of an armed robbery which was found in defendant's car, where the defendant was driving too closely behind a suspected vehicle being followed by police and was apparently attempting to frustrate the approaching officer's identification efforts. Such deliberately furtive actions, at the approach of law officers were strong indicia of mens rea, and gave the officers at least a reasonable suspicion of criminal activity to warrant further investigation. *State v. Chambers*, 194 Ga. App. 609, 391 S.E.2d 657 (1990).

Where officer testified that, as the officer approached defendant, the officer saw "the headlights of the defendant's truck bounce

Investigative Stops (Cont'd)**2. Vehicle Stops (Cont'd)**

up and down like [the defendant] either hit a curb real hard or hit the railroad ties real hard," this conduct, combined with the proximity of a roadblock, was sufficiently abnormal or unusual to justify a Terry-type (i.e., second-tier) stop. *Taylor v. State*, 249 Ga. App. 733, 549 S.E.2d 536 (2001).

Speeding. — In view of the testimony that defendant was driving in excess of the speed limit, the stop of the defendant's vehicle was justified and the contention that it was pretextual, fails. *Partridge v. State*, 187 Ga. App. 325, 370 S.E.2d 173 (1988), cert. denied, 187 Ga. App. 908, 370 S.E.2d 173 (1988).

When two officers stopped defendant and one officer (the driver) was unable to testify, there was reliable communication between the officer driving, who explained that defendant was speeding, and the testifying officer, as both officers acted jointly to conduct the stop and although the testifying officer could not testify on actual speed, the officers were acting in concert when stopping defendant. Thus, reasonable suspicion was established, and the trial court erred in granting the motion to suppress evidence. *State v. Pennyman*, 248 Ga. App. 446, 545 S.E.2d 365 (2001).

Officer's mistake as to offense for which vehicle was stopped. — Even though defendant's behavior did not technically violate the "laying drags" statute (O.C.G.A. § 40-6-251), the specific offense for which the officer stopped the defendant, the fact that defendant was driving in such a manner as to endanger others reasonably justified an investigative stop. *State v. Armstrong*, 223 Ga. App. 350, 477 S.E.2d 635 (1996).

Where an officer stopped defendant for driving through an intersection without the vehicle's headlights on, because the officer acted in good faith believing that an unlawful act had been committed, the officer's actions were not rendered improper by a later legal determination that defendant's actions were not a crime according to a technical legal definition or distinction determined to exist in the penal statute. *State v. Hammang*, 249 Ga. App. 811, 549 S.E.2d 440 (2001).

Intoxicated driver. — Police officer was authorized to stop a driver to determine if

the driver was intoxicated, but while a reasonable investigative stop does not offend against the fourth amendment, such a stop must be a brief stop, limited in time to that minimally necessary to investigate the allegation invoking suspicion, and limited in scope to identification and limited questioning reasonably related to the circumstances that justified the initiation of the momentary stop. *Raney v. State*, 186 Ga. App. 758, 368 S.E.2d 528 (1988).

Citizen's report of drunk driver. — The report of a "concerned citizen" driver that the citizen believed the driver of the car behind the citizen was drunk was a reasonable and articulable basis for suspicion by a police officer that the second driver might be driving under the influence of alcohol authorizing the officer to detain the driver briefly for the limited purpose of determining whether the driver in fact exhibited perceptible manifestations of intoxication. *State v. Noble*, 179 Ga. App. 785, 347 S.E.2d 722 (1986).

Anonymous tip sufficient to justify stop. — The reliability of an anonymous tip sufficient to justify an investigatory stop was established where: verified aspects of the tip predicted the time and location in which defendant would drive a described truck; it was indicated that the information was acquired by the personal observations of the caller; and aspects of the tip were corroborated by prior information the police had acquired about defendant. *Britton v. State*, 220 Ga. App. 120, 469 S.E.2d 272 (1996).

Information obtained by an officer from lookout heard on a broadcast, without more, was not sufficient to justify an investigatory stop of defendants' vehicle. *McSwain v. State*, 240 Ga. App. 60, 522 S.E.2d 553 (1999).

Stop of vehicle with dealer's drive-out license tag improper. — The initial stop of the defendant's vehicle was improper since the arresting officer stopped the vehicle because it had a dealer's drive-out license tag rather than a state-issued tag. *Berry v. State*, 248 Ga. App. 874, 547 S.E.2d 651 (2001), aff'd sub nom. *Gober v. State*, 275 Ga. 356, 566 S.E.2d 317 (2002).

"Terry-type" stop of defendant's automobile was justified, where the evidence showed that defendant was seen in the driveway of a house where several burglaries had occurred and that the defendant and a

passenger acted in a suspicious manner when they saw a police cruiser. *Dillard v. State*, 177 Ga. App. 805, 341 S.E.2d 310 (1986).

Stop of defendant's motor home was authorized based on the existence of a reasonable and articulable suspicion that it was being used to transport marijuana, where officers who were present when the vehicle was stopped knew that it was traveling north after the driver had met with a known marijuana smuggler, and they had observed that it was so heavily loaded that it rode low on its axles and swayed from side to side. *Eisenberger v. State*, 177 Ga. App. 673, 340 S.E.2d 232, cert. denied, 479 U.S. 818, 107 S. Ct. 77, 93 L. Ed. 2d 33 (1986).

Three persons driving along dirt road late at night in high crime area may give rise to an articulable ground for suspicion. *State v. Purdy*, 147 Ga. App. 340, 248 S.E.2d 683 (1978).

Defendant's act of pulling into a parking lot did not furnish any additional reason sufficient to create an articulable suspicion justifying an investigative stop. *State v. Canidate*, 220 Ga. App. 276, 469 S.E.2d 710 (1996).

On facts, articulable ground for suspicion existed. — Where police officers observed a truck traveling along a dirt road after midnight in an area where several recent burglaries had taken place, it cannot be said that an articulable ground for suspicion does not exist. *Allen v. State*, 140 Ga. App. 828, 232 S.E.2d 250 (1976).

Where the officers received a tip which did not furnish probable cause to stop appellant and search, but led them to the location specified and to find appellant, who fit the description given, attempting to leave the area in the car described by the informant, the officers had an articulable suspicion warranting the stop of the vehicle to investigate the circumstances. *Stiggers v. State*, 151 Ga. App. 546, 260 S.E.2d 413 (1979).

The brief investigatory stop of defendant was permissible even though the officers did not personally observe defendant commit a traffic violation or any other criminal act before they made the stop, where there was a report of recent unlawful discharge of a firearm, with the appearance of only the defendant's truck, coming from the direc-

tion where the shots were fired, and the presence of fresh mud on that truck, which suggested defendant had been in the wooded area where the shots were fired. *Cheatham v. State*, 204 Ga. App. 483, 419 S.E.2d 920 (1992).

Investigatory stop was authorized where police had witnessed or had knowledge of at least five indicia which contributed to an articulable suspicion of criminal activity. *Lewis v. State*, 233 Ga. App. 560, 504 S.E.2d 732 (1998).

Where a police officer detained the defendant because the defendant failed to give straight answers regarding the defendant's plans, this gave rise to an articulable suspicion justifying additional investigation and was not unconstitutionally intrusive in light of the problem of interstate drug traffic. *State v. Hall*, 235 Ga. App. 412, 509 S.E.2d 701 (1998).

Where an officer manning a checkpoint saw defendant suddenly brake and turn the vehicle into a driveway short of the checkpoint and that, prior to the abrupt turn, defendant had not used a turn signal and defendant's vehicle lacked two rear lights, and because the officer knew that the defendant had been identified as a supplier of methamphetamines, collectively, these facts formed a sufficient, reasonable basis for the officer to believe defendant was transporting illegal drugs or was otherwise engaged in criminal conduct. *Gary v. State*, 249 Ga. App. 879, 549 S.E.2d 826 (2001).

No unconstitutional seizure occurred, where patrol units without flasher lights on followed defendant for several blocks observing that defendant committed multiple traffic offenses then stopped defendant and made an arrest for DUI. *State v. Wright*, 221 Ga. App. 202, 470 S.E.2d 916 (1996).

Seizure of evidence during investigatory stop of automobile upheld. — An investigative stop of defendant's automobile which resulted in seizure of narcotics and defendant's arrest did not violate the fourth amendment where the anonymous tip that formed the basis for the stop had been sufficiently corroborated by the arresting officer's recognition of defendant as having been involved in an earlier drug investigation to furnish reasonable suspicion that defendant was engaged in criminal activity. *State v. Ball*, 207 Ga. App. 729, 429 S.E.2d 258 (1993).

Investigative Stops (Cont'd)**2. Vehicle Stops** (Cont'd)

Stop held valid. — State trooper's conduct fell within the permissible scope of a noncustodial traffic stop, where the initial stop of an automobile was valid and officer then asked the Spanish-speaking driver to step out of the car, sought information about the car's ownership, asked for a driver's license and questioned driver and driver's bilingual spouse generally regarding their destination before obtaining consent to search the vehicle. *United States v. Suarez*, 694 F. Supp. 926 (S.D. Ga. 1988), *aff'd*, 885 F.2d 1574 (11th Cir. 1989).

Where, after being stopped at a properly configured New Year's eve roadblock, the defendant was diverted to the side of the road, this was not a "second detention," but a continuation of the original investigative stop, and no added proof was required to make the brief prolonging of the stop valid. *Workman v. State*, 235 Ga. App. 800, 510 S.E.2d 109 (1998).

The stop of the defendant's vehicle was authorized by a trooper's observation of the traffic offense of following too close, even though the trooper acknowledged that the trooper would not have stopped the defendant but for the tip that the defendant had been smoking a joint; an officer's ulterior motive for a stop is of no consequence where the stop is made for a valid reason. *Cotton v. State*, 237 Ga. App. 18, 513 S.E.2d 763 (1999).

Police officers had a reasonable, articulable suspicion of criminal wrongdoing; hence the stop of an automobile was justified since: (1) officers received several reports of youths driving by in a car and shooting darts at people with a blow gun; (2) based on information from the victims and witnesses, police issued a "be on the lookout" notice for a small compact teal green vehicle with a white male driver with a crew cut and a black male passenger; (3) officers investigating the attacks drove around in the general area described in the notice and spotted two juveniles driving a small teal green car with a white male driver with a crew cut and a black male in the passenger seat; (4) the officers stopped the car; and (5) the car's driver did not have a valid driver's license and there were illegal fireworks in

plain view on the backseat. In re B.K.M., 247 Ga. App. 588, 544 S.E.2d 504 (2001).

Trial court did not err in denying defendant's motion to suppress items that were found in the trunk of defendant's car after defendant was apprehended on suspicion of shoplifting despite defendant's claim that defendant did not consent to the search of the car, as the trial court weighed the credibility of the testimony and the record supported the trial court's finding that defendant freely and voluntarily consented to the search; moreover, even if defendant did not consent to the search, the search was valid under the automobile exception to the warrant requirement, which allows a warrantless search of a vehicle where there is probable cause, because the police had probable cause to search the vehicle in light of information from a store manager who saw defendant place store items in defendant's trunk without paying for them and in light of defendant's subsequent conduct of shoplifting at another store down the road 30 minutes later. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Where, after being stopped at a properly configured New Year's eve roadblock, the defendant was diverted to the side of the road, this was not a "second detention," but a continuation of the original investigative stop, and no added proof was required to make the brief prolonging of the stop valid. *Slocum v. State*, 267 Ga. App. 337, 599 S.E.2d 299 (2004).

Officer's be-on-the-lookout (BOLO) bulletin provided reasonable suspicion of criminal activity sufficient to authorize the stop of defendant's vehicle. The BOLO provided particularized information describing the color, manufacturer, and model of the vehicle, the number and race of its occupants, and its location and direction of travel. *Faulkner v. State*, 277 Ga. App. 702, 627 S.E.2d 423 (2006).

Stop held invalid. — Stop of the defendant's car by an officer was held invalid as inarticulate hunch of illegal activity where the officer was patrolling the apartment complex at 4 A.M. and observed the defendant pull into the complex parking lot at a "rapid speed", then quickly enter the apartment building and emerge a short time later, re-enter the defendant's vehicle and drive away at a "rapid speed." *United States v.*

Momodu, 909 F. Supp. 1571 (N.D. Ga. 1995).

Because the only arguably suspicious behavior by the defendant was driving around a subdivision several times late at night, because there was no evidence introduced that such activity violated any local ordinances or other applicable law, or that there was any other basis for a stop, and because the police had received no information that the defendant had committed any acts of vandalism in the area, there was no particularized and objective basis to justify an investigatory stop, and the trial court erred in denying the defendant's motion to suppress. *Attaway v. State*, 236 Ga. App. 307, 511 S.E.2d 635 (1999).

The mere fact that an older model yellow car of a particular kind was seen three days after the issuance of an alert was not sufficient to raise a reasonable suspicion that it was the same car involved in a purse snatching three days earlier at a location two miles away. *State v. Burns*, 238 Ga. App. 683, 520 S.E.2d 39 (1999).

The mere fact that past incidents of vandalism had occurred in the area of the stop did not indicate that the driver was, or was about to be, engaged in criminal conduct in the absence of some information linking the driver to the vandalism. *In re M.J.H.*, 239 Ga. App. 894, 522 S.E.2d 491 (1999).

The officer lacked reasonable suspicion for stopping the vehicle where defendant merely pulled into a parking lot and then began to drive away, and at the time the officer made the stop, the officer had no "particularized and objective" reason for believing that the occupants of the truck were engaged in criminal activity. *State v. Winnie*, 242 Ga. App. 228, 529 S.E.2d 215 (2000).

An investigative stop of the defendant's van was improper since: (1) the patrol officers who stopped the defendant did not see any traffic violations or other suspicious conduct justifying the stop and, instead, stopped the defendant based solely on a lookout broadcast by undercover officers; (2) the only facts known by the undercover officers were that the defendant stopped defendant's van at an apartment complex parking lot where they were watching a particular apartment, went down the stairs, came back up the stairs, and left in the van. *Duke v.*

State, 247 Ga. App. 512, 544 S.E.2d 201 (2001).

Grant of defendant's motion to suppress was not clearly erroneous as the officer stopping defendant's automobile for an investigatory stop provided no factual basis for believing that defendant's older model automobile violated the taillight specifications in O.C.G.A. § 40-8-23(e) simply because newer models violated the statute; further, the trial court could have found that the officer's testimony that the officer had conducted research into the newer models' taillights was less than credible. *State v. Keddington*, 264 Ga. App. 912, 592 S.E.2d 532 (2003).

Because the police officer pulled defendant over based only on the fact that defendant's car was parked in a truck fueling area of a travel center for a long time, the stop was not supported by a reasonable suspicion, and it was, therefore, in violation of U.S. Const., amend. 4. *Moore v. State*, 265 Ga. App. 108, 592 S.E.2d 892 (2004).

Where a 911 call from an unidentified informant did not provide the police with reasonable suspicion to stop defendant's vehicle, the stop unreasonably intruded upon defendant's fourth amendment rights; as a result, the trial court erred by denying defendant's motion to suppress. *Slocum v. State*, 267 Ga. App. 337, 599 S.E.2d 299 (2004).

Defendant's motion to suppress evidence obtained during a traffic stop was granted because the arresting officer had no articulable suspicion for making the stop based on defendant's driving 10 miles under the speed limit in the left lane of a highway. *State v. Whelchel*, 269 Ga. App. 314, 604 S.E.2d 200 (2004).

On facts, articulable ground for suspicion did not exist. — Trial court properly suppressed evidence obtained in a traffic stop of defendant's vehicle as the police officers who initiated the stop, in reliance on information they obtained from a tipster that they had just arrested, did not have a reasonable articulable suspicion for stopping defendant's vehicle at the time of the stop. Furthermore, the fact that an officer saw defendant pass a bag to the passenger in defendant's car did not support the state's argument that articulable suspicion existed to initiate the stop, because the stop had already been initiated before the officer saw

Investigative Stops (Cont'd)**2. Vehicle Stops (Cont'd)**

anything being passed between defendant and the passenger. *State v. Davenport*, 268 Ga. App. 704, 603 S.E.2d 324 (2004).

Information that car operator wanted for felony. — Where an arresting officer has adequate reason to stop a car, obtain the license of the operator during that momentary detention, and verify that the operator is not drunk or under the influence of intoxicants, subsequently obtained information that the operator is wanted for a felony warrant justifies the arrest and a subsequent search of the vehicle without a warrant. *Graves v. State*, 167 Ga. App. 246, 305 S.E.2d 913 (1983).

Informant's identification of defendant as supplier of marijuana and the defendant's presence in the parking lot of the informant's apartment justified an investigatory stop. *Burdette v. State*, 210 Ga. App. 471, 436 S.E.2d 502 (1993).

Evidence obtained after investigatory stop of car admissible. — Where an officer was authorized to make a limited investigation of the defendant's identity and when the officer asked for the defendant's name, a response known to the officer to be false was given, this authorized the arrest of the defendant for violating O.C.G.A. § 16-10-25, and the fruits of a search of the defendant and the car in which the defendant was a passenger conducted pursuant to this legal arrest would be admissible at the defendant's trial. *State v. Roberson*, 165 Ga. App. 727, 302 S.E.2d 591 (1983).

After traffic stop had concluded and consent to search was refused, officers could not legally detain defendants based only on their nervous behavior. *Parker v. State*, 233 Ga. App. 616, 504 S.E.2d 774 (1998).

Testimony as to illegally arrested defendants. — A police officer who had the authority to stop a car and ask the occupants to identify themselves could testify to seeing the defendants in the car, even though the defendants were then illegally arrested. *United States v. Kelly*, 749 F.2d 1541 (11th Cir.), cert. denied, 472 U.S. 1029, 105 S. Ct. 3506, 87 L. Ed. 2d 636 (1985).

Stopping an automobile and detaining its occupants constitute a seizure, even though the purpose of the stop is limited and the

resulting detention quite brief. *Bowers v. State*, 151 Ga. App. 46, 258 S.E.2d 623 (1979), aff'd, 245 Ga. 367, 265 S.E.2d 57 (1980).

By instructing defendant to either roll down the car window or open the door, police officer "seizes" the defendant within the meaning of U.S. Const., amend. 4. To justify such intrusion, the state has to produce evidence of articulable facts which give rise to a suspicion that the law has been violated. Although this suspicion need not meet the standard of probable cause, it must be more than mere caprice, or a hunch, or an inclination. *State v. Smith*, 137 Ga. App. 101, 223 S.E.2d 30 (1975).

Suspected occupants of home in motor vehicle. — Where police had probable cause to believe the law was being violated by the occupants of an apartment, police properly approached and briefly detained the occupants of a car that had just come to a stop at the residence to determine whether any of them lived there. *Claffey v. State*, 209 Ga. App. 455, 433 S.E.2d 441, aff'd, 211 Ga. App. 335, 439 S.E.2d 516 (1993).

Compliance with county manual not necessary. — The state was not required to show compliance with a particular section of a county police policies and procedures manual in order to establish a valid search and seizure at a roadblock established to make license and insurance checks as well as apprehend DUI drivers. *State v. Sherrill*, 247 Ga. App. 708, 545 S.E.2d 110 (2001).

Request for information unrelated to traffic stop and for consent to search for drugs. — An officer does not necessarily illegally exceed the scope of a valid traffic stop by asking for information unrelated to the traffic stop and for consent to search for drugs while the person is still being detained and without articulable suspicion of a crime. *State v. Sims*, 248 Ga. App. 277, 546 S.E.2d 47 (2001).

The trial court did not err in suppressing evidence obtained in a search of the defendant's vehicle since the defendant was detained without justification when an officer began to interrogate defendant about the contents of defendant's car following a traffic stop, and the defendant's subsequent consent to search was the product of this impermissible seizure. *State v. Sims*, 248 Ga. App. 277, 546 S.E.2d 47 (2001).

Scope of search following stop based on seatbelt violation. — The trial court did not err in denying the defendant's motion to suppress marijuana and a handgun found in defendant's car following a traffic stop which was conducted because neither the defendant nor the passenger were wearing seatbelts since: (1) the officer asked for defendant's license to establish defendant's identity and asked questions reasonably related to the traffic violation; (2) the defendant's license showed a Macon address, so the officer asked defendant about still living in Macon and then, based on the defendant's voluntary comments about what defendant was doing in Atlanta, asked defendant a follow-up question about a friend; (3) the defendant then refused to answer the officer's question and kept looking around while the passenger attempted to get out of the car and then refused to fully comply with the officer's request to close the door; and (4) the officer noticed large bags located on the car's back seat. *Bell v. State*, 248 Ga. App. 254, 546 S.E.2d 34 (2001).

Seatbelt violation. — Reasonable suspicion supported the stop of the defendant's vehicle since the arresting officer stopped the vehicle after noticing that neither the defendant driver nor the passenger were wearing seatbelts. *Crenshaw v. State*, 248 Ga. App. 505, 546 S.E.2d 890 (2001).

Improper expansion of scope of traffic investigation. — A state trooper impermissibly expanded the scope of a traffic investigation following a stop of the defendant's car because neither the defendant nor the passenger were wearing seatbelts since the trooper asked the defendant numerous questions that were unrelated to the reason for the stop then asked for permission to search the defendant's pockets and found a vial with cocaine residue. *State v. Gibbons*, 248 Ga. App. 859, 547 S.E.2d 679 (2001).

Trial court did not err in denying defendant's motion to suppress marijuana and cocaine that was found lying in plain site on the floorboard of the truck that defendant used by an officer who approached the truck, identified himself as a police officer, and asked defendant if the officer could speak with defendant, as the officer's approach to the vehicle was not a stop requiring reasonable suspicion, but rather was a first tier police-citizen encounter. *Marion v.*

State, 268 Ga. App. 699, 603 S.E.2d 321 (2004).

Search and Seizure Incident to Lawful Arrest

Purpose. — Searches incident to lawful custodial arrests comprise one of the narrow exceptions to the general principle that searches are unconstitutional unless authorized by a prior judicial warrant. The exception serves two purposes: (1) it allows the arresting officer to disarm the suspect, thus protecting the officer's safety and foreclosing the possibility of escape; and (2) the exception permits the officer to prevent the suspect from destroying evidence. A lawful incident search cannot extend beyond the perimeters established by these goals. *United States v. Edwards*, 554 F.2d 1331 (5th Cir. 1977), vacated on other grounds, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

Lawful arrest authorizes searches. — U.S. Const., amend. 4 protects against an unreasonable search all those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made, but a search in connection with a lawful arrest is valid, although without a warrant. *Barron v. State*, 109 Ga. App. 786, 137 S.E.2d 690 (1964).

Legal search may be made incident to lawful arrest or by consent of the owner of the premises or property. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

As general rule, search and seizure incident to arrest is reasonable if the arrest is lawful and the search is incident to the arrest in purpose, time, scope, and place. *United States v. Ryan*, 415 F.2d 847 (5th Cir. 1969).

A search without a warrant but incident to a lawful arrest may be lawful. *Black v. State*, 119 Ga. App. 855, 168 S.E.2d 916 (1969).

Where no contention is made that the arrest was not lawful, the search of the motor vehicle in which the defendant was a passenger for things connected with the crime for which the defendant was arrested was not unlawful. *Lindsey v. State*, 227 Ga. 48, 178 S.E.2d 848 (1970).

When, in the eyes of the law, a person is in detention, a search of the person and seizure of effects of a suspect in detention is incidental to such arrest and is reasonable. *United States v. Jones*, 352 F. Supp. 369 (S.D.

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Ga. 1972), *aff'd*, 481 F.2d 1402 (5th Cir. 1973).

Lawful arrest will authorize a search. *United States v. Turner*, 628 F.2d 461 (5th Cir. 1980), *cert. denied*, 451 U.S. 988, 101 S. Ct. 2325, 68 L. Ed. 2d 847 (1981).

Search of defendant was authorized as incident to a lawful arrest, after the defendant and another person were observed by the arresting officer displaying crack cocaine as they were walking very closely together in a "well-known drug area." *Jackson v. State*, 197 Ga. App. 154, 397 S.E.2d 737 (1990).

Standing to contest validity of search. — Defense counsel was not ineffective in failing to file a motion to suppress the gun and knitted caps found in the car, as defendant, a passenger, lacked standing to contest the search of the car; further, the caps were found in a search of the car incident to a lawful arrest. *Patterson v. State*, 259 Ga. App. 630, 577 S.E.2d 850 (2003).

Validity of search depends on validity of arrest. — In order for the warrantless search to have been valid the arrest must have been legal. Where no reasonable cause for the defendant's arrest existed when the search was made and it was not made in connection with or incident to a lawful arrest without a warrant, then the search was unlawful. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Federal constitutionality of search incident to arrest depends upon the constitutional validity of the arrest. Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the petitioner had committed or was committing an offense. *Vaughn v. State*, 247 Ga. 136, 274 S.E.2d 479 (1981).

"Fruit of poisoned tree" doctrine. — Under the "fruit of the poisoned tree" doctrine, the search must fall, if the original arrest was invalid. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

Incident search may not precede an arrest and serve as part of its justification. *Hill v.*

State, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Once the defendant is in custody, a search at another place is not incident to the arrest but must be treated as though it is in the defendant's or the defendant's agent's own possession, safe from intrusion. *Hunter v. State*, 127 Ga. App. 664, 194 S.E.2d 680 (1972).

Search must be contemporaneous with arrest. — Search is not permissible as incident to the arrest without warrant when it is not contemporaneous with it and conducted in an area within the immediate control of the prisoner, that is, an area so contiguous that the prisoner might gain control of a weapon, destroy evidence, and so on. *Hunter v. State*, 127 Ga. App. 664, 194 S.E.2d 680 (1972).

Search held contemporaneous to arrest. — Where defendant's arrest was lawful, the fact that the arresting officer took the time to write out two traffic tickets before searching defendant's vehicle did not render the search noncontemporaneous to the arrest. *Oswell v. State*, 181 Ga. App. 35, 351 S.E.2d 221 (1986).

Scope of search. — Except under exigent and unusual circumstances, a search incident to arrest can be held reasonable only for the purposes of preventing the defendant from access to a weapon or evidence which defendant may be desirous of destroying, and this usually limits the search to the defendant's person and clothing, and that very narrow area surrounding defendant where defendant might reach even though under restraint. *Scott v. State*, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

Nature of offense for which accused is arrested has important bearing upon what objects may be seized as incidental to arrest. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967); *Scott v. State*, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

Areas subject to warrantless search at time of lawful arrest. — An officer at the time of lawful custodial arrest may, without a warrant, make a full search of the person of the accused, a limited area within the control of the person arrested, and of an automobile in the arrested person's possession at the scene of the arrest for the discovery and preservation of criminal evidence. *Glover v. State*, 139 Ga. App. 162, 227 S.E.2d 921 (1976).

Search of person. — Having lawfully placed the suspect under arrest, officers are authorized to search the suspect's person for the purpose of protecting themselves from attack or preventing the suspect from escaping. *Coley v. State*, 135 Ga. App. 810, 219 S.E.2d 35 (1975).

Once defendant has been placed under custodial arrest, police may search the defendant's person, incident to that arrest, for weapons or contraband. *Graves v. State*, 138 Ga. App. 327, 226 S.E.2d 131 (1976).

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. It is the fact of the lawful arrest that establishes the authority to search, and in the case of a lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement amendment, but is also a reasonable search under U.S. Const., amend. 4. *Graves v. State*, 138 Ga. App. 327, 226 S.E.2d 131 (1976).

Officer at time of lawful custodial arrest may, without warrant, make full search of the person of the accused, a limited area within the control of the person arrested, and of an automobile in the defendant's possession at the scene of the arrest for the discovery and preservation of criminal evidence. *Williams v. State*, 150 Ga. App. 852, 258 S.E.2d 659 (1979).

Where a police officer was going to issue a citation to defendant for violating the local open container ordinance, and defendant became nervous after the officer noticed a bulge in defendant's pocket, the officer was fully authorized to conduct a pat-down search of defendant prior to placing defendant in the back of a patrol car, and once a .32 caliber revolver was discovered in defendant's rear pocket, probable cause existed for defendant's arrest, and the subsequent search which yielded the illegal contraband was permissible as a search incident to a lawful arrest. *Mashburn v. State*, 186 Ga. App. 488, 367 S.E.2d 881 (1988).

Search incident to arrest was proper, where the circumstances surrounding the arresting officer's response to a report of a drug sale were sufficient to establish proba-

ble cause for the arresting officer to believe that defendant possessed a controlled substance. *Scott v. State*, 201 Ga. App. 162, 410 S.E.2d 362 (1991).

Heimlich maneuver. — Use of a "Heimlich Maneuver" to remove suspected contraband from defendant's mouth did not violate U.S. Const., amend. 4. *Merriweather v. State*, 228 Ga. App. 246, 491 S.E.2d 467 (1997).

Officer hearing defendant state place for illegal activity. — Because officer actually heard the defendant state that the defendant would be at "Silver Creek" early the next morning with cocaine and law enforcement officers observed the defendant appear at "Silver Creek" early the next day, probable cause existed for the defendant's arrest, and the search of the defendant which resulted in the discovery of cocaine was lawfully conducted pursuant to a lawful warrantless arrest. *State v. Hancock*, 203 Ga. App. 577, 417 S.E.2d 381, cert. denied, 203 Ga. App. 907, 417 S.E.2d 381 (1992).

Search of surrounding area. — A search may extend beyond the person arrested to the place where the person is arrested in order to find and seize things connected with the crime, as its fruits, or as means by which it was committed, as well as weapons and other things to effect escape from custody; and a dwelling place where arrest is made may be subjected to search going beyond the room where the arrest was made. *Cash v. State*, 222 Ga. 55, 148 S.E.2d 420 (1966).

It is reasonable for officer to search area surrounding arrest area into which a suspect might reach to obtain a weapon. *Banks v. State*, 246 Ga. 178, 269 S.E.2d 450 (1980).

Where there was probative evidence that defendant was driving in excess of the lawful speed limit, there was evidence from which the trial court could reasonably conclude that the police officer did not overstep officer's bounds in stopping the defendant, arresting defendant for a traffic violation and conducting a protective search of the immediate vicinity of defendant's automobile. *Kilgore v. State*, 158 Ga. App. 55, 279 S.E.2d 239 (1981).

Where necessary, police arresting a suspect may conduct a protective sweep of the area to check for other persons who might pose a threat to the safety of the officers or

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the public. If the officers spot evidence during a protective sweep, they may seize it. *United States v. Standridge*, 810 F.2d 1034 (11th Cir.), cert. denied, 481 U.S. 1072, 107 S. Ct. 2468, 95 L. Ed. 2d 877 (1987).

Possessing an arrest warrant and probable cause to believe suspect was in the suspect's home, the officers were entitled to enter and to search anywhere in the apartment in which the suspect might be found. Until the suspect was found, the search for the suspect was not over, and there was still that particular justification for entering any place that had not yet been searched. *State v. Wright*, 204 Ga. App. 382, 419 S.E.2d 334, cert. denied, 204 Ga. App. 922, 419 S.E.2d 334 (1992).

Search of defendant's apartment could not be justified as a protective sweep since defendant was arrested just outside the front door and the evidence did not establish that the officers had reason to believe that any other person was present in the apartment at the time of the arrest. *United States v. Sunkett*, 95 F. Supp. 2d 1367 (N.D. Ga. 2000), aff'd, 264 F.3d 1146 (11th Cir. 2001).

Because the police were entitled to conduct a limited sweep of a residence to ensure their safety prior to obtaining consent to search and because the contraband was not discovered during the "protective sweep," the search did not violate the fourth amendment; consequently, the trial court properly denied defendant's motion to suppress. *Nelson v. State*, 271 Ga. App. 658, 610 S.E.2d 627 (2005).

Search of an automobile incident to a lawful arrest is proper. *Cook v. Smith*, 303 F. Supp. 90 (S.D. Ga. 1969), aff'd, 427 F.2d 1172 (5th Cir. 1970); *Stephens v. Lindsey*, 304 F. Supp. 203 (S.D. Ga. 1969).

If a police officer has made a lawful custodial arrest of the occupant of automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. *Coley v. State*, 177 Ga. App. 669, 341 S.E.2d 9 (1986); *Fortson v. State*, 201 Ga. App. 272, 410 S.E.2d 774 (1991), aff'd, 262 Ga. 3, 412 S.E.2d 833 (1992).

Because defendant was arrested on speeding and driving without a license or proof of

insurance charges before the passenger compartment of the defendant's automobile was searched, the warrantless search was therefore legal so long as the arrest itself was legal. *Dixon v. State*, 180 Ga. App. 222, 348 S.E.2d 742 (1986).

Search of the defendant's automobile after the defendant had been handcuffed and was no longer in the car was valid, where the defendant was the subject of a lawful custodial arrest, and the search of the defendant's vehicle immediately followed the arrest. *Sims v. State*, 197 Ga. App. 214, 398 S.E.2d 244 (1990).

Where police officers had reasonable grounds to detain defendant and the defendant's companion briefly for the limited purpose of ascertaining their identity and conducting a driver's license and vehicle registration check, a search of their vehicle was authorized as a search incident to arrest. *State v. Miller*, 197 Ga. App. 99, 397 S.E.2d 508 (1990).

The search of the defendant's vehicle, after the defendant had been arrested for a traffic violation, resulting in the discovery of a .38 caliber revolver "stuffed down" between the front seat and the console, was justified as a search incident to a lawful arrest. *Daniel v. State*, 199 Ga. App. 180, 404 S.E.2d 466 (1991).

The contemporaneous, warrantless search of the interior of an automobile recently occupied by an arrestee is justified in order to secure any weapons that might be available to the arrestee and to prevent the concealment or destruction of evidence. *Fortson v. State*, 262 Ga. 3, 412 S.E.2d 833 (1992).

As the arresting officer had made a lawful custodial arrest of the defendant, the officer had authority to conduct, as a contemporaneous incident of that arrest, a warrantless search of the vehicle compartment of the automobile which defendant had just been operating. *Barnett v. State*, 204 Ga. App. 491, 420 S.E.2d 43 (1992).

The police had probable cause to make an immediate, warrantless search of the automobile seat back for cocaine whether exigency existed and regardless of whether the vehicle was then impounded, where defendant's voluntary admission against penal interest regarding the precise location of and nature of the drugs was corroborated ade-

quately by the officer's observation of defendant's location and vantage point within the car. *Barnett v. State*, 204 Ga. App. 491, 420 S.E.2d 43 (1992).

The search of the defendant's car after defendant fled from a traffic stop and then attempted to flee on foot was permissible as a search incident to arrest. *Scoggins v. State*, 248 Ga. App. 1, 545 S.E.2d 19 (2001).

A search of an automobile was valid as an incident to a lawful custodial arrest although the defendant had been handcuffed and placed in a patrol car while the search was conducted. The decisive factor is whether the arrestee was, at the time of arrest, a recent occupant of the automobile, not whether the automobile and its contents were in the arrestee's immediate control at the time of the search. *Scoggins v. State*, 248 Ga. App. 1, 545 S.E.2d 19 (2001).

Once the passenger was placed under arrest, the officer could lawfully search the entire passenger compartment of the defendant's vehicle as a search incident to arrest. *Tutu v. State*, 252 Ga. App. 12, 555 S.E.2d 241 (2001).

Seizure of gun located inside passenger compartment of car in which appellant had been a passenger just before being arrested was not violative of fourth and fourteenth amendment rights. *State v. Hopkins*, 163 Ga. App. 141, 293 S.E.2d 529 (1982).

Search of defendant's briefcase was permissible as a search incident to a lawful arrest. *Wade v. State*, 184 Ga. App. 289, 361 S.E.2d 266 (1987).

Instrumentalities used in commission of crime may be seized at time of arrest without search warrant. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Where evidence showed that the defendant's cell phone was an instrumentality of the crime of cocaine trafficking and that the details of the drug transaction were arranged by telephone, the trial court did not err in denying the motion to suppress the search of the defendant's cell phone because the defendant's cell phone was confiscated during a lawful search incident to defendant's arrest and because it was an instrumentality of the crime that was probative of criminal conduct. *Lopez v. State*, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

Removal of weapons. — It is reasonable that when lawful arrest is made the arresting

officer may remove any weapons that the suspect might seek to use to try to resist arrest or to escape. *Banks v. State*, 246 Ga. 178, 269 S.E.2d 450 (1980).

Evidence found in search incident to lawful arrest is admissible. *Evans v. State*, 235 Ga. 396, 219 S.E.2d 725 (1975).

A search and seizure incident to a lawful arrest is valid although made without a warrant and evidence thus obtained is admissible at trial. *Cook v. Smith*, 303 F. Supp. 90 (S.D. Ga. 1969), *aff'd*, 427 F.2d 1172 (5th Cir. 1970); *Stephens v. Lindsey*, 304 F. Supp. 203 (S.D. Ga. 1969); *United States v. Brown*, 305 F. Supp. 299 (S.D. Ga. 1969).

While it has been held by standards of U.S. Const., amend. 4 that the search of premises under circumstances where the defendant is under lawful arrest is limited by its proximity to the defendant, and may thus be unreasonable where geographically removed, and while a search which is reasonable at its inception may violate U.S. Const., amend. 4 by virtue of its intolerable intensity and scope yet no one questions the right, without a search warrant, to search the person after a valid arrest. Yet, to be admissible, the evidence must have been obtained by means of a search and seizure reasonably related in scope to the justification for their initiation. *Holtzendorf v. State*, 125 Ga. App. 747, 188 S.E.2d 879 (1972).

Property that an arrestee takes with the arrestee to jail is subject to search under analysis similar to that allowing search incident to an arrest. *Loden v. State*, 199 Ga. App. 683, 406 S.E.2d 103 (1991).

Cocaine obtained during lawful arrest. — The fact that Drug Enforcement Administration agents suspected appellant of criminal conduct other than that for which the appellant was lawfully arrested is irrelevant to the legality of the arrest, and the cocaine discovered during a search pursuant to a lawful arrest was not an unlawful seizure within the proscription of U.S. Const., amend. 4. *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980).

Cocaine was seized in a valid search incident to arrest, where police officers noticed a bulge in the defendant's clothing that appeared not to be caused by the defendant's body and, in response to the officers' questions, the defendant began to perspire and pull the defendant's jacket together in

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front of the bulge. *United States v. Tomaszewski*, 833 F.2d 1532 (11th Cir. 1987).

Marijuana obtained by warrantless search incident to warrantless arrest inadmissible. — Defendant may not be lawfully convicted of possessing marijuana obtained by a search without warrant that the defendant verbally protested, justified by an arrest without warrant and justified by a different crime discovered only by the defendant's "voluntary" statement after being stopped, seized, or detained without any probable cause whatever. *Holtzendorf v. State*, 125 Ga. App. 747, 188 S.E.2d 879 (1972).

Burden on state to show evidence obtained by illegal search was incident to lawful arrest. — Evidence obtained by illegal seizure and search of the defendant's person, by which the defendant is compelled to incriminate self, being inadmissible against a defendant accused of crime, the burden devolves upon the state to show that evidence obtained by search was procured after a legal arrest. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

Inventory Searches

Purposes. — An inventory search serves three distinct purposes: the protection of personal property which may be in the automobile, the protection of the police against claims arising from property allegedly lost or stolen while the automobile is in police custody, and the protection of the police from possible danger. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

Inventory searches. — Inventory searches are valid only because they may attain three goals: (1) they may protect the car owner's property while it remains in police custody; (2) they may protect the police against disputes over lost or stolen property; and (3) they may protect the police from danger. To be constitutionally permissible, an inventory search must be no more intrusive than necessary to respond to these goals alone. *United States v. Edwards*, 554 F.2d 1331 (5th Cir. 1977), vacated on other grounds, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

Inventory searches have two purposes: to protect the vehicle and the property in it; and to safeguard the police or other officers from claims of lost possessions. *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

An inventory search serves three distinct purposes: the protection of personal property; the protection of the police against claims arising from property allegedly lost or stolen; and the protection of the police from possible danger. To prevent escape, self-injury, or harm to others, the police have a legitimate interest in separating the accused from the property found in the accused's possession. An inventory is then necessary both to preserve the property of the accused while the accused is in jail and to forestall the possibility that the accused may later claim that some item has not been returned to the accused. However, the inventory must not be done with an investigative intent, but it should be incident to the caretaking function of the police. *Gaston v. State*, 155 Ga. App. 337, 270 S.E.2d 877 (1980).

Consent not required for inventory search. — An inventory is not for the exclusive protection of the owner, but also serves to protect the police, and, therefore, it is not necessary that police ask a prisoner whether the prisoner wants the items to be inventoried. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

U.S. Const., amend. 4 is not violated when police take custody of property of persons they arrest to store that property for safekeeping. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Custodial seizures and accompanying inventory searches are reasonable. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Reasonableness of mere inventorial search. — Merely because the police are not searching with the express purpose of finding evidence of crime, they are not exempt from the requirements of reasonableness set down in U.S. Const., amend. 4. However, the real purpose of the inspection must be inventorial and nonpretextuous with an unexpected result insofar as turning up evidence

is concerned. *Lowe v. Hopper*, 400 F. Supp. 970 (S.D. Ga.), *aff'd*, 520 F.2d 1405 (5th Cir. 1975).

Inventory searches that follow standard police procedure are reasonable. *United States v. Wade*, 564 F.2d 676 (5th Cir. 1977); *United States v. Roberson*, 897 F.2d 1092 (11th Cir. 1990).

Inventory searches are reasonable if conducted in accordance with standard police practice. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), *cert. denied*, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, *cert. denied*, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979); *Gaston v. State*, 155 Ga. App. 337, 270 S.E.2d 877 (1980).

Unauthorized search based on informant's tip. — Inventory search of defendant's vehicle was not authorized, because the search was based on the tip of an informant who did not reveal the source of the information, nor was the information the informant provided sufficiently detailed to suggest that it was based on anything more substantial than mere rumor. *Salter v. State*, 198 Ga. App. 242, 401 S.E.2d 541 (1990); *Polke v. State*, 203 Ga. App. 306, 417 S.E.2d 22 (1992).

Evidence obtained under guise of inventory search. — Because a bag was placed in custody of another individual by defendant after the defendant's involvement in traffic accident (such individual putting it in the individual's apartment) and, additionally, because the defendant's friend was willing and able to take custody of the bag, the state could not premise seizure of the bag on necessity to protect it from being lost or stolen or to protect themselves; consequently, police conducted a warrantless investigatory search (without probable cause) under the guise of an inventory search, and the defendants' motion to suppress should have been granted. *Gaston v. State*, 155 Ga. App. 337, 270 S.E.2d 877 (1980).

If it is clear that police officers are conducting a warrantless investigatory search without probable cause under the guise of an inventory search, courts should refuse to allow such apparent subterfuges to erode the strictures of U.S. Const., amend. 4. The same is true of an "impulse" search that is not, at the time it occurs, a proper caretaking function of the police. *Williams v.*

State, 157 Ga. App. 476, 277 S.E.2d 923, *cert. denied*, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Because a patrol officer briefly detained the unlicensed driver of a van to make an investigation of suspicious circumstances, and the trial record showed that a licensed passenger was allowed to drive the van from the location where the unlicensed driver was arrested to the sheriff's office and that a computer check gave the officer no reason to believe the van had been stolen, the subsequent impoundment and inventory of the van was not reasonably necessary, so that evidence discovered and seized as a result of the inventory was not admissible at trial. *Reed v. State*, 195 Ga. App. 821, 395 S.E.2d 294 (1990).

The absence of an impound inventory sheet should not have impacted a trial court's determination as to the admissibility of the evidence found during the search of the defendant's vehicle or whether the search violated the defendant's constitutional rights, and therefore, as a matter of law, the trial court erred in granting the defendant's motion to suppress. *State v. Haddock*, 235 Ga. App. 726, 510 S.E.2d 561 (1998).

Inventory rationale is one which may be abused and stretched to cover unnecessary searches; but even some suspicion that contraband will be found will not void an otherwise valid inventory search. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, *cert. denied*, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Where a police officer in good faith, conducts an inventory search without any investigative intent, such search is not violative of defendant's constitutional rights and it is not error to deny defendant's motion to suppress. *Carl v. State*, 160 Ga. App. 464, 287 S.E.2d 379 (1981).

Mere expectation of uncovering evidence will not vitiate an otherwise valid inventory search. *United States v. Roberson*, 897 F.2d 1092 (11th Cir. 1990).

Officers immune from damages for improper inventory search. — Where the law as to inventory searches was not "clearly established" at the time FBI agents opened plaintiff's luggage, the agents were shielded from liability for damages as a matter of law. *Sellers v. United States*, 709 F.2d 1469 (11th Cir. 1983).

Inventory Searches (Cont'd)

Interests to be protected by reasonable inventory. — Only so long as the scope of the search is reasonable, taking into consideration the three interests to be protected by the inventory (the protection of the owner's property while it remains in police custody; the protection of police against claims or disputes over lost or stolen property; and the protection of the police from potential danger), will it be held to be a constitutionally permissible intrusion. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Inventory-type search in executing writ of possession reasonable. — It was reasonable for state officials to conduct an inventory-type search in executing a writ of possession and to remove weapons, drugs, or other items that might endanger the public from the defendant's personal property before placing it on a public street. *United States v. Reynolds*, 726 F.2d 1536 (11th Cir. 1984).

Search held for inventory, not investigative purposes. — Because the evidence demanded a finding that an impoundment and an inventory of defendant's wrecked and deserted automobile were authorized and the trial court apparently so found and the impounding officer found a carrying case in the trunk which the officer opened, the trial court was not authorized to find that the actions of the officer who discovered the evidence constituted an unwarranted investigative search, rather than a valid inventory search, of the automobile, and the grant of defendant's motion to suppress evidence contained in the case was reversed. *State v. Evans*, 181 Ga. App. 422, 352 S.E.2d 599 (1986).

An inventory must not be done with an investigative intent, but it should be incident to the caretaking function of the police. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Probable cause not required for inventory searches. — In circumstances involving non-criminal inventory searches, where probable cause to search is irrelevant, search warrants are not required, linked as the warrant requirement textually is to the probable cause concept. *Garner v. State*, 154 Ga. App. 839,

269 S.E.2d 912 (1980).

Validity of warrant based on inventory search. — Where an automobile inventory search is not illegal, a later search warrant, based upon this information, is not invalid. *Anglin v. State*, 244 Ga. 1, 257 S.E.2d 513 (1979), overruled on other grounds, *Welch v. State*, 254 Ga. 603, 331 S.E.2d 573 (1985).

Warrant which authorized the seizure of "all items contained within a specified room and motel at the time of the fire on February 17, 2001, and which remain therein which is evidence of the crime of Insurance Fraud" was not impermissibly vague because the warrant included detailed information about the removal of cats and a dog from defendant's home and the taking of those animals to the motel room prior to a fire at the home allegedly started by defendant's son with the knowledge and consent of defendant in the warrant application, an investigator testified that CD's, tapes, stereo equipment, and other electronics were witnessed being taken to the specified motel and room number and were noticeably absent from the fire scene, and an insurance investigator further testified that in a recorded statement, defendant said that there were no items removed from the house prior to the fire. *Maddox v. State*, 272 Ga. App. 440, 612 S.E.2d 484 (2005).

Criteria as to legality of impoundment of vehicle. — Where a defendant was arrested pursuant to a valid bench warrant while driving in Georgia with the defendant's spouse, where the federal agents impounded the car the defendant was driving and where the defendant challenged the motives of the arresting officers in impounding the defendant's vehicle when it was not impeding traffic or otherwise presenting a hazard to the public and when the defendant specifically but unsuccessfully requested to be allowed to make arrangements for its disposition, the critical question was not whether the police needed to impound the vehicle in some absolute sense, or could have effected an impoundment more solicitously, but whether the decision to impound and the method chosen for implementing that decision were, under all the circumstances, within the realm of reason. *Sammons v. Taylor*, 967 F.2d 1533 (11th Cir. 1992).

Impounded vehicle. — No search warrant is necessary to inspect an impounded vehicle

because such inspections are reasonable and do not violate the rights of the people to be secure in their persons, houses, papers, and effects. *United States v. Jones*, 432 F.2d 773 (5th Cir. 1970).

Warrantless search of automobile at police station after arrest elsewhere is constitutionally permissible, although the persons under arrest were in custody at the time and there was ample opportunity to obtain a warrant. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Automobiles coming into lawful custody of police may be searched without warrant for purpose of inventorying the contents and providing for their safekeeping, without having probable cause to believe that evidence of a crime will be discovered. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Police procedure in conducting an inventory upon impounded motor vehicles is not an unreasonable search in violation of U.S. Const., amend. 4. *Hall v. State*, 143 Ga. App. 706, 240 S.E.2d 125 (1977).

When vehicles are impounded, police routinely follow caretaking procedures by securing and inventorying the cars' contents. These procedures have been widely sustained as reasonable under U.S. Const., amend. 4. *Martasin v. State*, 155 Ga. App. 396, 271 S.E.2d 2 (1980).

After the lawful initial stop and arrest of defendant, a subsequent inventory search of a defendant's automobile, which revealed additional contraband, is proper where defendant makes no request to retrieve the vehicle but, instead, voluntarily acquiesces to an officer's driving the automobile to the police station to be impounded. *Kilgore v. State*, 158 Ga. App. 55, 279 S.E.2d 239 (1981).

Inventory search authorized both as search of properly impounded vehicle and as search incident to lawful arrest. See *State v. Gilchrist*, 174 Ga. App. 499, 330 S.E.2d 430 (1985).

A police officer's decision to impound a car and to conduct an inventory search was upheld where the car was involved in a parking lot collision; the defendant was arrested after driving with a suspended driver's license and a license tag issued to another vehicle and driving without insurance; the officer was unable to reach anyone locally

who could take custody of the car; and other alternatives to impoundment would have incurred the risk of theft or damage to the car or its contents. *State v. Gilchrist*, 174 Ga. App. 499, 330 S.E.2d 430 (1985).

Inventory search was lawful after defendant was arrested and the defendant's car was impounded for improper tag registration. *Dillard v. State*, 177 Ga. App. 805, 341 S.E.2d 310 (1986).

An inventory search is appropriate whenever the police department selects the towing vehicle rather than the defendant in order to protect the police against claims of lost or stolen property. *Fortson v. State*, 201 Ga. App. 272, 410 S.E.2d 774 (1991).

Because police officers decided that it was unsafe to leave the defendant's vehicle at the place where the defendant was arrested because it would cause a road hazard the next morning since it would be blocking the driveway of a bank, the action of the officers in impounding and inventorying the vehicle was reasonable when measured against the fourth amendment's interest in protecting the individual's right to privacy. *Martin v. State*, 201 Ga. App. 716, 411 S.E.2d 910 (1991).

A police officer had the legal right to impound a parked vehicle occupied by the defendant at the time the officer learned of an improper license plate, and an ensuing search was justified either as an onsite inventory search or under the inevitable discovery doctrine. *United States v. Williams*, 936 F.2d 1243 (11th Cir. 1991), cert. denied, 503 U.S. 912, 112 S. Ct. 1279, 117 L. Ed. 2d 504 (1992).

Where there were no passengers in defendant's car and defendant was ineligible to further drive the car because of lack of a valid driver's license, and the car was in a dangerous position on the roadway, it had to be moved for safety's sake. Choosing impoundment was reasonably necessary to safeguard defendant's property, protect the public by removing the roadway obstruction, and prevent exposure of the officer to potential danger. *Williams v. State*, 204 Ga. App. 372, 419 S.E.2d 351 (1992).

Where a vehicle was lawfully impounded following the defendant's arrest and the tools in question were included in the inventory of the items contained in the car, the seizure of these particular items was autho-

Inventory Searches (Cont'd)

rized although the warrant on which the search was based neither mentioned them nor contained any information suggesting that they had been used in the commission of a crime. *Day v. State*, 203 Ga. App. 186, 416 S.E.2d 548 (1992).

Where at the time of the defendant's arrest, the defendant was living on leased premises in a remote mountain location, and the defendant's lessor actually requested and assisted in the vehicle's removal, the action of the officers in impounding and inventorying the vehicle was lawful. *Moulder v. State*, 207 Ga. App. 335, 427 S.E.2d 793 (1993).

An inventory search of defendant's truck following impoundment was not illegal since the police department had a long standing policy that all parts of a vehicle were to be inventoried, including all containers. *Staley v. State*, 224 Ga. App. 806, 482 S.E.2d 459 (1997).

The validity of an inventory search hinges on the legality of the decision to impound a car, which must be made according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity; therefore, because the officer's decision to impound an automobile was not made in accordance with police guidelines but was motivated by a desire to find incriminating evidence, the inventory search of the car was invalid. *United States v. Skinner*, 957 F. Supp. 228 (M.D. Ga. 1997).

Even though a vehicle did not pose a hazard to other drivers since it was parked off the road and on private property, the vehicle and its contents were exposed to a risk of theft or damage and impoundment was reasonably necessary. *Scott v. State*, 232 Ga. App. 337, 501 S.E.2d 255 (1998).

Contents of an impounded vehicle are routinely inventoried to protect the property of the owner, protect the officers against claims for lost or stolen property, and protect the police from potential danger, and the validity of such conduct is not dependent upon the absolute necessity for the police to take charge of property to preserve it, but depends instead on whether the police conduct was reasonable under the fourth amendment in light of the circumstances confronting the police at the time; thus,

police were authorized to impound and later perform a routine inventory of defendant's car where defendant was arrested at the home of a friend in connection with a murder and the disappearance of defendant's spouse, defendant's car was at the home of the friend, and police knew that defendant had been planning to leave the state with the friend and that defendant's car was wanted in an investigation in another county, because, under the circumstances, the police had reason to believe that defendant's detention would be lengthy and the officers were not required to trust that the car would remain untouched if they left it at the friend's home. *Wright v. State*, 276 Ga. 454, 579 S.E.2d 214 (2003), cert. denied, 540 U.S. 1106, 124 S. Ct. 1059, 157 L. Ed. 2d 892 (2004).

Time limit for removal of vehicle. — Impoundment and inventory search of defendant's vehicle, pursuant to a police department policy requiring an arrestee's vehicle to be removed within 15 minutes, was not unreasonable as a matter of law. *Gooden v. State*, 196 Ga. App. 295, 395 S.E.2d 634 (1990).

Unreasonable impoundment and inventory. — Because the defendant's car was being towed away by a wrecking service of the defendant's choice to a destination of the defendant's choice and the defendant was present and physically capable of making arrangements for the safekeeping of the defendant's belongings, there was no justification for police intrusion in the form of an inventory search. Such a search was unreasonable under U.S. Const., amend. 4. *State v. Travitz*, 140 Ga. App. 351, 231 S.E.2d 127 (1976).

Unless the rationale for an inventory search inheres in the decision to seize and inventory, the impoundment itself may be unreasonable and the resulting inventory search invalid. *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

After an automobile owner has been arrested and the police allow a private party to drive the car home, any subsequent search and impoundment of the vehicle without a warrant constitutes an illegal search and seizure. *Phillips v. State*, 167 Ga. App. 260, 305 S.E.2d 918 (1983).

Where a driver was arrested and a reliable friend was present who was authorized and

capable of removing the vehicle, the rationale for impoundment did not exist, making the impoundment unreasonable and resulting inventory search invalid. *Strobhart v. State*, 165 Ga. App. 515, 301 S.E.2d 681 (1983).

Areas of automobile subject to inventory search. — In conducting an inventory search pursuant to standard police practice, an officer may search those places within an automobile where, under the facts of the particular case, the officer can reasonably conclude that personal property may be located. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

Police, in conducting an inventory search, may ordinarily inspect the glove compartment, the trunk, on top of the seats as well as under the front seats, and the floor of the automobile. An inspection of these areas is reasonable because these are common locations in or on which it is reasonably to be expected that the owner or occupant of an automobile may place items of personalty. The intrusion, although serious, is justified by the need to protect the property of the owner, and to protect the police from claims. This is to say no more than in the typical case it is not unreasonable for the police to search such places while conducting an inventory. *Arnold v. State*, 155 Ga. App. 581, 271 S.E.2d 714 (1980).

When police take custody of any sort of container, such as automobile, it is reasonable to search the container to itemize the property to be held by the police. *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Circumstances not justifying inventory search. — When the driver of a motor vehicle is arrested and a reliable friend is present, authorized, and capable of removing an owner's vehicle which is capable of being safely removed, it is unnecessary for the police to impound the car and the rationale for an inventory search does not exist. Therefore, impoundment and search under these circumstances would be a serious intrusion upon rights provided by U.S. Const., amend. 4. *State v. Lubvick*, 147 Ga. App. 784, 250 S.E.2d 503 (1978); *Fortson v. State*, 262 Ga. 3, 412 S.E.2d 833 (1992).

Where the driver of a motor vehicle is arrested and a reliable friend is present,

authorized, and capable of removing an owner's vehicle which is capable of being safely removed; or where the arrestee expresses a preference as to towing service and designates an appropriate carrier and destination for the vehicle, it is unnecessary for the police to impound it. In either of these instances, the rationale for an inventory search does not exist. *Mulling v. State*, 156 Ga. App. 404, 274 S.E.2d 770 (1980).

Even though police, rather than the arrestee had selected the towing service, an inventory search was not appropriate in order to protect the police against claims of lost or stolen property. *Fortson v. State*, 262 Ga. 3, 412 S.E.2d 833 (1992).

Circumstances under which police may take charge of property. — Police seizure and inventory are not dependent for their validity upon the absolute necessity for the police to take charge of property to preserve it. They are permitted to take charge of property under broader circumstances than that. *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Validity of seizure and inventory not dependent on necessity to take charge of property. — A police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve it. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

In circumstances involving noncriminal inventory searches, search warrants are not required, linked as the warrant requirement textually is to the probable cause concept. This is so because the salutary functions of a warrant simply have no application in that context; the constitutional reasonableness of inventory searches must be determined on other bases. *Carl v. State*, 160 Ga. App. 464, 287 S.E.2d 379 (1981).

Civil seizure of house does not justify inventory search. — The government's lawful seizure of a house in connection with pending civil forfeiture proceedings did not entitle the government to conduct an inventory search of the house's contents over the objection of the tenant occupying the house. *United States v. Ladson*, 774 F.2d 436 (11th Cir. 1985).

Once lawfully within a house, officers are authorized to make a search of the entire

Inventory Searches (Cont'd)

house for the limited purpose of securing it, i.e., discovering the presence of all occupants and eliminating the possibility of harm to the officers and the destruction of evidence. *State v. Camp*, 175 Ga. App. 591, 333 S.E.2d 896 (1985).

Evidence adduced from inventory of property reported stolen admissible. — Where police recovered property defendant reported stolen and conducted a routine inventory to determine whether the property was in fact defendant's, incriminating evidence found during the inventory was properly admitted at trial against the defendant because the inventory was conducted in good faith and was a reasonable search and seizure. *Ledesma v. State*, 251 Ga. 885, 311 S.E.2d 427, cert. denied, 467 U.S. 1241, 104 S. Ct. 3510, 82 L. Ed. 2d 819 (1984).

Subsequent reading of documents found in inventory search justified under "second glance doctrine". — Where one officer pursuant to a valid and proper inventory had read and called attention to a death note found in defendant's possessions and where the discovery and disclosure of the note were appropriate police actions, the subsequent acts of other officers, in rereading and perusing the documents in question were plainly justified under the "second glance doctrine." *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Inventory of shopping bag was reasonable. — Where police officers acting in good faith and while carrying out an inventory procedure without investigative intent, discovered and read "death note" contained in defendant's open ended shopping bag, the search was deemed reasonable and, therefore, was not violative of the defendant's rights. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Heroin obtained during inventory search admissible. — Heroin discovered by police officers conducting an inventory of the contents of an automobile in order to remove the valuables for safekeeping while the owner was under arrest was admissible and was not obtained as the result of an unreasonable search and seizure. *Denson v. State*, 128 Ga. App. 456, 197 S.E.2d 156 (1973).

Search valid as items inevitably discovered. — Even though exigent circumstances did not require a search of defendant's locked briefcase, the contents thereof would have been inevitably discovered in an inventory search, and therefore, defendant's motion to suppress was properly denied. *Taylor v. State*, 228 Ga. App. 325, 491 S.E.2d 417 (1997).

Consent Searches**1. In General**

Facts of every case must be examined in light of the "reasonable expectation of privacy" test. Only after it is determined that the aggrieved party did not have such expectations do the more traditional consent tests come back into play. *Braddock v. State*, 127 Ga. App. 513, 194 S.E.2d 317 (1972).

Probable cause and warrant not required. — Search conducted with one's consent need not meet the probable cause and warrant requirements of U.S. Const., amend. 4. *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977); *Curry v. State*, 144 Ga. App. 129, 240 S.E.2d 280 (1977); *Green v. State*, 242 Ga. 261, 249 S.E.2d 1 (1978), rev'd on other grounds sub nom. *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979); *Williams v. State*, 151 Ga. App. 833, 261 S.E.2d 720 (1979); *Murphy v. State*, 155 Ga. App. 128, 270 S.E.2d 335 (1980); *Witt v. State*, 157 Ga. App. 564, 278 S.E.2d 145 (1981); *Crews v. State*, 170 Ga. App. 104, 316 S.E.2d 549 (1984); *Weaver v. State*, 178 Ga. App. 91, 341 S.E.2d 921 (1986); *Allen v. State*, 191 Ga. App. 623, 382 S.E.2d 690 (1989); *Ramirez v. State*, 192 Ga. App. 255, 384 S.E.2d 279 (1989); *Calixte v. State*, 197 Ga. App. 723, 399 S.E.2d 490 (1990).

A valid consent eliminates the need for either probable cause or a search warrant, and only if the issue of consent is decided adversely to the state need the trial court consider the issue of probable cause. *State v. Bassford*, 183 Ga. App. 694, 359 S.E.2d 752 (1987).

Even though a state police officer had no probable cause and nothing more than a general suspicion that there might be contraband in the car, one of the exceptions to the requirement of both a warrant and probable cause is a search conducted pursuant to consent, and even if the defendant was de-

tained beyond the time minimally necessary to investigate the circumstances that caused the initial stop, the defendant's consent authorized the search of the car the defendant was driving. *Raney v. State*, 186 Ga. App. 758, 368 S.E.2d 528 (1988); *Hunter v. State*, 190 Ga. App. 52, 378 S.E.2d 338, cert. denied, 190 Ga. App. 898, 378 S.E.2d 338 (1989).

Consensual search upon a traffic stop for a seatbelt violation supported the trial court's denial of a motion to suppress, as the search conducted pursuant to the defendant's consent was not a search based solely on the defendant's failure to wear a seatbelt; thus, the trial court did not err by ruling that law enforcement did not violate the fourth amendment during an officer's traffic stop for a violation of O.C.G.A. § 40-8-76.1. *Blitch v. State*, 281 Ga. 125, 636 S.E.2d 545 (2006).

Search must be within scope of consent.

— Consensual searches are reasonable only if kept within the bounds of the actual consent given. *Mason v. Pulliam*, 557 F.2d 426 (5th Cir. 1977).

Search of defendant's shoes did not exceed the scope of the consent given to search because defendant responded to a permissible police inquiry by voluntarily consenting to a search of defendant's person and bags and the agents were still within the scope of consent given when the police found evidence amounting to probable cause to search defendant's shoes. *Perez v. State*, 249 Ga. App. 399, 547 S.E.2d 699 (2001).

In a drug case, a court erred by suppressing evidence found on defendant, a passenger in a validly stopped car, where pursuant to a valid request to search for drugs after drugs were seen in the car, defendant voluntarily consented to the search of defendant's person. *State v. Gooch*, 266 Ga. App. 746, 598 S.E.2d 341 (2004).

Search pursuant to probation agreement lawful. — The lack of a probation officer's involvement in a warrantless search pursuant to a probational agreement did not violate defendant's constitutional rights given the express language of that agreement and the investigative officer's good faith suspicion of drug transacting. *State v. Bethune*, 207 Ga. App. 340, 427 S.E.2d 795 (1993).

Scope of search may be limited by individual consenting to search. — If an individual

gives consent to a search of the individual's vehicle, then that individual may limit the scope of the search. In those cases in which no limitation is placed on the consent, a police officer is allowed the discretion to conduct a complete search, including closed containers. *United States v. Harris*, 716 F. Supp. 1470 (M.D. Ga. 1989), aff'd, 928 F.2d 1113 (11th Cir. 1991).

Scope of search proper. — A police officer did not exceed the proper scope of a search to which the defendant consented since: (1) officers asked the defendant and others whether they had any weapons, including needles; (2) the defendant was then asked individually if defendant could be searched for weapons or similar objects; (3) the defendant agreed and gave no indication that the officer could not empty defendant's pockets in conducting the search. *McNeil v. State*, 248 Ga. App. 70, 545 S.E.2d 130 (2001).

Search of curtilage. — Defendant's consent to search the defendant's house impliedly included consent to search the curtilage, in which a "hobo," or garbage can, was located. *Woods v. State*, 258 Ga. 540, 371 S.E.2d 865 (1988).

Continuing nature of consent. — Legally obtained consent for search continues throughout the duration of the search unless revoked. *Conley v. State*, 180 Ga. App. 662, 350 S.E.2d 45 (1986); *Miller v. State*, 183 Ga. App. 55, 357 S.E.2d 876 (1987); *Beguiristain v. State*, 187 Ga. App. 164, 369 S.E.2d 774 (1988).

Defendant's failure to limit scope of search. — Police officer did not exceed the scope of the defendant's consent by searching luggage in the trunk of the defendant's car, where the defendant was physically present while the officer searched the car and had ample opportunity to limit the scope of the search or request that it be discontinued. *United States v. Harris*, 928 F.2d 1113 (11th Cir. 1991).

Evidence supported court's determination that search of defendant's vehicle following consent at police roadblock did not exceed scope of consent. See *Kan v. State*, 199 Ga. App. 170, 404 S.E.2d 281, cert. denied, 199 Ga. App. 906, 404 S.E.2d 281 (1991).

Consent may have retroactive effect. — Although a police officer entered a suspect's

Consent Searches (Cont'd)**1. In General (Cont'd)**

premises before consent to search was given but discovered stolen items on the premises after the consent was given, the officer's presence was authorized at the time of discovery, and the discovered items could not be suppressed. *Atkins v. State*, 173 Ga. App. 9, 325 S.E.2d 388 (1984), *aff'd*, 254 Ga. 641, 331 S.E.2d 597 (1985).

Manifestation of consent can be by word or deed. *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980).

Mere submission to claim of lawful authority is not consent. — The state's burden of proving that the necessary consent was freely and voluntarily given is not satisfied by showing a mere submission to a claim of lawful authority. *Garcia v. State*, 200 Ga. App. 741, 409 S.E.2d 683 (1991).

Because a passenger in a car was not informed of the right to refuse to consent of a search of the passenger's purse and did not give any express consent but merely remained silent, the trial court did not err in finding that the cocaine found in the passenger's purse was the product of a non-consensual search. *State v. Harris*, 236 Ga. App. 525, 513 S.E.2d 1 (1999).

Sufficient evidence to support nonverbal consent to patdown. — See *Borda v. State*, 187 Ga. App. 49, 369 S.E.2d 327 (1988).

Because there was no evidence contesting the police officers' testimony that defendant consented to a search by gestures, the totality of the circumstances supported the trial court's determination that defendant consented to the search; consequently, the trial court properly denied defendant's motion to suppress. *Galvan v. State*, 270 Ga. App. 282, 605 S.E.2d 919 (2004).

A voluntary consent to search does not remove the taint of an illegal seizure; rather, voluntariness is merely a threshold requirement. *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), *rev'd on other grounds*, 690 F.2d 869 (11th Cir. 1982).

Consent cannot be product of illegal detention. — In order to eliminate any taint from an involuntary seizure or arrest preceding a consent to search, there must be proof both that the consent was voluntary and that it was not the product of illegal detention. Proof of a voluntary consent alone is not

sufficient. The relevant factors include the temporal proximity of an illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct. *Brown v. State*, 188 Ga. App. 184, 372 S.E.2d 514 (1988).

Consent search of a bag in defendant's possession and consent search of defendant's residence was tainted by illegality of stop of defendant where defendant's consent to the search came within fifteen minutes of the illegal stop, there were no intervening circumstances between the initiation of the illegal detention and the consent, the stop of defendant was not based on suspicious behavior, and the defendant was not informed of the right to refuse consent to the search nor given any appreciable time to decide whether to give consent to the search. *United States v. Momodu*, 909 F. Supp. 1571 (N.D. Ga. 1995).

Coercive question by officer. — Because a police officer approached the appellee and asked if the officer could search appellee, the officer stated that the officer did not need a search warrant, and because the appellee's testimony demonstrated that the appellee had construed the officer's statement in the coercive sense (the appellee had acquiesced only because the officer stated that the officer didn't need a warrant to search), the cocaine was the inadmissible product of a nonconsensual "seizure" by the officer rather than the admissible product of appellee's consent to be searched. *State v. Westmoreland*, 204 Ga. App. 312, 418 S.E.2d 822 (1992).

Inviting officer into home. — There was no fourth amendment violation where defendant implicitly consented to police officer's presence on the defendant's property by inviting officer into the defendant's home and even if the officer technically trespassed on defendant's property this of itself did not constitute an illegal search. *Ball v. Georgia*, 733 F.2d 1557 (11th Cir. 1984).

Although police officer's initial entry into defendant's residence to discuss information the officer had with defendant regarding defendant's allegedly having drugs around defendant's residence was illegal because the officer's entry was not authorized, the officer's subsequent act in leaving and in being invited to enter again after defendant got out of the bathroom was sufficiently

attenuated from the officer's initial illegal entry that the trial court did not err in denying defendant's motion to suppress after defendant consented to a search of defendant's property and defendant showed police where drugs were hidden, as the officer's second entry into the residence was at defendant's request. *Brown v. State*, 261 Ga. App. 351, 582 S.E.2d 516 (2003).

Where officer never sought defendant's permission to enter apartment, defendant could not possibly have consented to the intrusion. The notion of "implied consent" advanced in support of this type of search has no basis within the context of U.S. Const., amend. 4. *Clare v. State*, 135 Ga. App. 281, 217 S.E.2d 638 (1975).

Permission to search car obtained after arrest. — Where the evidence showed that after defendant was stopped for speeding and found to be without a driver's license, the defendant followed the trooper to the sheriff's office in order to post a cash bond, and while that process was taking place, the trooper decided to seek defendant's consent to search the defendant's car, and when defendant was about to leave after posting bond, the trooper asked the defendant to sign a written permission and defendant complied, defendant failed to show the consent was illegally obtained. *Partridge v. State*, 187 Ga. App. 325, 370 S.E.2d 173 (1988), cert. denied, 187 Ga. App. 908, 370 S.E.2d 173 (1988).

Motorist was precluded from challenging legality of consent search of the motorist's vehicle, because, not only did the motorist fail to manifest a subjective expectation of privacy in suitcases containing marijuana, the motorist affirmatively disavowed any such expectation. *United States v. McBean*, 861 F.2d 1570 (11th Cir. 1988).

Implied consent from acceptance of continued employment. — Under circumstances in which one voluntarily accepts and continues employment which subjects the person to search on a routine basis, such search is made with the person's consent. *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977).

Seizure of a robbery weapon pursuant to a consent search is proper. *Cantrell v. State*, 237 Ga. 851, 230 S.E.2d 287 (1976).

Proof of consent when subject of search not in custody. — When the subject of a

search is not in custody and the state attempts to justify a search on the basis of the person's consent, U.S. Const., Amends. 4 and 14 require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. *Brand v. State*, 129 Ga. App. 747, 201 S.E.2d 180 (1973).

Effect of laws of property and agency. — U.S. Const., amend. 4 protects people, not places; only the aggrieved person or expressly authorized agent may waive the person's rights; any power to consent to a search derived from traditional and subtle distinctions in the law of property or agency cannot override that expectation of privacy upon which an individual justifiably relies. With no reasonable expectation of privacy in the premises, however, the consent of another with equal or superior possessory or property interests is then sufficient to validate the search. *Braddock v. State*, 127 Ga. App. 513, 194 S.E.2d 317 (1972).

Observing evidence of crime prior to consent. — The fruits of a search of the defendant's premises, by a conservation ranger looking for deer carcasses, conducted with the defendant's consent, were admissible. The legality of such a search was not vitiated because, prior to obtaining consent, the ranger had observed the evidence of the crime by walking around the side of the house. *State v. Sutton*, 258 Ga. 382, 369 S.E.2d 249 (1988).

Evidence admissible where obtained from consensual, though otherwise illegal, search. — When the defendant grants permission to an otherwise illegal search (whether the defendant "gives up" and admits guilt, or whether the defendant feels that by expressing unconcern defendant may yet escape detection) and on request defendant personally unlocks the automobile, gives the keys to the officers, or expresses verbal permission for the search to be made, a waiver results, and evidence gained therefrom is admissible. *Young v. State*, 113 Ga. App. 497, 148 S.E.2d 461 (1966).

Warrant issued based on searches voluntarily given is valid. — If a defendant's consent to the first two searches was freely and voluntarily given, the subsequent search warrant, the issuance of which was based on the evidence obtained from the first two searches, was valid. *Kosal v. State*, 204 Ga.

Consent Searches (Cont'd)**1. In General (Cont'd)**

App. 708, 420 S.E.2d 621 (1992).

Where information imparted to appellant was in fact underlying, if mistaken, basis for officers' request for permission to search, such circumstances do not demonstrate that the appellant's consent was obtained by officers' deceit. *Suddeth v. State*, 162 Ga. App. 460, 291 S.E.2d 430 (1982).

Denial of motion not error where search consented to. — Where defendant consents to a search of defendant's car at the time of the defendant's arrest and later signs a consent to search, the trial court does not err in denying defendant's motion to suppress the evidence seized from the defendant's car inasmuch as the defendant voluntarily consented to the search. *Thompson v. State*, 157 Ga. App. 600, 278 S.E.2d 62, *aff'd*, 248 Ga. 343, 285 S.E.2d 685 (1981).

Reason on consent form other than reason for investigatory stop. — Because there was no evidence that the defendant was misled about the purpose of the search or that the evidence seized was used for any purpose other than that to which the defendant consented, the fact that the officer indicated on the consent form that the search was in connection with an investigation of a drug crime when the traffic stop was purportedly for a license violation did not invalidate the consent. *State v. Harris*, 236 Ga. App. 525, 513 S.E.2d 1 (1999).

Condition of probation. — The defendant's waiver of fourth amendment right to be free from unreasonable search and seizure was consented to and was a valid condition of probation since the defendant was informed of the waiver at sentencing in the presence of counsel, who did not object. *Johnson v. State*, 248 Ga. App. 454, 546 S.E.2d 562 (2001).

Traffic stop. — Where defendant was free to go after a valid traffic stop, was not unreasonably detained or asked numerous questions unrelated to the traffic stop, defendant's constitutional rights were not violated when a police officer requested consent to search a car and defendant was subsequently convicted of trafficking in cocaine. *Daniel v. State*, 260 Ga. App. 732, 580 S.E.2d 682 (2003), *aff'd*, 277 Ga. 840, 597 S.E.2d 116 (2004).

Summary judgment was denied to a pursuing deputy sheriff and the supervisor in an arrestee's 42 U.S.C. § 1983 suit because ramming the arrestee's car during a high-speed chase, causing an accident that left the arrestee a quadriplegic, constituted a fourth amendment seizure; the pair did not have qualified immunity because the supervisor authorized the deputy to use excessive force without knowing the minor nature of the arrestee's traffic offense. *Harris v. Coweta County*, F. Supp. 2d , 2003 U.S. Dist. LEXIS 27348 (N.D. Ga. Sept. 25, 2003).

There was no fourth amendment violation under circumstances in which, during the course of a traffic stop, the officer asked the defendant to get out of the car for safety reasons and asked the defendant for consent to search the car before completing the traffic citation and obtaining information on the status of the defendant's license, which consent was given by the defendant. *Salmeron v. State*, 280 Ga. 735, 632 S.E.2d 645 (2006).

Consent not valid. — Trial court did not err in granting defendant's motion to suppress evidence of cocaine found during a search incident to a traffic stop because defendant's consent to search was not valid where defendant was under arrest for loud music; the fact that defendant was nervous after being stopped by a state trooper was not in and of itself sufficient articulable suspicion which would result in probable cause to search defendant's vehicle. *State v. McCloud*, 261 Ga. App. 37, 581 S.E.2d 679 (2003).

2. Who May Consent

Consent of head of household. — It is the general rule that the voluntary consent of the head of a household to the search of premises owned or controlled by the head of the household is sufficient to authorize a search of the premises without a search warrant, and such search does not violate the constitutional prohibition against unreasonable searches and seizures. *Tolbert v. State*, 224 Ga. 291, 161 S.E.2d 279, *cert. denied*, 393 U.S. 1005, 89 S. Ct. 493, 21 L. Ed. 2d 468 (1968); *Montgomery v. State*, 155 Ga. App. 423, 270 S.E.2d 825 (1980); *Crawford v. State*, 181 Ga. App. 454, 352 S.E.2d 635 (1987).

Where the defendant's spouse, the sole

lessee of an apartment, called the police because their children had been stabbed, invited them into the home, and then left, entrusting it to the police, and later gave written consents to search, the trial court properly denied the defendant's motion to suppress evidence found during searches of the apartment. *Caldwell v. State*, 260 Ga. 278, 393 S.E.2d 436 (1990).

Owner of house with whom defendant lives may consent to search of area not specifically set aside for such occupant. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), *aff'd*, 481 F.2d 1402 (5th Cir. 1973).

Consent of spouse. — When a wife reported a domestic disturbance at the marital residence, and told responding officers that her husband used cocaine, after which the husband refused the officers' request for consent to search the residence, the wife's subsequent grant of such consent did not authorize a search, and the officers were required to obtain a warrant, as the husband was reasonably entitled to expect that his wife would honor his refusal, and the "common authority" allowing her to consent to a search also allowed him to assert a right to be free from a search on behalf of all occupants of the residence. *Randolph v. State*, 264 Ga. App. 396, 590 S.E.2d 834 (2003).

Where a divorce decree gave the defendant's ex-spouse the right to unobstructed access to the defendant's house to remove the ex-spouse's property, the warrantless entry into the basement by a police officer accompanying the ex-spouse, based on the ex-spouse's consent, was authorized and not in violation of the defendant's fourth amendment rights. Despite the fact that the defendant had padlocked the basement door and that the defendant was not present, the trial court properly refused to suppress evidence found by the officer in plain view in the basement. *Bray v. State*, 265 Ga. App. 886, 595 S.E.2d 687 (2004).

Sibling's consent to search of defendant's bedroom in sibling's apartment. — Defendant's sibling, who was the lessee of an apartment, could consent to a search of the entire apartment, including the bedroom where the defendant was staying; lessee did not give up control and authority of the apartment merely by allowing the defendant to stay in one of its bedrooms and accepting

money from the defendant and the lessee did not give up the right to object to the defendant's use of the lessee's home for illegal purposes. *Ford v. State*, 214 Ga. App. 284, 447 S.E.2d 334 (1994).

Former roommate and landlord unable to consent to search. — Neither a roommate who had moved out of apartment prior to search nor landlord before the defendant/tenant had abandoned the apartment, could, absent certain exigent circumstances, consent to a warrantless search of the defendant's apartment. *Browning v. State*, 176 Ga. App. 420, 336 S.E.2d 41 (1985).

Ten-year-old child did not have sufficient authority to validly consent to the search of child's parents' home. *Davis v. State*, 262 Ga. 578, 422 S.E.2d 546 (1992).

Validity of consent. — A warrantless search based on consent that would not satisfy the test set out in *U.S. v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), could nonetheless be upheld if the law enforcement officer conducting the search reasonably (albeit erroneously) believed the consent given was valid. Resolution of this issue requires a determination by the factfinder, applying an objective standard, that the facts available to the officer at the time of the search would warrant one of reasonable caution in the belief that the consenting party had authority over the premises. *State v. Stewart*, 203 Ga. App. 829, 418 S.E.2d 110 (1992).

Officer's warrantless entry into the defendant's home and bedroom was a search requiring a valid consent, but the trial court did not consider the relevant factors in deciding if the defendant's 14-year-old child gave a valid consent to such a search; the trial court's order suppressing evidence seized during the search was vacated, and the case was remanded with directions to consider the relevant factors. *State v. McKinney*, 268 Ga. App. 296, 601 S.E.2d 777 (2004).

Consent by co-inhabitant insufficient. — Since defendant was present and refused to consent to a warrantless search of defendant's residence, the search was invalid even though defendant's co-inhabitant consented to the search. *State v. Randolph*, 278 Ga. 614, 604 S.E.2d 835 (2004), *aff'd*, U.S. , 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).

Resident cannot consent to search of travel bag of temporary guest. — As a resi-

Consent Searches (Cont'd)**2. Who May Consent (Cont'd)**

dent of a house, who voluntarily consented to a search by law enforcement personnel, did not have "common authority" over a travel bag of a temporary guest, the resident's consent was ineffective to authorize a search of it, and the agent conducting the search, who deduced that the bag belonged to one of two guests, should have sought consent of the believed owners, both of whom were on the scene. *United States v. Gilley*, 608 F. Supp. 1065 (S.D. Ga. 1985).

Search of another's premises. — Since U.S. Const., amend. 4 protects persons, not places, one cannot object to the searching of another's premises or property if the latter consents to the search, even though property is found for the possession of which defendant is subsequently prosecuted. *Cook v. State*, 134 Ga. App. 712, 215 S.E.2d 728 (1975).

Third-party consent. — The state may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *Park v. State*, 154 Ga. App. 348, 268 S.E.2d 401 (1980).

Consent may be given by a third party, if the third party has a sufficient relationship to the premises. *Witt v. State*, 157 Ga. App. 564, 278 S.E.2d 145 (1981).

A warrantless search is justified when permission is obtained from a third party who possesses common authority over, or other sufficient relationship to, the premises sought to be inspected. *Rucker v. State*, 250 Ga. 371, 297 S.E.2d 481 (1982).

When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained by a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987); *Pupo v. State*, 187 Ga. App. 765, 371 S.E.2d 219 (1988).

An officer's belief that a third party has authority to consent to the search of another

person's property should not only be based on information previously obtained in the officer's investigation, but should also be based on the facts and circumstances existent at the time of the search. *State v. Oliver*, 183 Ga. App. 92, 357 S.E.2d 889 (1987).

The authority that justifies the third-party consent does not rest upon the law of property but rests rather on mutual use of the property by persons generally having joint access or control for most purposes. *State v. Oliver*, 183 Ga. App. 92, 357 S.E.2d 889 (1987).

Consent of defendant's stepchild to enter and search the stepchild's apartment, and of defendant's spouse to search a suitcase over which the spouse had common authority with the defendant, was sufficient authorization to police to search the suitcase. *Johnson v. State*, 266 Ga. 140, 464 S.E.2d 806 (1996).

Sharer of defendant's bedroom may consent. — The rape and child molestation victim's parent could consent to a search of the bedroom which the defendant and the parent shared. *Calloway v. State*, 199 Ga. App. 272, 404 S.E.2d 811 (1991).

Effect of relinquishing possession of automobile to third party. — Where the owner or lessee of an automobile relinquishes actual possession to a third party, the owner or lessee thereby abandons any expectation of privacy in the automobile, and the owner or lessee therefore lacks standing to contest the legality of the search and seizure of the vehicle. *Reinhardt v. State*, 197 Ga. App. 825, 399 S.E.2d 729 (1990).

The defendant had sufficient authority to consent to the search of a car, where the evidence showed the car was leased in the name of an individual who was not in the car and a check conducted by the patrol officer who had stopped the vehicle for a traffic offense revealed the return of the car was overdue. *Gossett v. State*, 199 Ga. App. 286, 404 S.E.2d 595, cert. denied, 199 Ga. App. 906, 404 S.E.2d 595 (1991).

Consent given by third person, under age of majority, not necessarily invalid. — Where consent to search a suspect's residence is given by another person, which person is under the age of majority, the fact of minority alone will not render the consent invalid; rather, each case will be considered in light of the minor's age, address, right of access to the premises, and right to invite others onto

the premises. *Atkins v. State*, 173 Ga. App. 9, 325 S.E.2d 388 (1984), *aff'd*, 254 Ga. 641, 331 S.E.2d 597 (1985).

A child under the age of 18 can give a valid consent to search the child's mother's house. *Atkins v. State*, 254 Ga. 641, 331 S.E.2d 597 (1985).

A minor child's age, address, right of access, and right of invitation determine whether that child can give a valid consent to search the child's mother's house. *Atkins v. State*, 254 Ga. 641, 331 S.E.2d 597 (1985).

Validity of third-party consent where defendant absent. — Where the absent target of the search and the consenting third party do not have common authority over and mutual use of premises, the third party has the right to permit inspection in the third party's own right and the absent target has assumed the risk that the third party may grant this permission to others. *Fears v. State*, 152 Ga. App. 817, 264 S.E.2d 284 (1979).

Consent by third party to turn over luggage to police. — Where an individual, in whose car defendant's luggage was placed prior to the defendant's arrest, was torn between two unattractive alternatives — keeping the unwanted luggage or turning it over — and finally decided to take a police receipt and gave it to the police, the individual's consent was voluntary and effective. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, *cert. denied*, 444 U.S. 886, 101 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Consent by apartment complex employees. — Because there was evidence that would authorize the trial court to find that, at the time that the entries by the police officer occurred, the defendant had neither leased nor was residing in the apartment, and that the defendant had no contractual rights in the premises which were in any way superior to those of the apartment complex employees, the evidence seized was the product of lawful searches conducted pursuant to the valid consent of the apartment complex employees. *Green v. State*, 187 Ga. App. 373, 370 S.E.2d 348, *cert. denied*, 187 Ga. App. 907, 370 S.E.2d 348 (1988).

Parent's consent to take defendant's gun. — Because the record showed that defendant's parent voluntarily consented to allow a police officer to take the defendant's gun and even asked that the officer not return it,

the fact that the parent's consent may have occurred after the officer seized the gun did not render the search and seizure invalid. *State v. McBride*, 261 Ga. 60, 401 S.E.2d 484 (1991).

Consent to search of rental car by renting party and rent payor valid as to renter. — Because the defendant did not own the car searched but had rented it on behalf of another person, the other person made the rental payments, the other person maintained possession of the car and used it, while the defendant rode in it only occasionally, and there was both an implied consent to open the car from the other person who may have had a legitimate expectation of privacy in its contents, as well as an express authority in the agent of the vehicle's owner to re-take possession of it under the contract of rental, the argument that the warrantless search without the defendant's permission violated the defendant's interest in the privacy of the vehicle and was thus illegal was without merit. *Little v. State*, 180 Ga. App. 359, 349 S.E.2d 248 (1986).

Bus passengers. — Bus passenger freely consented to detectives' search after they boarded the bus, explained that they were attempting to stem the flow of illicit drugs and firearms, and then asked passengers if they would consent to a random search of their baggage. *United States v. Fields*, 909 F.2d 470 (11th Cir. 1990).

Where a party to communication consents to another's listening to and recording the party's conversation, no search or seizure is involved. U.S. Const., amend. 4 does not protect a wrongdoer from the risk that the party's companions may be reporting to the police. *Ansley v. Stynchcombe*, 480 F.2d 437 (5th Cir. 1973).

Requiring consent to such a search as a condition of parole is not unreasonable. *Dean v. State*, 151 Ga. App. 847, 261 S.E.2d 759 (1979).

3. Voluntariness

Consent waives objection to evidence. — Free and voluntary consent that one's belongings be searched is a waiver of objection to the evidence produced as a result of the search. *Young v. State*, 113 Ga. App. 497, 148 S.E.2d 461 (1966).

If undisputed evidence shows that a person freely and voluntarily authorized a

Consent Searches (Cont'd)**3. Voluntariness (Cont'd)**

search of that person's automobile, the person cannot complain of an illegal search and seizure. *Hightower v. State*, 228 Ga. 301, 185 S.E.2d 82 (1971).

Consent must be voluntary. — Consent to search without a warrant must be given unequivocally, specifically, and intelligently. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), *aff'd*, 481 F.2d 1402 (5th Cir. 1973).

The defendant's acquiescence to a repeated order to show officers the contents of the defendant's watch pocket could not be construed as voluntary consent, since acquiescence is not a substitute for free consent. *Corley v. State*, 236 Ga. App. 302, 512 S.E.2d 41 (1999).

Defendant's spouse was coerced into giving consent to a police search of the residence, and the trial court did not err in granting defendant's motion to suppress; the notion of "implied consent" advanced in support of the search had no basis within the context of fourth amendment rights. *State v. Fulghum*, 261 Ga. App. 594, 583 S.E.2d 278 (2003).

Consent to search must be the product of an essentially free and unrestrained choice by its maker. *Williams v. State*, 151 Ga. App. 833, 261 S.E.2d 720 (1979).

Search with consent is one undertaken with knowledge and without objection by accused. Consent, once legally obtained, ought to continue until revoked or otherwise withdrawn. *Ferguson v. Caldwell*, 233 Ga. 887, 213 S.E.2d 855 (1975).

Knowledge that consent may be withheld. — Waiver of fourth amendment rights is invalid unless person consenting knows that permission may be freely withheld. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), *aff'd*, 481 F.2d 1402 (5th Cir. 1973).

Constitution does not require proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search. *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980).

Although a warning that a party was free to decline to consent to a search is not required in order to validate consent to a search, knowledge is highly relevant in the voluntariness determination. *United States*

v. Robinson, 625 F.2d 1211 (5th Cir. 1980), *rev'd* on other grounds, 690 F.2d 869 (11th Cir. 1982).

Specific advice as to constitutional guaranty against unreasonable search need not precede a request that a suspect consent to search. While the search is not invalidated thereby as a matter of law, consent is not lightly assumed in the case of search and seizure. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), *aff'd*, 481 F.2d 1402 (5th Cir. 1973).

Fact that appellant was not advised of the appellant's right to refuse permission to conduct a search does not require finding that the appellant's consent was coerced. *Suddeth v. State*, 162 Ga. App. 460, 291 S.E.2d 430 (1982).

It is not essential to the validity of a consent search that the individual be informed of the individual's right to refuse. *Mann v. State*, 196 Ga. App. 730, 397 S.E.2d 17 (1990).

It is not essential to validity of consent to search automobile that owner be told that the owner has the right to refuse. *Woodruff v. State*, 233 Ga. 840, 213 S.E.2d 689 (1975).

Factors as to voluntariness. — There are three factors to be considered in determining whether voluntary consent was obtained by exploitation of an illegal seizure: the temporal proximity of the seizure and the consent; the presence of intervening circumstances; and, particularly, the purpose and flagrancy of the official misconduct. *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), *rev'd* on other grounds, 690 F.2d 869 (11th Cir. 1982).

Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. *Brand v. State*, 129 Ga. App. 747, 201 S.E.2d 180 (1973).

Test as to whether consent to search was freely given is the "totality of the circumstances" under *Schnecko v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) and *United States v. Scott*, 578 F.2d 1186 (6th Cir.), *cert. denied*, 439 U.S. 870, 99 S. Ct. 201, 58 L. Ed. 2d 182 (1978). *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337,

cert. denied, 444 U.S. 886, 101 S. Ct. 179, 62 L. Ed. 2d 116 (1979); *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), rev'd on other grounds, 690 F.2d 869 (11th Cir. 1982); *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981); *United States v. Williams*, 647 F.2d 588 (5th Cir. 1981).

Voluntariness of consent to search is question of fact to be determined from totality of the circumstances, and an appellate court should not overturn a trial court's holding on this question unless it is clearly erroneous. *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979); *State v. Norrington*, 203 Ga. App. 574, 417 S.E.2d 203 (1992), cert. denied, 203 Ga. App. 907, 417 S.E.2d 203 (1992).

If defendant voluntarily consented to the police search, then the search was valid. Voluntariness is a question to be determined from the totality of the circumstances, and the Court of Appeals will not disturb the trial court's determination on appeal unless it is clearly erroneous. *United States v. Smith*, 649 F.2d 305 (5th Cir. 1981), cert. denied, 460 U.S. 1068, 103 S. Ct. 1521, 75 L. Ed. 2d 945 (1983).

Voluntariness of consent to search is determined by looking to the totality of the circumstances, including such factors as the age of the accused, the accused's education, the accused's intelligence, length of detention, whether the accused was advised of the accused's constitutional rights, prolonged nature of questioning, use of physical punishment, and psychological impact of all these factors on the accused. *Dean v. State*, 250 Ga. 77, 295 S.E.2d 306 (1982); *Noland v. State*, 178 Ga. App. 486, 343 S.E.2d 763 (1986); *State v. Norrington*, 203 Ga. App. 574, 417 S.E.2d 203 (1992), cert. denied, 203 Ga. App. 907, 417 S.E.2d 203 (1992).

Whether there was a valid consent to search is a matter exclusively within the province of the factfinder, the trial court, and where, after a full exposure of the facts, the trial court finds consent for a search, that finding must be accepted by the court of appeals unless clearly erroneous. *Conley v. State*, 180 Ga. App. 662, 350 S.E.2d 45 (1986).

Whether there is a valid consent to search

is a matter exclusively within the province of the factfinder, the trial court. Unless clearly erroneous, the trial court's ruling on disputed facts and credibility at a suppression hearing must be accepted on appeal. *Allen v. State*, 200 Ga. App. 326, 408 S.E.2d 127, cert. denied, 200 Ga. App. 895, 408 S.E.2d 127 (1991).

Burden is on prosecution to show voluntariness of consent to warrantless search by clear and convincing evidence. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Whether consent to search was freely given is issue on which state must carry burden of proof. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Where the state seeks to justify a warrantless search on grounds of consent, it has the burden of proving that the consent was freely and voluntarily given. *State v. Norrington*, 203 Ga. App. 574, 417 S.E.2d 203, cert. denied, 203 Ga. App. 907, 417 S.E.2d 203 (1992).

Burden when consent given after illegal stop. — When trying to establish that there was a voluntary consent to carry out a search after an illegal stop, the government has a much heavier burden to carry than when the consent is given after a permissible stop. *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979).

Proof of voluntary consent. — The consent which opens the doors of a private home to official search and seizure cannot be deemed voluntary unless it be made clearly to appear that it was freely and intelligently given, not expressly or impliedly coerced. *Ray v. United States*, 84 F.2d 654 (5th Cir. 1936).

Voluntary consent and plain view doctrine. — Whatever is observed by a police officer in a legally correct location as a person voluntarily complies with a request for owner's registration papers confirming an oral statement of ownership falls within the plain view doctrine. An officer's limited use of a flashlight to illuminate the interior of a glove compartment as a person voluntarily complies with a request for owner's registration papers does not prevent the application of the plain view doctrine. *Caito v. State*, 130 Ga. App. 831, 204 S.E.2d 765 (1974).

Consent Searches (Cont'd)**3. Voluntariness (Cont'd)**

Effect of preliminary refusal in later decision to consent. — Appellant's refusal to give consent to a search prior to arrest, while a factor to be considered in evaluating the voluntariness of the appellant's later decision to give consent, was not determinative. Because the defendant consented to search of suitcase after being read the defendant's Miranda rights for the second time and after being advised that the defendant could refuse consent, and because the defendant considered the options for two to three minutes before giving consent, and because there was no suggestion that threats, promises, or coercion were used to obtain the defendant's consent to the search, there was no search and seizure within the proscription of U.S. Const., amend. 4. *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980).

Voluntariness of consent to accompany agents. — The question whether a party's consent to accompany agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances, and is a matter which the government has the burden of proving. *United States v. Fry*, 622 F.2d 1218 (5th Cir. 1980).

Voluntary consent by probationer to searches. — Because a person voluntarily agrees, as a condition of probation, to the possibility that periodic "shake down" searches may be conducted, the person consents to a search of the individual's person, the individual's property, and the individual's room, and waives rights under U.S. Const., amend. 4. *Dean v. State*, 151 Ga. App. 847, 261 S.E.2d 759 (1979).

Voluntariness of consent by prisoner in police custody. — A prisoner in police custody by reason of an illegal arrest is in no position to refuse to comply with the demands of the officer in whose custody the prisoner is placed, whether such demand is couched in the language of a police request or a direct order. Consent to a search in such a situation is not truly voluntary and the search is illegal. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

The mere fact that defendant was under arrest at the time the defendant gave consent to the search of the defendant's gar-

ment bag did not establish that the consent was made involuntarily or by coercion. *Mann v. State*, 196 Ga. App. 730, 397 S.E.2d 17 (1990).

Consent to search given while under arrest is not per se void as being coerced. *Mitchell v. State*, 178 Ga. App. 244, 342 S.E.2d 738 (1986).

Coercion not established by mere fact of arrest. — The mere fact that an accused is under legal arrest when the consent to a search is given does not establish the consent was made involuntarily or by coercion. *Wright v. State*, 189 Ga. App. 441, 375 S.E.2d 895 (1988).

Subtly coercive questions and person's possibly vulnerable state affect voluntariness. — Voluntary consent to a search is a question of fact to be determined from the totality of the circumstances and, in evaluating the circumstances, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. *Jonas v. City of Atlanta*, 647 F.2d 580 (5th Cir. 1981).

Consent obtained after expression of desire for counsel. — Even accepting the fact that the consent to search was obtained after the defendant indicated a desire to have counsel before questioning, that alone was not enough to mandate a finding of coercion where the defendant had declined the invitation to use the phone and had said that there was nothing to hide. *Hill v. State*, 183 Ga. App. 654, 360 S.E.2d 4 (1987).

Belief that there is no alternative to consent. — A detention does not escape the strictures of the fourth amendment merely because an individual who reasonably felt that the individual had no alternative to compliance mouthed some pro forma words of consent. *United States v. Elsoffer*, 671 F.2d 1294 (11th Cir. 1982).

Consent to search was invalid and drugs found in the course of the search were suppressed, where police officer requested permission to search the defendants' car after their traffic stop had been fully concluded; under the circumstances, the owner would not have imagined being free to refuse permission. *Gonzales v. State*, 255 Ga. App. 149, 564 S.E.2d 552 (2002).

Implicitly coercive nature of a uniformed police officer's request that suspect accompany officer may exert pressure on the indi-

vidual to acquiesce. Such acquiescence cannot, of course, substitute for free consent. *McQuirter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Although house was surrounded by police, this does not ipso facto require a finding of coercion. *Suddeth v. State*, 162 Ga. App. 460, 291 S.E.2d 430 (1982).

Consent not voluntary where forcible entry threatened. — The testimony of the defendant's parent that the parent gave a house key to the police only because they threatened forcible entry if the parent did not do so supported the court's ruling that the parent's consent to search the house was not freely and voluntarily given. *State v. Davis*, 261 Ga. 225, 404 S.E.2d 100 (1991).

Taxpayer's consent to examination of financial affairs. — Internal revenue service agent's alleged characterization of taxpayer's examination as "routine audit" did not vitiate taxpayer's consent to provide information, where the examination of the taxpayer's financial affairs did not have its genesis in a secret criminal investigation. *United States v. Piper*, 681 F. Supp. 833 (M.D. Ga. 1988).

Surrender of bag upon request. — Because the police officer asked the defendant what was in the defendant's bag, upon which the defendant voluntarily surrendered the bag to the officer, there is no possible interpretation of the evidence except that the defendant tacitly consented to inspection of the bag and there was no illegal search or seizure. *State v. Turntime*, 170 Ga. App. 740, 318 S.E.2d 157 (1984).

Trial court did not err in determining that the consent to the search of the defendant's automobile was voluntary and evidence obtained not excludable as the product of duress or coercion where the arresting officer testified that officer was requested to look out for a green and white Thunderbird automobile occupied by two black individuals armed with shotguns and believed to be dangerous, the vehicle was located and the officer noticed a shotgun on the right-hand passenger seat, the defendant was arrested and given the mandatory Miranda warnings which the defendant indicated were understood, when asked if the property in the vehicle belonged to the defendant, the defendant replied that everything in the car

belonged to the defendant and gave the officer permission to search, and, on cross-examination, it was determined that the defendant fully cooperated with the officers conducting the search. *Williams v. State*, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

The defendant's constitutional rights were not violated because the officer testified that the officer issued the defendant a warning ticket for improper lane change, explained to the defendant the effect of a warning ticket, and then told the defendant that the defendant was free to go but during the officer's conversation with the defendant, however, certain discrepancies arose that caused the officer to suspect that the defendant might be involved with drug smuggling and after the defendant granted permission and signed a consent to search form, the officer searched the car and found cocaine under the passenger seat. *Lowe v. State*, 214 Ga. App. 92, 446 S.E.2d 532 (1994).

Implied consent found in a licensing system covers only the property of the licensee. *Braddock v. State*, 127 Ga. App. 513, 194 S.E.2d 317 (1972).

Consent by implication in operation of licensing programs. — There is an exception to constitutional requirement for search warrant where consent is given by implication in the operation of accepted licensing programs. *Braddock v. State*, 127 Ga. App. 513, 194 S.E.2d 317 (1972).

Implied consent by sublicensee. — If one party is making profits by the interstate operation of the party's vehicle under another's permit, that party is, in effect, a sublicensee, and is subject to the same regulation, methods of enforcement, and principles of determination of the existence of implied consent. *Braddock v. State*, 127 Ga. App. 513, 194 S.E.2d 317 (1972).

Voluntary consent held shown. — Because the record indicated without contradiction that the defendant intelligently and voluntarily consented to the search of the defendant's possessions after being fully informed that the defendant had a right to refuse the search, the trial court was authorized to find that valid consent had been given. *McShan v. State*, 155 Ga. App. 518, 271 S.E.2d 659 (1980); *Lopez v. State*, 184 Ga. App. 31, 360 S.E.2d 722, cert. denied, 184 Ga. App. 910, 360 S.E.2d 722 (1987); *Smith v. State*, 184

Consent Searches (Cont'd)**3. Voluntariness (Cont'd)**

Ga. App. 304, 361 S.E.2d 215 (1987); *Jones v. State*, 184 Ga. App. 328, 361 S.E.2d 693 (1987); *Garcia v. State*, 207 Ga. App. 653, 428 S.E.2d 666 (1993).

The trial court's finding the fact of consent, and that the consent was freely and voluntarily given, was supported by the evidence. *Langston v. State*, 202 Ga. App. 431, 414 S.E.2d 676 (1992).

The trial court was correct in finding that defendant's consent to search was freely and voluntarily given where defendant's initial consent combines with the fact that once the officers began talking with the defendant they learned that defendant had no driver's license or insurance, observed that defendant appeared to have been drinking, and saw the bag of marijuana at defendant's feet. *Martin v. State*, 204 Ga. App. 782, 420 S.E.2d 645 (1992).

In an action for arson, the defendant's contention that the presence of several fire department officials was so oppressive as to require a finding of coercion, was rejected because defendant testified that the defendant's wife and a friend, who spoke excellent English were present while the defendant talked with the fire department investigator and that the defendant understood the defendant was not under arrest. Thus, defendant's consent to the search was freely and voluntarily given. *Kosal v. State*, 204 Ga. App. 708, 420 S.E.2d 621 (1992).

The defendant's consent to a search of the defendant's person was not involuntary, notwithstanding the contention that an officer represented that a warrant to search would be obtained if consent was refused but that probable cause to secure the warrant did not exist, since (1) a GBI agent's response to the defendant's query regarding how long the defendant would be detained — "as long as it's going to take me to write a search warrant and to find a judge to sign the warrant" — simply did not fall within the category of last ditch ploys aimed at avoiding the requirement for a probable cause determination before a magistrate; and (2) the details of a tip from a reliable informant were corroborated by the personal observations of the investigating agents and, therefore there was probable cause for a warrant-

less search. *Solomon v. State*, 237 Ga. App. 655, 513 S.E.2d 520 (1999).

When defendant, after being properly stopped for a traffic violation, was asked for consent to search defendant's vehicle and replied, "I don't care," none of the circumstances surrounding the consent showed it was involuntary, as a videotape of the encounter showed no hint of fear, intimidation, coercion or deceit, there was no evidence of a lengthy detention, and defendant suffered no physical punishment; therefore, an officer's failure to advise the defendant of the defendant's constitutional rights did not invalidate the consent, as questioning was limited to defendant's lack of a valid driver's license, whether defendant had drugs in the car, and whether defendant consented to a search. *Goodman v. State*, 272 Ga. App. 639, 613 S.E.2d 190 (2005).

Because defendant was not detained or subjected to prolonged questioning or physical punishment, the police officers were lawfully on the premises, explained the basis for their suspicion, and asked for permission to search defendant's pants, defendant's consent to the search was voluntary; consequently, the trial court erred in granting defendant's motion to suppress. *State v. Kinsey*, 272 Ga. App. 723, 613 S.E.2d 232 (2005).

Voluntary consent held not shown. — In the context of an airport stop, the government did not carry its burden of showing, by exceptionally clear evidence, that a defendant consented to accompany a Drug Enforcement Agency agent to an airport office to be searched where the agent retained the defendant's ticket and driver's license at least through the point at which the agent elicited the defendant's consent and the agent's statements about investigating for drugs easily could have induced the defendant to believe that the defendant's refusal to go to the office would lead only to formal detention. *United States v. Robinson*, 690 F.2d 869 (11th Cir. 1982).

The superior court was authorized to consider the absence of any attempt by the deputy to advise the defendant of the defendant's constitutional rights along with the defendant's testimony that the defendant did not believe that the defendant had any right to refuse to consent to the search in determining that the state had failed to

satisfy its burden of showing that the consent to search was, in fact, freely and voluntarily given. *State v. Norrington*, 203 Ga. App. 574, 417 S.E.2d 203, cert. denied, 203 Ga. App. 907, 417 S.E.2d 203 (1992).

Because the defendant was in illegal detention, was never informed of the right to refuse a search of the defendant's person, and never otherwise expressly indicated the defendant's consent but merely said that "[the defendant] understood," there was no valid consent to search as a matter of law. *Rogers v. State*, 206 Ga. App. 654, 426 S.E.2d 209 (1992).

Plain View

Elements of plain view doctrine. — Police officer free to use and seize what the officer sees in plain sight if the officer is at a place where the officer is entitled to be. *Green v. State*, 127 Ga. App. 713, 194 S.E.2d 678 (1972); *Mahar v. State*, 137 Ga. App. 116, 223 S.E.2d 204 (1975), cert. denied, 429 U.S. 923, 97 S. Ct. 323, 50 L. Ed. 2d 291 (1976).

An exception to the warrant requirement of U.S. Const., amend. 4 is the "plain view" doctrine, which holds that evidence obtained in a warrantless seizure is admissible if inadvertently discovered by an officer rightfully in a position that afforded full view of the evidence. *United States v. Bright*, 471 F.2d 723 (5th Cir.), cert. denied, 412 U.S. 921, 93 S. Ct. 2742, 37 L. Ed. 2d 148 (1973).

A police officer is free to use and seize what the police officer sees in plain sight if the police officer is at a place where the police officer is entitled to be and if exigent circumstances exist that justify a warrantless seizure. *Walker v. State*, 130 Ga. App. 860, 205 S.E.2d 49 (1974).

What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which the officer came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with the search directed against the accused — and permits the warrantless seizure. Extension of the original justification is legitimate only if it is immediately apparent to the police that they

have evidence before them; the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. *Harp v. State*, 136 Ga. App. 897, 222 S.E.2d 623 (1975).

The plain view exception to U.S. Const., amend. 4's requirement of probable cause is conditioned upon the requirement that the police officer have a prior justification for an intrusion in the course of which the officer comes inadvertently across a piece of evidence incriminating the accused. *United States v. Robinson*, 535 F.2d 881 (5th Cir. 1976).

Where officers received a tip that a crime was being committed, investigated but discovered appellant, who corresponded to the tip, legally stopped appellant, and discovered, in plain view, paraphernalia readily identifiable as that commonly used in the crime the informant had reported, there was probable cause to arrest and to seize the evidence. *Stiggers v. State*, 151 Ga. App. 546, 260 S.E.2d 413 (1979).

The plain view doctrine is in reality a supplement to, or extension of, the original justification for the search, rather than a mere exception to the warrant requirement. *In re Southeastern Equip. Co. Search Warrant*, 746 F. Supp. 1563 (S.D. Ga. 1990).

In order for a plain-view seizure to be considered a valid extension of the original justification for the search, three requirements must be met. First, the searching agents must lawfully be in the position where they viewed the disputed evidence, whether that original justification arose from a valid warrant or any of the other exceptions to the warrant requirement. Second, the searching agents must inadvertently discover the disputed evidence. Third, the incriminating nature of the disputed evidence must be immediately apparent on its face. *In re S.E. Equip. Co. Search Warrant*, 746 F. Supp. 1563 (S.D. Ga. 1990).

Contraband lawfully found in plain view need not be ignored and can be seized. *Samuel v. State*, 198 Ga. App. 558, 402 S.E.2d 325 (1991).

The plain view doctrine will support a warrantless search and seizure if the agents are lawfully in position to obtain the view, the discovery is inadvertent, and the object viewed is immediately seen to be incriminat-

Plain View (Cont'd)

ing. *Samuel v. State*, 198 Ga. App. 558, 402 S.E.2d 325 (1991).

To be admissible under the plain-view doctrine, the items must be seized by an officer (1) who has an independent justification for being in a position from which the items can be viewed; (2) who discovers the items inadvertently; and (3) to whom it is immediately apparent that the items are evidence. *United States v. Moody*, 763 F. Supp. 589 (M.D. Ga. 1991), *aff'd*, 977 F.2d 1420 (11th Cir. 1992), *cert. denied*, 507 U.S. 944, 113 S. Ct. 1348, 122 L. Ed. 2d 729 (1993).

"Plain feel" principle. — Where experienced officer believed the object in defendant's pocket was a clear plastic baggie containing contraband upon initially feeling it in defendant's pocket and then visually observed a portion of the baggie protruding from the pocket, the "plain feel" corollary to the "plain view" doctrine applied, namely, that if contraband is identified through an officer's sense of touch in the course of a lawful patdown, it may be seized. *Seaman v. State*, 214 Ga. App. 878, 449 S.E.2d 526 (1994).

The "plain feel" doctrine was exceeded and the contraband seized should have been suppressed because an officer patted down the defendant during a traffic stop and felt an object in the defendant's pocket that the officer could not identify, but knew was not a weapon, and then removed the object which the officer discovered was a plastic bag containing marijuana. *Boatright v. State*, 225 Ga. App. 181, 483 S.E.2d 659 (1997).

During the execution of a search warrant at a residence where defendant was visiting, the sheriff's deputy felt what appeared to be marijuana in a plastic bag while searching defendant for weapons which search was permissible under the "plain feel" doctrine; thus, the trial court properly denied defendant's motion to suppress. *Kinder v. State*, 269 Ga. App. 99, 603 S.E.2d 496 (2004).

Expectation that evidence will be discovered does not preclude operation of the plain view exception to the warrant requirement. *State v. Echols*, 204 Ga. App. 630, 420 S.E.2d 64 (1992).

Officers not required to ignore articles in plain view and readily observable and their

seizure under these circumstances does not make them the fruit of an unlawful search, since, being in plain view, no search is involved. *Scott v. State*, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

If a police officer has a right to be in the position from which an object is seen lying in plain view, the object is admissible as evidence. *Dennis v. State*, 166 Ga. App. 715, 305 S.E.2d 443 (1983); *Phillips v. State*, 167 Ga. App. 260, 305 S.E.2d 918 (1983); *State v. Webb*, 193 Ga. App. 2, 386 S.E.2d 891 (1989).

No invasion of privacy. — If an article is already in plain view, neither its observation nor its seizure involves any invasion of privacy. *Talley v. State*, 200 Ga. App. 442, 408 S.E.2d 463 (1991).

Inadvertence of sighting. — For the "plain view" exception to the warrant requirement to be invoked, the sighting of things not specified in the warrant must have been "inadvertent." *Lockhart v. State*, 166 Ga. App. 555, 305 S.E.2d 22 (1983).

"Plain view" does not require inadvertence. *Merriman v. State*, 201 Ga. App. 817, 412 S.E.2d 598 (1991).

Observation of what is observable by public. — There is no protection under U.S. Const., amend. 4 against observation by public official of what is observable by the general public. *Ehlers v. Bogue*, 626 F.2d 1314 (5th Cir. 1980), *cert. denied*, 451 U.S. 909, 101 S. Ct. 1979, 68 L. Ed. 2d 298 (1981).

In a prosecution of defendant for possession of cocaine, a law enforcement officer had a legitimate reason to be on defendant's property, because the evidence showed that the officer observed defendant smoking and smelled marijuana while walking on a path that local residents regularly traveled; defendant had no reasonable expectation of privacy in the area visible from the path, even if it passed through the defendant's property. *Smith v. State*, 276 Ga. App. 677, 624 S.E.2d 272 (2005).

To observe that which is open to view is not generally considered a search. *Grimes v. United States*, 405 F.2d 477 (5th Cir. 1968).

The officer needed no search warrant to drive down a public street in response to a report that marijuana was being grown on defendant's property. If the marijuana was in plain view from the vantage point of the public road, the officer's mere act of driving

by and looking for the reported contraband would certainly not constitute a “search” such as would require a warrant. *State v. Echols*, 204 Ga. App. 630, 420 S.E.2d 64 (1992).

Seizure of items under plain view doctrine where initial intrusion valid. — Where the initial intrusion that brings police within plain view of an incriminating item of property is supported either by a lawful warrant or by one of the recognized exceptions to the warrant requirement, the seizure of that property for use as evidence is also legitimate. *United States v. Roach*, 590 F.2d 181 (5th Cir. 1979).

A police officer who is unable to approach the front door of a residence and tries to knock upon a side door only makes a “valid intrusion” upon the property. When the officer makes such a “valid intrusion” and seizes contraband in plain view, there is in effect no search at all. *State v. Zackery*, 193 Ga. App. 319, 387 S.E.2d 606 (1989).

Seizure of items in plain view suspected to have derived from recent area burglaries while executing search warrant for documents proving theft of services was valid, where the incriminating character of the items was immediately apparent and officer had a lawful right to visual and physical access of the objects themselves. *Nichols v. State*, 210 Ga. App. 134, 435 S.E.2d 502 (1993).

Seizability of evidence discovered in plain view. — Evidence discovered in plain view, from a place where officers are entitled to stand and where their claim to stand is not created as a pretext solely to make legitimate otherwise impermissible intrusions, is not the subject of a search within the meaning of U.S. Const., amend. 4; seizing such evidence does not trigger the warrant requirement. *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977).

No error was found in the trial court’s denial of the defendant’s motion to suppress evidence obtained in a warrantless search because the officers knocked on the defendant’s door and the defendant voluntarily allowed the deputies to enter the defendant’s apartment, making their intrusion into the defendant’s apartment valid. Once inside the apartment, the chain saw was in plain view. *Latimer v. State*, 204 Ga. App. 639, 420 S.E.2d 91 (1992).

Seizure of farm animals was justified after officials, entering the property to investigate a report that deprived animals were observed from the highway, immediately observed additional, clearly deprived animals in need of immediate care in plain view. *Sirmans v. State*, 244 Ga. App. 252, 534 S.E.2d 862 (2000), cert. denied, 534 U.S. 831, 122 S. Ct. 76, 151 L. Ed. 2d 40 (2001).

Seizure of contraband in “plain sight”. — A police officer may seize what is in plain sight if the officer is in a place where the officer is constitutionally entitled to be, but it must be immediately apparent to the investigating officer that the property to be seized is contraband. *Williams v. State*, 165 Ga. App. 708, 302 S.E.2d 609 (1983).

Although the police may seize what is in “plain sight” if they are in a place where they are constitutionally entitled to be, it must be immediately apparent to the investigating officer that the property to be seized is contraband. *Vincent v. State*, 178 Ga. App. 199, 342 S.E.2d 382 (1986).

The trial court erred in suppressing evidence on grounds of lack of probable cause, because the evidence was observed by police in plain sight in a place where police were constitutionally authorized to be and the defendant was not arrested, searched, or detained that night on the basis of discovery of the bottle containing the illegal material. The defendant was not arrested until four days later, after the independent discovery of fingerprints on the bottle containing cocaine that matched the fingerprints of the defendant already on file. *State v. Smalls*, 203 Ga. App. 283, 416 S.E.2d 531 (1992).

A police officer who observes contraband in plain view is entitled to seize it, so long as the officer is at a place where the officer is entitled to be, i.e., so long as the officer has not violated the defendant’s fourth amendment rights in the process of establishing the officer’s vantage point. *Thomas v. State*, 203 Ga. App. 529, 417 S.E.2d 353, cert. denied, 203 Ga. App. 908, 417 S.E.2d 353 (1992).

Observation of stolen goods in plain view. — There is no illegal search and seizure when officers are authorized to be where they are when they observe stolen goods in plain view. *Hatcher v. State*, 141 Ga. App. 756, 234 S.E.2d 388 (1977).

Contraband in plain view seized during lawful inventory search admissible. — If a

Plain View (Cont'd)

driver is arrested and removed from the vehicle, and the vehicle is on a highway or other public property, and there is no third person present to whom it is or might properly be turned over, or for some other sufficient reason a decision to impound it is properly made, and if in connection with such impoundment an inventory search is a recognized and routine procedure, contraband that appears in plain view in the course of such inventory is properly seized, and may be introduced in evidence. *Martasin v. State*, 155 Ga. App. 396, 271 S.E.2d 2 (1980).

Intrusive search not permitted merely because contraband discovered in "plain view". — The fact that contraband was discovered in "plain view" during a limited search of premises did not serve to permit the police to "roam freely" in an intrusive and thorough search of the entire premises, where no exigency was present which would have necessitated departure from the requirement for a warrant. *State v. Scott*, 176 Ga. App. 887, 339 S.E.2d 276 (1985).

Search pursuant to warrant. — When, in the course of performing a lawful search for an item listed on a search warrant, officers come across other articles of an incriminatory character, such articles may be seized under the "plain view" doctrine. To justify application of the plain view doctrine, the seizing officers must (1) have independent justification for being in a position to see the item; (2) must discover the items inadvertently; and (3) must immediately observe that the items are evidence. The officers must have probable cause to believe the items are evidence of the crime. *United States v. Jenkins*, 901 F.2d 1075 (11th Cir.), cert. denied, 498 U.S. 901, 111 S. Ct. 259, 112 L. Ed. 2d 216 (1990).

Plain view doctrine extends to use of artificial light. — The plain view doctrine, allowing discovery and seizure of contraband in plain sight without a warrant, extends to the use of artificial light at night to observe contraband which would be in plain sight during the day. *United States v. Allen*, 472 F.2d 145 (5th Cir. 1973).

Use of flashlight to look into automobile. — The use of a flashlight to expose to better light what would otherwise be visible to one who simply looks through a car window does

not make the viewing any more of a search or any less of a plain view. *State v. Hodges*, 184 Ga. App. 21, 360 S.E.2d 903, cert. denied, 184 Ga. App. 910, 360 S.E.2d 903 (1987).

A truly cursory inspection — one that involves merely looking at what is already exposed to view, without disturbing it — is not a "search" for fourth amendment purposes, and therefore does not even require reasonable suspicion. *State v. Field*, 188 Ga. App. 639, 373 S.E.2d 815, cert. denied, 188 Ga. App. 912, 373 S.E.2d 815 (1988).

"Plain view" discovery of evidence of other crime during search pursuant to a warrant admissible. — Where the warrant was executed less than five hours after a shooting and was supported by sufficient facts to authorize a finding of probable cause for a more thorough search of the apartment, the scene of the crimes, the fact that the police officers discovered what appeared to be objects of an unrelated crime lying in "plain view" in the defendant's bedroom did not require exclusion of that evidence at trial. *Isbell v. State*, 179 Ga. App. 363, 346 S.E.2d 857 (1986), cert. denied, 479 U.S. 1098, 107 S. Ct. 1319, 94 L. Ed. 2d 172 (1987).

A car has little capacity for escaping public scrutiny, since it travels public thoroughfares where its occupants and its contents are in plain view. Thus, what a person knowingly exposes to the public, even in the person's own home or office, is not a subject of protection under U.S. Const., amend. 4. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Under the "plain view" doctrine, a law officer has the right to visually search the entirety of the car from the officer's vantage point on a street or roadside. *Galloway v. State*, 178 Ga. App. 31, 342 S.E.2d 473 (1986).

Where police officer's original stop of the defendant's automobile was authorized, the subsequent seizure of contraband which was in the officer's plain view did not violate defendant's fourth amendment rights. *Freeman v. State*, 194 Ga. App. 303, 390 S.E.2d 300 (1990).

Identification number visible on dashboard. — The recordation of vehicle identification numbers, visible on the dashboards

of vehicles, by police entering the open business premises of an automobile repair shop and looking through the windshields of parked vehicles (no vehicle being entered, no door being opened, and no physical object being seized), was authorized by the “plain view doctrine.” *Shaw v. State*, 253 Ga. 382, 320 S.E.2d 371 (1984), cert. denied, 469 U.S. 1212, 105 S. Ct. 1183, 84 L. Ed. 2d 331 (1985).

Gun in plain view inside car. — Because the defendant told the police chief the gun defendant had used was on the front seat of defendant’s car, and the chief looked into the car, observed a gun lying on the front seat, and seized it, what the officer saw in “plain view” from outside the defendant’s automobile corroborated what the defendant had told the officer and justified the intrusion into the automobile and the seizure of the gun. *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Where defendant was already stopped at the side of a road and a police chief, lawfully wanting to question defendant about the incorrect vehicle tag number that defendant had given earlier, walked passed an open car door and saw a gun in plain sight, there was no stop and the chief had a right to retrieve the gun; consequently, the trial court did not err by refusing to suppress the evidence of the gun. *Eldridge v. State*, 270 Ga. App. 84, 606 S.E.2d 95 (2004).

Opening of bag within automobile authorized under “plain view” doctrine. — The opening of a canvas gym bag in which cocaine was discovered, during the course of a warrantless search of defendant’s automobile, was authorized, where the search of the vehicle was authorized under the “plain view” doctrine. *Dimick v. State*, 178 Ga. App. 60, 341 S.E.2d 914 (1986).

Evidence in plain view seized during safety inspection of boat admissible. — Where coast guard officers boarded a vessel pursuant to a safety and documents stop under 14 U.S.C. 89(a) and en route to pilot house discovered marijuana in plain view and subsequently seized the ship, there was no illegal search or seizure. *United States v. Brantley*, 733 F.2d 1429 (11th Cir. 1984), cert. denied, 470 U.S. 1006, 105 S. Ct. 1362, 84 L. Ed. 2d 383 (1985).

Where peace officers entered a defendant’s residence armed with an arrest war-

rant and a search warrant, arrested the defendant and searched the premises, certain articles in plain view having strong evidentiary value as to the crimes charged are not subject to a motion to suppress although not specifically named in the search warrant. *Scott v. State*, 122 Ga. App. 204, 176 S.E.2d 481 (1970).

Entry into home to care for unsupervised children. — A detective was authorized to enter a home without a warrant and items thereafter observed in plain view were properly admitted into evidence since the detective entered the home to ensure that children who were without adult supervision because of action by police officers and were being watched by two uniformed officers, were being cared for properly. *State v. Peterson*, 273 Ga. 657, 543 S.E.2d 692 (2001), cert. denied, 534 U.S. 955, 122 S. Ct. 356, 151 L. Ed. 2d 269 (2001).

Evidence in plain view seized from duplex unit adjoining unit for which warrant was issued was admissible. — Where law enforcement officials executed a search warrant for 621-B Roadway Avenue, from the exterior, 621 Roadway appeared to be a duplex having two entrances, one marked 621-A and the other 621-B, but upon entering 621-B, police officers discovered what seemed to be a single dwelling undergoing conversion into a duplex, a dividing wall between 621-A and 621-B was only partially built, a passageway between A and B existed, and a police officer, standing in 621-B, spied bags of marijuana eight to ten feet on the other side of the partially constructed wall in 621-A, inasmuch as the facts met the requirements of the “plain view” doctrine, the denial of the motion to suppress the marijuana was not error. *Williams v. State*, 165 Ga. App. 708, 302 S.E.2d 609 (1983).

Seizure of rolling papers in plain view. — Where a stop is reasonable, the consent initially given to search the vehicle is not withdrawn, and the rolling papers are in plain view scattered across the dash, a seizure of the rolling papers after the defendants are jailed does not violate constitutional rights. *Merrill v. State*, 130 Ga. App. 745, 204 S.E.2d 632 (1974).

Seizure of shoes in plain view at committal hearing. — Where defendant, during the defendant’s committal hearing, crossed legs, revealing the pattern of the tread on the

Plain View (Cont'd)

soles of the defendant's shoes to a law enforcement officer who was acting as bailiff at the hearing, and the officer seized the shoes upon the defendant's return to jail based upon the officer's earlier investigation at the scene of the crimes, which revealed a similar tread pattern having been made by one of the alleged perpetrators, the trial court did not err in denying the defendant's motion to suppress on the basis that the evidence seized was in plain view. *Mitchell v. State*, 181 Ga. App. 470, 352 S.E.2d 647 (1987).

Observation of a "pickax handle" in plain view, in a scabbard on a motorcycle, was sufficiently provocative to a law enforcement official monitoring a gathering of motorcycle clubs to establish reasonable and articulable suspicion of the officer to question its possessor of the reason for its presence. The defendant's subsequent voluntary admission of possession of a revolver provided for a limited intrusion under the seat of the defendant's motorcycle. *Allison v. State*, 188 Ga. App. 460, 373 S.E.2d 273 (1988).

Bank deposit bag found in a security guard's home was properly seized under the plain view doctrine, where, although the bag was not listed in the warrant, the warrant described numerous bank bags, stock certificates, checks, and bills, and the officers had probable cause to believe that the bag might have been stolen. *United States v. Jenkins*, 901 F.2d 1075 (11th Cir.), cert. denied, 498 U.S. 901, 111 S. Ct. 259, 112 L. Ed. 2d 216 (1990).

View through cracks in fence. — Defendant's fourth amendment rights were not infringed when police officers looked through cracks in a wooden fence into defendant's backyard and saw marijuana plants growing. *Merriman v. State*, 201 Ga. App. 817, 412 S.E.2d 598 (1991).

Incriminating character of the item must be immediately apparent for a warrantless search under the "plain view" exception. *Brown v. State*, 269 Ga. 830, 504 S.E.2d 443 (1998).

Closed refrigerator. — Marijuana contained in an operating, closed refrigerator was not in the plain view of a police officer. *State v. Gallup*, 236 Ga. App. 321, 512 S.E.2d 66 (1999).

Scope of warrant held not exceeded. — Since the search warrant authorized an officer to search for clothing with possible blood stains and the officer saw, in plain view, what the officer believed to be dried blood on a sink, the officer's search of the sink's underside for more blood did not exceed the scope of the warrant. *Moss v. State*, 275 Ga. 96, 561 S.E.2d 382 (2002).

Custodial Searches

Custodial interrogation is questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of person's freedom of action in any significant way. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Whether custodial search is valid depends not on officer's state of mind but on whether, viewed in retrospect, the objective facts were such as to justify a prudent person in believing that enough facts on which to base an arrest before a search were made. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Interrogation absent custody of defendant. — Where a possible criminal defendant has not been taken into custody or otherwise deprived of freedom of action in any significant way, the custodial interrogation condemned by *Miranda* has not occurred. *Grogins v. State*, 154 Ga. App. 606, 269 S.E.2d 98 (1980).

Presence of defendant's attorney at custodial interrogation constituted "adequate protective device" making any failure to advise defendant of *Miranda* rights irrelevant. *Baxter v. State*, 254 Ga. 538, 331 S.E.2d 561 (1985), cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 275 (1985).

Photographs of defendant's cut leg were properly admitted at trial, and their taking was not an unlawful search and seizure even though they were taken while defendant was in custody. *Deering v. State*, 168 Ga. App. 835, 310 S.E.2d 720 (1983).

Removal of shoes not "strip search". — Where a defendant was arrested for driving on a suspended license, and drug traces had been found in the car, the removal of the defendant's shoes did not amount to a "strip search" as that term is generally used; the trial court correctly determined that there

was no violation of the defendant's fourth amendment rights. *Bobbit v. State*, 195 Ga. App. 566, 394 S.E.2d 385 (1990).

Fingerprints, Blood, Urine and other Medical Tests

Implied consent provision in O.C.G.A. § 40-5-55(a) is unconstitutional as violative of Ga. Const. 1983, Art. I, Sec. I, Para. XIII, and the fourth and fourteenth amendments of the Constitution of the United States because it authorizes a search and seizure, chemical testing of a suspect's blood, without probable cause that the suspect had been driving while impaired, where the suspect was involved in an accident involving serious injuries or fatalities. *Cooper v. State*, 277 Ga. 282, 587 S.E.2d 605 (2003).

Consent to blood testing. — Test results of a sample taken from a suspect may not be used for purposes for which the suspect was not advised and to which the suspect did not consent, and while it is not always essential under the fourth amendment for a person to be told that he or she may refuse to consent to a warrantless search, informing an individual of the right to refuse consent is a factor a trial court may consider in determining whether such consent was voluntary; a trial court's suppression of blood test results obtained from a defendant without a warrant was affirmed where any consent given by defendant before the blood draw did not include testing and where defendant was not informed of defendant's right to refuse consent and did not give a free and voluntary consent after blood was drawn. *State v. Poppell*, 277 Ga. 595, 592 S.E.2d 838 (2004).

Consent form. — Since the consent form signed by defendant stated that defendant's blood and hair would be used against the defendant in a court of law and that defendant was a suspect in a certain murder, the form did not limit the use of the blood or hair to only the designated murder investigation or to any particular purpose. *Pace v. State*, 271 Ga. 829, 524 S.E.2d 490 (1999), cert. denied, 531 U.S. 890, 121 S. Ct. 101, 148 L. Ed. 2d 60 (2000).

Taking fingerprints in absence of counsel. — Constitutional rights are not denied because fingerprints are taken in the absence of counsel. *Ward v. United States*, 486 F.2d 305 (5th Cir. 1973), cert. denied, 416 U.S.

990, 94 S. Ct. 2398, 40 L. Ed. 2d 768 (1974).

Swabbing the hands of accused to lift gunshot residue does not constitute an unconstitutional search or seizure. *Strickland v. State*, 247 Ga. 219, 275 S.E.2d 29, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 632 (1981).

Search for evidence by intrusion into a person's body against that person's will can be reasonable only under very limited circumstances. *State v. Haynie*, 240 Ga. 866, 242 S.E.2d 713 (1978).

Neither the presence of defendant's counsel nor defendant's consent is required for the execution of a warrant calling for the seizure of hair, blood, or other body fluids. *Johnson v. State*, 179 Ga. App. 467, 346 S.E.2d 903 (1986).

Compelled withdrawal of blood. — A suspect's fourth amendment right to be free of unreasonable searches and seizures applies to the compelled withdrawal of blood. *Welch v. State*, 254 Ga. 603, 331 S.E.2d 573 (1985).

Blood sample is not taken from defendant unconstitutionally because the defendant does not freely consent to the taking of the sample and because it is taken without a search warrant. *Corn v. Hopper*, 244 Ga. 28, 257 S.E.2d 533 (1979).

Blood sample taken from defendant was voluntarily consented to by defendant who was advised of the purpose of the test, was not promised any benefits for participating in the test, and was not threatened with fear or injury for failure to cooperate. *Deering v. State*, 168 Ga. App. 835, 310 S.E.2d 720 (1983).

Blood test admissible despite acquittal on initial traffic violation. — Where a police officer stopped a driver for a traffic violation and suspicion of driving under the influence, the results of a blood alcohol test were admissible where the officer had a reasonable articulable suspicion of wrongdoing, even though the defendant was acquitted of the traffic violation. *Branch v. State*, 175 Ga. App. 696, 334 S.E.2d 24 (1985).

Blood test inadmissible if without probable cause. — Georgia Supreme Court has held that O.C.G.A. § 40-5-55(a) is unconstitutional to the extent it requires chemical testing of the driver of a vehicle involved in a traffic accident resulting in serious injuries or death as it violates the fourth and fourteenth amendments of the United States

Fingerprints, Blood, Urine and other Medical Tests (Cont'd)

Constitution because it authorizes a search and seizure without probable cause; thus, where testing is conducted based upon the seriousness of injuries in an accident, rather than upon probable cause that the person has violated O.C.G.A. § 40-6-391, the results are inadmissible. *Buchanan v. State*, 264 Ga. App. 148, 589 S.E.2d 876 (2003).

Compelled administration of breath test designed to ascertain blood alcohol content undoubtedly implicates fourth amendment rights. *State v. Johnston*, 249 Ga. 413, 291 S.E.2d 543 (1982).

Requesting multiple chemical tests of driver allowed. — Nothing in the implied consent law prohibits an officer from advising a driver of the driver's implied consent rights and requesting multiple chemical tests at one time, and such a request does not violate the fourth amendment as an unreasonable attempt to "shop" through the driver's bodily fluids in search of evidence. *McKeown v. State*, 187 Ga. App. 685, 371 S.E.2d 543 (1988).

A urinalysis is a search. *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987).

Taking of urine specimens. — The governmental taking of a urine specimen is a seizure within the meaning of the fourth amendment. *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986).

The Applicant Drug Screening Act (O.C.G.A. § 45-20-110 et seq.), requiring applicants for state employment to submit to urine tests for the presence of illegal drugs, violates applicants' rights to privacy under the fourth and fourteenth amendments. *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990).

Compelled urine sample requires reasonable suspicion. — Considering the nature of a police department's legitimate interests and the individual officers' reasonable expectations of privacy, the fourth amendment allows the chief of police, the city, and city officials to demand a urine sample from an employee for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences from those facts in the light of experience, that a urinalysis will produce evidence of illegal drug use by that particular

employee. *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986).

Periodic drug testing of civilian federal employees by urinalysis, absent some form of individualized suspicion, is in almost all cases offensive to the mandates of the fourth amendment. *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986).

Employees who may be subjected to urinalysis testing. — The duties of the civilian-law-enforcement employees at an army base who will be subjected to standardless urinalysis testing for drugs must be shown to be more than remotely or conceivably related to national security, or the duties if performed under the influence of drugs must be shown to pose a potential danger to persons or property well beyond the danger inherent in ordinary police or transportation employment for the search to pass constitutional muster. *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986).

Urinalysis tests taken by employees in electrical distribution division of city board of lights and water, ordered by the city manager and manager of the board of lights and water when employees suspected of drug usage refused to resign, were "searches" within the meaning of the fourth amendment but were not unreasonable and therefore did not violate the fourth amendment since the tests were administered in a purely employment context and were not done in connection with any criminal investigation or procedure. *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985).

Requiring city employees to submit to urinalyses did not violate their fourth amendment rights, where city officials had reasonable grounds to suspect employees were working under the influence of drugs and the urinalyses were conducted solely to further an employment-related objective and in a manner designed to minimize intrusion. *Allen v. Marietta Bd. of Lights & Water, Inc.*, 693 F. Supp. 1122 (N.D. Ga. 1987).

Because a city firefighter was ordered by an employer to submit to urinalysis test but did not actually take any such test prior to termination for failure to comply with the order, there was no "search" within the meaning of the fourth amendment. *Everett*

v. Napper, 632 F. Supp. 1481 (N.D. Ga. 1986), modified on other grounds, 833 F.2d 1507 (11th Cir. 1987).

Ordering a firefighter to undergo a urinalysis did not violate the fourth amendment right to be free from unreasonable search and seizure, because city officials had reason to suspect that the firefighter was involved with the use of illegal drugs. *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987).

Employees' consent to urinalysis testing held involuntary. — Because the plaintiffs were informed that if they did not participate in urinalysis testing, their employment would be terminated and the plaintiffs stated they did participate only because they feared they would lose their jobs, the plaintiffs' consent to search was obviously not voluntary, but was the result of coercion. *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986).

Georgia's requirement that candidates for state office pass a drug test does not fit within the closely guarded category of constitutionally permissible suspicionless searches, since the state failed to show a "special need" for the intrusion sufficient enough to override the fourth amendment's normal requirement of individualized suspicion. *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997).

Urine sample from probationer. — Probationer's fourth amendment rights were not violated by the invocation of the mandatory conditions of probationer's probation to obtain a urine sample for use as evidence against probationer in an independent criminal prosecution, where, although the request for urinalysis was not made as a routine incident of the probation supervision process, it was prompted by a good-faith suspicion that the probationer was dealing in drugs. *Green v. State*, 194 Ga. App. 343, 390 S.E.2d 285 (1990), *aff'd*, 260 Ga. 625, 398 S.E.2d 360 (1990), *cert. denied*, 500 U.S. 935, 111 S. Ct. 2059, 114 L. Ed. 2d 464 (1991).

Handwriting samples. — A defendant has no reasonable expectation of privacy with respect to the defendant's handwriting so as to invoke the sanctions of U.S. Const., amend. 4. *Reeves v. State*, 139 Ga. App. 214, 228 S.E.2d 201 (1976).

The law provides that an order to furnish handwriting samples or exemplars is a lawful

order, and does not violate any legal or constitutional rights. *United States v. Knight*, 607 F.2d 1172 (5th Cir. 1979).

Comment on refusal to provide handwriting exemplar permissible. — Handwriting exemplars fall outside the protection of U.S. Const., amend. 4 and comment on the refusal to provide an exemplar is permissible. *United States v. Knight*, 607 F.2d 1172 (5th Cir. 1979).

Voice exemplars. — A defendant's consent to use of the defendant's voice in a voice lineup was not required since voice exemplars are not within the scope of fourth amendment protections. *Campbell v. State*, 228 Ga. App. 258, 491 S.E.2d 477 (1997).

Hair samples from defendant's person, taken pursuant to a search warrant, were properly admitted, where there was probable cause to believe that hair which the warrant affidavit stated had been found in a stocking mask abandoned at the scene of a robbery would match a sample of defendant's hair. *Ferrell v. State*, 198 Ga. App. 270, 401 S.E.2d 301 (1991), *overruled as stated in* *Watts v. State*, 261 Ga. App. 230, 582 S.E.2d 186 (2003).

AIDS testing of convicts. — O.C.G.A. § 17-10-15(b) does not violate U.S. Const., amend. 4 because the government's interest outweighs the individual's and the results are kept confidential and cannot be used against the individual in a criminal prosecution; nor does O.C.G.A. § 17-10-15(b) violate the right to privacy under the due process clause of the fourteenth amendment or the state or federal equal protection clauses. *Adams v. State*, 269 Ga. 405, 498 S.E.2d 268 (1998).

Exigent Circumstances

Probable cause alone insufficient. — No amount of probable cause can justify a warrantless search or seizure absent exigent circumstances. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Whether a search is sought to be justified as incident to an arrest for possession of cocaine or whether it is sought to be justified by exigent circumstances, it cannot be upheld unless probable cause existed for a belief that the suspect was currently in unlawful possession of cocaine. *Polke v. State*, 203 Ga. App. 306, 417 S.E.2d 22 (1992).

Exigent Circumstances (Cont'd)

Only in exigent circumstances will judgment of police as to probable cause serve as sufficient authorization for a search. One of the exigent circumstances justifying a warrantless search is where there is a seizure and search of a moving vehicle. *State v. Bradley*, 138 Ga. App. 800, 227 S.E.2d 776 (1976).

Only in exigent circumstances will judgment of police as to probable cause serve as sufficient authorization for a search. *United States v. Fogelman*, 586 F.2d 337 (5th Cir. 1978).

Exigency determined at time of seizure, not search. — The fact that sufficient time to obtain a warrant had passed between seizure and the corresponding search of defendant's car did not invalidate either, since exigency is to be determined at the time of the seizure of the automobile, not at the time of the search. *United States v. Roach*, 590 F.2d 181 (5th Cir. 1979).

Exigencies of situation as they appear to officer involved. — Even though acts of peace officers in detaining and questioning a citizen are necessarily a curtailment of the citizen's right to go about one's business unmolested (i.e., a seizure of the person), but more importantly because investigation and questioning are necessary elements of crime prevention and detection, the exigencies of the situation as they reasonably appear at the time to the officer involved must dictate the extent of intrusion into constitutionally protected areas. *Holley v. State*, 157 Ga. App. 863, 278 S.E.2d 738 (1981).

Exigent circumstances justify search incident to an arrest. — In exigent circumstances, police officers are authorized, pursuant to a lawful arrest, to enter upon premises and conduct a reasonable search of the suspects' persons and immediate presence. *State v. Camp*, 175 Ga. App. 591, 333 S.E.2d 896 (1985).

"Plain view" doctrine permits warrantless search and seizure. — Where an officer observed contraband in an apartment from the outside and saw one of the occupants attempt to conceal it, the officer's warrantless intrusion into the apartment was justified by the exigent circumstance that the contraband was in danger of immediate destruction. *State v. David*, 269 Ga. 533, 501 S.E.2d 494 (1998).

There is no general automobile exception to U.S. Const., amend. 4's requirements. The movable nature of an automobile is not enough. There must be exigent circumstances as well. *United States v. Fogelman*, 586 F.2d 337 (5th Cir. 1978).

Distinction has long been drawn between warrantless search of automobile as opposed to a house or other structure due to the mobility of the car. *Whitlock v. State*, 124 Ga. App. 599, 185 S.E.2d 90 (1971).

Likelihood of imminent departure gives rise to exigent circumstances that justify a warrantless seizure. *United States v. Bryant*, 580 F.2d 812 (5th Cir. 1978).

When vehicle subject to warrantless search. — A reasonable search may be made of vehicle which is easily and quickly movable, without a warrant and in the absence of a prior arrest, so long as there is probable cause to believe that the vehicle contains contraband. *United States v. Brown*, 411 F.2d 478 (5th Cir. 1969).

Moving vehicle is subject to warrantless search if probable cause and exigent circumstances exist. *United States v. Robinson*, 535 F.2d 881 (5th Cir. 1976).

The general rule is that one of the exigent circumstances justifying a warrantless search is a situation where there is a seizure and search of a moving vehicle, and when the vehicle is indeed moving there is only the requirement that the search and seizure be based upon sufficient probable cause. *State v. Watts*, 154 Ga. App. 789, 270 S.E.2d 52 (1980).

Ability of a vehicle to become mobile is sufficient to satisfy the exigency requirement for a search without a warrant. The vehicle does not have to be moving at the moment when the police obtain probable cause to search. *United States v. Alexander*, 835 F.2d 1406 (11th Cir. 1988).

Practicability of procuring warrant for search of vehicles for contraband. — A necessary difference between a search of a store, dwelling house, or other structure, in respect of which a proper official warrant readily may be obtained, and a search of a ship, motorboat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, is that the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. *United States v. Ramey*, 464 F.2d 1240 (5th Cir. 1972).

Blocking airplane with police cars was reasonable manner of stopping it considering the possibility of flight in a highly mobile aircraft. *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

Police authorized, in exigent circumstances, to enter search premises. — In exigent circumstances, police officers are authorized, pursuant to a lawful arrest, to enter upon the premises and conduct a reasonable search of the suspects' persons and immediate presence, including a search under a piece of furniture where one of the suspects was observed reaching for or disposing of an unknown object, which might reasonably be thought to be either a weapon or evidence. *Dennis v. State*, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

Burning building clearly presents an exigency of sufficient proportions to render a warrantless entry reasonable. *Romano v. Home Ins. Co.*, 490 F. Supp. 191 (N.D. Ga. 1980).

A burning residence constitutes an exigency justifying a warrantless entry, and officials need no warrant to remain for a reasonable time to investigate the cause of a blaze after it has been extinguished. *Davis v. State*, 178 Ga. App. 760, 344 S.E.2d 730 (1986).

Firefighters in building do not need warrant to remain for reasonable time after fire extinguished in order to investigate the cause, since the aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain either the owner's consent or a warrant. *Waters v. State*, 174 Ga. App. 916, 331 S.E.2d 893 (1985).

Warrantless arrests. — The doctrine of "exigent circumstances," applicable only with respect to searches, did not supply probable cause for warrantless arrests. *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985).

A section of a police field manual which allows arrest with a supervisor's approval for three or more "hazardous moving violations," does not conflict with U.S. Const., amend. 4 by providing for the physical arrest of misdemeanants under "exigent circumstances," where probable cause exists. *Young v. City of Atlanta*, 631 F. Supp. 1498 (N.D. Ga. 1986).

Exigent circumstances held to exist. — The circumstances were sufficiently exigent

to justify a warrantless arrest where the FBI had probable cause to believe that defendant had attempted to rob one bank and had actually robbed another earlier that day, there was reason to believe defendant was armed at all times, defendant's sibling could have felt remorse and called defendant to warn the defendant, or defendant could have seen the defendant's own photo on a television news report about the robberies, if the FBI delayed, defendant might dispose of the stolen cash or other evidence, and more importantly, any delay increased the risk that innocent members of the public might be injured if the defendant attempted to leave the motel at which the defendant was staying, so that it was safer to arrest the defendant immediately by surprise in the defendant's motel room than to wait for a warrant, and to risk a gun battle erupting in the halls, stairs, lobby, or other public area of the fully occupied hotel should the defendant try to escape. *United States v. Standridge*, 810 F.2d 1034 (11th Cir.), cert. denied, 481 U.S. 1072, 107 S. Ct. 2468, 95 L. Ed. 2d 877 (1987).

Circumstances are exigent if a suspect is implicated in a drug conspiracy, is thought to be armed, discovers that a confederate is arrested, and discovers that the suspect has been cornered by the police and faces imminent arrest. *United States v. Forker*, 928 F.2d 365 (11th Cir. 1991).

Officers who stopped a car for a traffic violation had probable cause to believe a search would uncover evidence of a crime based upon inconsistent statements and a bulge in the suspect's midsection and there were exigent circumstances since the detained suspect might have left with the contraband if the officers waited to secure a warrant. *United States v. Banshee*, 85 F.3d 571 (11th Cir. 1996), op. withdrawn, corrected, 91 F.3d 99 (11th Cir. 1996), cert. denied, 519 U.S. 1083, 117 S. Ct. 752, 136 L. Ed. 2d 689 (1997).

Officers' decision to enter an apartment during a taped drug buy was justified because it appeared that the operation had gone sour and that children within the apartment might be placed in danger and attempts to destroy or conceal evidence would be made. *Cates v. State*, 232 Ga. App. 262, 501 S.E.2d 262 (1998).

Denial of a defendant's suppression motion was proper as the police officers were

Exigent Circumstances (Cont'd)

authorized to immediately enter a residence, without announcing their presence as required by O.C.G.A. § 17-5-27, as the occupants, upon seeing the police, fled into a residence where the police had recently conducted controlled drug buys and the officers had a reasonable belief that the fleeing occupants might retrieve weapons or destroy evidence; once legally inside the residence, the police were authorized to execute a search warrant that led to the discovery of the defendant's involvement in the drug sales. Further, suppression of evidence was not a constitutionally-required remedy for an improper entry pursuant to an otherwise valid search warrant. *Jackson v. State*, 280 Ga. App. 716, 634 S.E.2d 846 (2006).

Exigent circumstances held not to exist. — No exigent circumstances supported the warrantless entry by police officers into the defendant's house, notwithstanding their assertion that entry was justified based on their reasonable belief that the defendant was in need of immediate aid since: (1) officers arrived at the scene one hour after the defendant's neighbor reported a motor vehicle accident and questioned the neighbor for another 20 minutes before making any inquiry as to whether the defendant was injured; (2) when the officers saw the defendant lying on the floor in the defendant's home, they did not call an ambulance and waited while dispatch contacted the defendant's spouse; (3) one officer testified that they were less concerned about the defendant's safety after they inspected the defendant's vehicle and saw no signs that the defendant's head had struck the windshield; and (4) when the officers entered the home, they attempted to wake the defendant by inflicting pain on the defendant and yelling. *State v. Shephard*, 248 Ga. App. 433, 546 S.E.2d 823 (2001).

Defendant's suppression motion was properly granted because: (1) an officer executing an arrest warrant for a third person had unreasonably looked through the defendants' window, discovering them using marijuana; (2) the officers did not identify themselves as police officers when they knocked at the defendants' door; (3) the defendants hid the marijuana before opening the door;

(4) the police confronted the defendants about the marijuana after they had determined that the third person was not in the house; and (5) the appellate court could not conclude, as a matter of law, that there were exigent circumstances justifying the warrantless seizure of the drugs, in that they were in danger of being destroyed, simply because the defendants hid the drugs before opening the door. *State v. Schwartz*, 261 Ga. App. 742, 583 S.E.2d 573 (2003).

Defendant's motion to suppress evidence seized by a police officer who entered an apartment without a warrant was properly granted because a residential alarm call did not create exigent circumstances justifying the entry where the officer had no reasonable belief that an emergency situation existed given the officer's delay in reaching the apartment, the officer's decision to allow a parent and two children to enter the apartment, and the lack of any signs of distress once the officer reached the residence. *State v. Merit*, 262 Ga. App. 687, 586 S.E.2d 393 (2003).

Administrative Inspections

Administrative warrant requires less than search warrant. — Courts may authorize administrative inspections on facts that would not support issuance of search warrant in a criminal case. *West Point-Pepperell, Inc. v. Marshall*, 496 F. Supp. 1178 (N.D. Ga. 1980), rev'd on other grounds, 689 F.2d 950 (11th Cir. 1982).

Exceptions to warrant requirement for administrative inspections. — The warrant requirement for unconsented administrative inspections is negated only if the enterprise sought to be inspected is engaged in a pervasively regulated business, the inspection will pose only a minimal threat to justifiable expectations of privacy, warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent federal interest, and the inspection may be carefully limited as to time, place, and scope. *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959 (N.D. Ga. 1977).

Warrantless regulatory inspections. — Because regulatory inspections further urgent federal interests and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant if specifically au-

thorized by statute. *Brennan v. Buckeye Indus., Inc.*, 374 F. Supp. 1350 (S.D. Ga. 1974), *aff'd sub. nom. Buckeye Indus., Inc. v. Secretary of Labor*, 587 F.2d 231 (5th Cir. 1979).

Warrantless OSHA inspections. — Business of manufacture and sale of textile machinery is not subject to pervasive state or federal regulation; therefore, the Secretary of Labor was not entitled, pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., to conduct warrantless inspection of business premises. *Usery v. Centrif-Air Mach. Co.*, 424 F. Supp. 959 (N.D. Ga. 1977).

Determination of probable cause for search under OSHA. — The fourth amendment requires that an administrative search warrant be obtained prior to the inspection of workplaces in carrying out the purposes of the Occupational Safety and Health Act of 1970; the Secretary of Labor needs only to establish administrative probable cause, which is tested by a standard of reasonableness, requiring a magistrate or judge to balance the need to search against the invasion which the search entails. *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982).

Routine traffic checks. — A roadblock set up primarily as a means to perform routine traffic checks was valid. *LaFontaine v. State*, 269 Ga. 251, 497 S.E.2d 367 (1998); *Boyce v. State*, 240 Ga. App. 388, 523 S.E.2d 607 (1999).

Reasonableness of road checks. — The state can practice preventative therapy by reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness. That this requires a momentary stopping of the traveling citizen is not fatal. Nor is it fatal because the inspection may produce the irrefutable proof that the law has just been violated. The purpose of the check is to determine the present, not the past: is the car, is the driver now fit for further driving? In the accommodation of society's needs to the basic right of citizens to be free from disruption of unrestricted travel by police officers' stopping cars in the hopes of uncovering evidence of nontraffic crimes, stopping for road checks is reasonable and, therefore, acceptable. Likewise, an arrest is proper if the check reveals a current violation which by its nature must have taken

place in the immediate past. *State v. Swift*, 232 Ga. 535, 207 S.E.2d 459 (1974).

Except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check a driver's license and the registration of the automobile are unreasonable under U.S. Const., amend. 4. *Bowers v. State*, 151 Ga. App. 46, 258 S.E.2d 623 (1979), *aff'd*, 245 Ga. 367, 265 S.E.2d 57 (1980); *Bobo v. State*, 153 Ga. App. 679, 266 S.E.2d 247 (1980).

Roadblock set up by various uniformed city police officers after they responded to an emergency call in the area satisfied the requirements for a valid routine license check. *Payne v. State*, 232 Ga. App. 591, 502 S.E.2d 526 (1998).

Driver's license check not illegal search. — A routine check for a driver's license, during which a police officer observed in the wallet of the party searched a stolen credit card, is not an illegal search. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), *aff'd*, 481 F.2d 1402 (5th Cir. 1973).

Brief detention of defendant at a roadblock did not violate defendant's fourth amendment rights, where all passing vehicles were stopped; the delay to passing motorists was minimal; the roadblock was set up in a well lit area by uniformed officers, and patrol cars were stationed on both sides of the road and on the median with blue lights flashing, making the roadblock highly visible to approaching motorists; and the "screening" officer was sufficiently trained to enable the officer to make a determination as to which motorists should be asked to take the field sobriety tests. *Evans v. State*, 190 Ga. App. 856, 380 S.E.2d 332, cert. denied, 493 U.S. 849, 110 S. Ct. 147, 107 L. Ed. 2d 105 (1989).

Sobriety checkpoint stops. are viewed differently from isolated vehicle stops because the subjective intrusion is appreciably less in the case of a checkpoint stop. *Christopher v. State*, 202 Ga. App. 40, 413 S.E.2d 236 (1991).

In a prosecution for driving under the influence, evidence obtained at a roadblock set up to check for driver's licenses and

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intoxicated drivers was admissible because the roadblock was legitimate and defendant's detention at the roadblock did not constitute an arbitrary, random stop or an unreasonable seizure. *White v. State*, 233 Ga. App. 276, 503 S.E.2d 891 (1998).

Allowing supervisory personnel to establish one-way roadblocks at a time and place conducive to stopping potentially intoxicated drivers does not create any significantly greater potential for improper targeting of ethnic or racial minorities than empowering them to select sites for two-way roadblocks. *State v. Stearns*, 240 Ga. App. 806, 524 S.E.2d 554 (1999).

Detention of driver for further tests for intoxication. — Requiring a driver who appeared to be intoxicated as viewed by police officers at a roadblock to submit to further detention so as to be subjected to field tests for intoxication did not violate the driver's fourth amendment rights. *State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (1984).

In order for a police officer at a roadblock to institute a secondary detention or seizure, the officer must have, at that time, a reasonable and articulable suspicion of criminal conduct. *State v. Fischer*, 230 Ga. App. 613, 497 S.E.2d 79 (1998).

Escaped convict. — Police officers who manned a roadblock were authorized to rely upon superior officers' determination that circumstances required an investigative stop of the defendants' vehicles, because there was information that an escaped convict might be traveling with the defendants, and the sighting of a revolver in one car authorized a search of the vehicle. *Holbrook v. State*, 177 Ga. App. 318, 339 S.E.2d 346 (1985).

Evidence obtained during roadblock inspection of concert-goers admissible. — On a motion to suppress evidence, the judge was authorized to find that a roadblock erected to inspect automobiles entering a rock concert was valid, and evidence resulting from routine traffic checks, or a more extensive warrantless search justified by plainly visible evidence of a nontraffic crime, was admissible. *State v. Swift*, 232 Ga. 535, 207 S.E.2d 459 (1974).

Border Searches

Validity of warrantless border searches. — U.S. Const., amend. 4 prohibits only unrea-

sonable searches and seizures. Warrantless border searches, including mail searches, are reasonable without probable cause or any ground for suspicion. *United States v. Pringle*, 576 F.2d 1114 (5th Cir. 1978).

There is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone. A search that would be unreasonable within the meaning of U.S. Const., amend. 4, if conducted by police officers in the ordinary case, would be a reasonable search if conducted by customs officials in lawful pursuit of unlawful imports. *United States v. Kayser*, 322 F. Supp. 52 (S.D. Ga. 1970).

Search may be based on unsupported suspicion. — Authorized federal border official may, upon unsupported suspicion, stop and search persons and their vehicles entering this country. *United States v. Kayser*, 322 F. Supp. 52 (S.D. Ga. 1970).

Unsupported and mere suspicion alone is sufficient to justify a search for purposes of customs law enforcement. Mere suspicion of possible illegal activity within their jurisdiction is enough cause to permit a customs officer to stop and search a person. *United States v. Kayser*, 322 F. Supp. 52 (S.D. Ga. 1970).

Reasonableness standard in border search context is less rigorous than the probable cause requirement which normally obtains under the fourth amendment. *United States v. Fogelman*, 586 F.2d 337 (5th Cir. 1978).

A border crossing is not the sine qua non of a valid border search. A reasonable suspicion that the vehicle has crossed the border or has been in contact with those who have done so is required. *United States v. Fogelman*, 586 F.2d 337 (5th Cir. 1978).

Reasonable cause required to stop and question about citizenship and immigration status. — In order to conduct a stop and ask questions about citizenship and immigration status, U.S. Const., amend. 4 requires that agents must have been aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. *United States v. Gonzalez-Vargas*, 496 F. Supp. 1296 (N.D. Ga. 1980).

Further away from border that a stop occurs, the more that is required for the

totality of the circumstances to justify a stop within the protection of U.S. Const., amend. 4. A requirement that a greater quantum of evidence should be required to justify a stop and citizenship inquiry the further away from the border or its functional equivalent that such a stop occurs is an appropriate response, in light of U.S. Const., amend. 4, to the problem of the inland movement of those who are not duly admitted to the country. *United States v. Gonzalez-Vargas*, 496 F. Supp. 1296 (N.D. Ga. 1980).

Removal of defendant's shoes did not go beyond a routine border search or constitute an unreasonable strip search. *Segree v. State*, 186 Ga. App. 489, 367 S.E.2d 882 (1988).

Airports

Limit on access to area of aircraft. — In the interest of general security, airport officials may limit access to the area of the aircraft, as distinguished from the more public areas of the lobby, ticket counters, and other public conveniences. Incident to limiting this access, officials may set up detection devices to screen persons approaching the more sensitive areas. *State v. David*, 130 Ga. App. 872, 204 S.E.2d 773 (1974).

No seizure where airline passengers voluntarily produce tickets and identification. — There is no seizure, within the meaning of U.S. Const., amend. 4, where Drug Enforcement Administration agents employing a drug courier profile, request airline passengers to produce their tickets and some form of identification, so long as the passenger's cooperation is voluntary and not the product of coercion, force, or other use of authority. *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980).

Because police officers initiated contact with a suspect in an airport by asking if the suspect would step aside and talk with them, no fourth amendment interests were implicated. *Reid v. State*, 179 Ga. App. 144, 345 S.E.2d 635 (1986).

Brief questioning absent detention or coercion. — The police may approach a citizen in an airport, identify themselves, request identification, and briefly question the individual without bringing into play the proscriptions of U.S. Const., amend. 4, so long as the individual is not detained against the individual's will or otherwise coerced into cooperating. As long as the cooperation is

voluntary and not the product of police coercion, a seizure has not occurred. *United States v. Smith*, 649 F.2d 305 (5th Cir. 1981), cert. denied, 460 U.S. 1068, 103 S. Ct. 1521, 75 L. Ed. 2d 945 (1983).

The conduct of police officers in approaching the defendant in an airport and identifying themselves as law enforcement officers, accompanied with their request to see the defendant's ticket and identification, did not amount to an intrusion upon any constitutionally protected area. Nor did the absence of an express statement to the defendant that the defendant was free to leave suggest that the defendant was "seized." Such police-citizen encounters involving no coercion or detention are without the compass of U.S. Const., amend. 4. *Brown v. State*, 188 Ga. App. 417, 373 S.E.2d 99 (1988).

Airport stop and investigation of the defendant did not violate fourth amendment, where the defendant was not seized or restrained until the defendant had been arrested upon probable cause to believe a bag containing cocaine was the defendant's or that the defendant was directly connected to it. *Young v. State*, 187 Ga. App. 161, 369 S.E.2d 772 (1988).

Stop by drug agent. — Defendant was not "seized" where encounter between a drug agent and the defendant took place in public concourse of airport, the agent wore no uniform and displayed no gun, nor did the agent summon the defendant to the agent's presence, but approached the defendant and properly identified self as a federal agent, requesting but not demanding the defendant's identification and reason for the defendant's trip to Florida, thus subsequent knowledge of possession of cocaine derived during the investigative stop could properly be considered as being acquired in a spot where the agent was authorized to be and where the defendant was lawfully being questioned. *Berry v. State*, 163 Ga. App. 705, 294 S.E.2d 562 (1982).

Because a Drug Enforcement Administration agent was not in uniform; made no physical contact; did not raise the agent's voice, and after looking at and returning appellant's driver's license and airline tickets, explained that the agent was a narcotics officer and asked if the appellant "would mind cooperating" with the agent and allow the agent to search the appellant for drugs,

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to which request the appellant stated that the appellant did not mind and had no drugs, and in fact requested that the search be carried out in "some place more private," this result of an initial stop did not constitute a seizure that would trigger fourth amendment protections. *McAdoo v. State*, 164 Ga. App. 23, 295 S.E.2d 114 (1982).

Airport stop of the defendant by a Drug Enforcement Administration agent did not constitute a seizure of the defendant's person within the meaning of this section because the defendant freely consented to converse with the agent after the latter had presented the agent's credentials, the agent made no show of force and the agent's manner was completely noncoercive, the agent did not ask the defendant to move from where the defendant was sitting, and where after the defendant refused consent to a search of the defendant's person and luggage, the agent terminated the conversation and walked away, leaving the defendant free to board the defendant's connecting flight. *Yocham v. State*, 165 Ga. App. 650, 302 S.E.2d 390 (1983).

There was no seizure because Drug Enforcement Administration officers asked a passenger to consent to a search of the passenger's person and luggage pursuant to a public interview. *United States v. Mancini*, 802 F.2d 1326 (11th Cir. 1986).

Defendant was not "seized" during an encounter with plainclothes drug enforcement officers at an airport, where the officers "walked up beside" defendant, identified themselves as law enforcement officers, and spoke in a conversational tone, asking for, rather than demanding, defendant's ticket and identification. *Owens v. State*, 192 Ga. App. 671, 385 S.E.2d 761 (1989).

Detention while waiting for drug detector dog. — Detention of defendant's bag at an airport for over an hour while law enforcement agents obtained a drug detector dog to sniff the bag was a minimal intrusion and did not violate defendant's fourth amendment rights. *State v. Grant*, 195 Ga. App. 859, 394 S.E.2d 916 (1990).

Detention of foreign language speaking suspect while awaiting interpreter. — A drug enforcement administration agent's investigative detention of a Spanish-speaking sus-

pect in an airport office was reasonable, where the agent, who had reasonable suspicion that the suspect was transporting drugs, acted diligently to obtain the assistance of an interpreter in order to interrogate the suspect. *United States v. Espinosa-Guerra*, 805 F.2d 1502 (11th Cir. 1986).

Taking defendant to room at airport constituted seizure. — Defendant was "seized," within the meaning of the fourth amendment, when the defendant was taken from an airport concourse to a room to be searched. *Miranda v. State*, 189 Ga. App. 218, 375 S.E.2d 295 (1988).

Observation of abnormal bulge in boots. — A federal drug enforcement agent noticed that the defendant, an airline passenger, had abnormally large bulges in both boots. When asked about the bulges, the defendant denied there was anything in the boots, an obviously untrue answer, which, coupled with the agent's observation and experience, provided the probable cause required for a warrantless arrest. *Clark v. State*, 183 Ga. App. 838, 360 S.E.2d 447 (1987).

Consent search of passenger. — Because a Drug Enforcement Agency agent's stopping and questioning an airline passenger at an airport about carrying drugs were proper and did not bring the fourth amendment into play, the agent's asking the passenger whether the passenger would consent to a search of the passenger's person and the passenger's suitcase did not amount to a seizure. *United States v. Jensen*, 689 F.2d 1361 (11th Cir. 1982).

Warrantless arrest and seizure where cocaine suspect exiting plane. — Because an agent of the Federal Drug Enforcement Administration observed the defendant exit a plane from Miami, a drug source city, the defendant had an unnatural bulge on the inside of each leg, and other incriminating evidence was present, this evidence clearly authorized the trial court to find that the agent had sufficient articulable and reasonable suspicion to conduct a Terry-type stop of the defendant, and while the defendant was lawfully stopped for questioning, the defendant freely and voluntarily consented to an inspection of the defendant's legs by the agent, under the totality of these circumstances, the agent had probable cause to arrest, and, in the search incident to the

arrest, the seizure of the cocaine found in the defendant's socks was justified. *Chappell v. State*, 183 Ga. App. 706, 359 S.E.2d 686 (1987).

Seizure of luggage. — Because the fourth amendment protects people, not things, courts should concern themselves with seizures of luggage only when those seizures impair the right of the possessor to freedom of movement with possessor's luggage. In airport luggage cases, the traveler's possessory interest would be impaired if the seizure of traveler's luggage were tantamount to a seizure of the traveler's person, whether actually, because traveler could not leave without the traveler's luggage, or constructively, where travel plans required traveler to proceed without the luggage. *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984).

Brief seizure of luggage, which interferes with the owner's freedom of movement, must be based on a reasonable, articulable suspicion that a crime is being, or soon will be, committed. *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984).

Detention of defendant's luggage at an airport was not an illegal seizure, where officers had a reasonable suspicion that defendant was carrying narcotics, and a narcotic detector dog was obtained 30 minutes after the luggage was removed from defendant's departing plane. *United States v. Cooper*, 873 F.2d 269 (11th Cir.), cert. denied, 493 U.S. 837, 110 S. Ct. 118, 107 L. Ed. 2d 79 (1989).

Removal of airline luggage pending further investigation. — Drug Enforcement Administration agent's removal of defendant's luggage from an airline baggage cart pending further investigation was not an unreasonable seizure. *Yocham v. State*, 165 Ga. App. 650, 302 S.E.2d 390 (1983).

Lifting luggage to assess weight. — Drug Enforcement Administration agent's action in lifting defendant's suitcase from airline baggage cart to assess its weight did not constitute an unreasonable seizure. *Yocham v. State*, 165 Ga. App. 650, 302 S.E.2d 390 (1983).

Airports demand special fourth amendment considerations. — Because of the danger posed by air piracy, airports are sui generis and, like international borders, are "critical zones" in which special fourth amendment considerations apply. *McSweeney*

v. State, 183 Ga. App. 1, 358 S.E.2d 465 (1987).

Implied consent at airport security checkpoints. — Because the defendant voluntarily presented self at the airport checkpoint and placed the defendant's handbag on the counter so that it could be scanned by x-ray, a sign at the airport security checkpoint informing all persons entering the area that they will be subject to search provided the necessary consent for the search of the defendant's handbag. Thus, by the defendant's conduct the defendant consented to the search of the defendant's handbag and its contents as a matter of law, and the marijuana found in the search of the handbag was admissible in evidence. *State v. Rosof*, 180 Ga. App. 637, 350 S.E.2d 36 (1986).

If an aircraft passenger presents self to an airport security checkpoint, the passenger has consented to the screening of the passenger's luggage by the X-ray machine and the passenger's person by the magnetometer. Moreover, a search need not be curtailed, even if the passenger decides not to take the flight. *McSweeney v. State*, 183 Ga. App. 1, 358 S.E.2d 465 (1987).

Placement of magnetometer at loading ramp. — There is nothing unreasonable in placement of magnetometer at entrance to loading ramp at airport or in the airport security officers' stopping a person not carrying a ticket when the device gives an alert and asking that person to remove the person's hand from the person's pocket, which might have been thought to contain a weapon. *State v. David*, 130 Ga. App. 872, 204 S.E.2d 773 (1974).

Exposure of airplane passengers to magnetometers constitutes a search under U.S. Const., amend. 4, but such search even without a warrant is not unreasonable in view of the threat of air piracy. *State v. David*, 130 Ga. App. 872, 204 S.E.2d 773 (1974).

Drug Couriers

Drug courier profile characteristics have a proper role in making the determination as to the existence of reasonable suspicion. The profile is a valuable administrative tool in guiding law-enforcement officers toward individuals on whom the officers should focus their attention in order to determine whether there is a basis for a specific and

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articulable suspicion that the particular individual is smuggling drugs. *Bothwell v. State*, 250 Ga. 573, 300 S.E.2d 126, cert. denied, 463 U.S. 1210, 103 S. Ct. 3545, 77 L. Ed. 2d 1393 (1983).

Stopping of airline passenger proper where passenger matched drug-courier profile. — A Drug Enforcement Agency agent's stopping and interrogation of an airline passenger at an airport was proper and did not bring the fourth amendment into play where the agent knew that the passenger was traveling from a drug center, had an unusual flight itinerary from Phoenix to Miami one evening with a return flight the next morning, and paid for the ticket in cash; and these characteristics were part of a drug-courier profile for detecting possible drug smugglers. *United States v. Jensen*, 689 F.2d 1361 (11th Cir. 1982).

Probable cause to arrest person with characteristics of drug courier profile. — Where law enforcement agent, who had past experience with narcotic searches, observed a suspect who had suspicious bulge in sweater, who was overheard saying during a telephone call, "I'm just trying to help him out, make a little extra money," and who exhibited some of the characteristics of the drug courier profile, including attempting to conceal fact that suspect was traveling with someone, agent had probable cause to believe that the suspect was committing an offense involving concealed contraband and to place suspect under arrest. *Allen v. State*, 172 Ga. App. 663, 324 S.E.2d 521 (1984).

Facts sufficient to authorize initial stop. — Because, based on experience, a federal drug enforcement agent knew that drug couriers often transport contraband strapped to their bodies, and because the defendant's surreptitious conduct — looking over the defendant's shoulders and adjusting the "bulge" on the defendant's leg without lifting up the defendant's trousers — clearly indicated an effort to conceal the protrusion, the agent had sufficient grounds for making the initial investigative stop and for seizing the bulge. *United States v. Roundtree*, 596 F.2d 672 (5th Cir.), cert. denied, 444 U.S. 871, 100 S. Ct. 149, 62 L. Ed. 2d 96 (1979).

Evidence supported finding that initial

stop of defendant's car was not a pretextual stop based upon an impermissible "drug courier profile" but instead was based upon commission of the offense of improper lane usage. *O'Keefe v. State*, 189 Ga. App. 519, 376 S.E.2d 406 (1988).

Facts sufficient to authorize arrest. — Because the defendant exhibited suspicious "leg bulges" when the defendant exited the plane from Miami, a known source city for the distribution of drugs, which "leg bulges" attracted the immediate attention of two agents of the Federal Drug Enforcement Administration, the appellant was placed under surveillance by both agents and was subsequently confronted, questioned, arrested, and searched by one of them, the defendant's false response to the inquiry about the objects in the defendant's boots, coupled with the agents' observation and experience, provided the probable cause required for the defendant's warrantless arrest. Accordingly, the search incident to that arrest was not violative of the fourth and fourteenth amendments, and the fruits of that search were properly considered by the trial court in convicting the defendant of trafficking in cocaine. *Miller v. State*, 183 Ga. App. 702, 359 S.E.2d 683, cert. denied, 183 Ga. App. 906, 359 S.E.2d 683 (1987).

Searches held unreasonable. — Use of drug courier profile on passenger arriving from a city known to be a major center for narcotics traffic resulted in an unreasonable search. *State v. Smith*, 164 Ga. App. 142, 296 S.E.2d 141 (1982).

Wiretaps

U.S. Const., amend. 4 applicable to wiretaps. — Fourth amendment rights apply to telephone wiretapping. *Dryden v. United States*, 391 F.2d 214 (5th Cir. 1968).

Wire-tapping comes within this constitutional protection. *Farmer v. State*, 228 Ga. 225, 184 S.E.2d 647 (1971).

Validity of warrantless wiretap. — Although a wiretap may not have been unlawful and not subject to prosecutions under former Code 1933, § 26-3001 (see O.C.G.A. § 16-11-62), that cannot alter the mandate of U.S. Const., amend. 4 which makes a wiretap an unlawful search and seizure without the proper warrants. *Farmer v. State*, 228 Ga. 225, 184 S.E.2d 647 (1971).

Validity of search of telephone conversations unrelated to offense. — A general and wide ranging search through all of the telephone conversations conducted on telephone lines during a period covering approximately 20 days, and seizure and recording of matters in no way related to the crime investigated, constituted a violation of the defendant's right to privacy guaranteed to defendant under the terms of U.S. Const., amend. 4 and by Ga. Const. 1983, Art. I, Sec. I, Para. XIII. *Cross v. State*, 225 Ga. 760, 171 S.E.2d 507 (1969).

Government's electronic surveillance of telephone booth conversations violated privacy upon which defendant justifiably relied while using the telephone booth and constituted a search and seizure within the meaning of U.S. Const., amend. 4. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Recording conversations where one party consents. — Admitting into evidence recorded conversations between a defendant and a consenting government informant does not violate the fourth amendment right of the accused. *United States v. Smith*, 918 F.2d 1551 (11th Cir. 1990).

Turning over of surveillance records to aggrieved person. — When a person's rights of U.S. Const., amend. 4 have been violated by means of an unlawful electronic surveillance, the surveillance records must be turned over to the aggrieved person in order that the person may prevail upon the district court to determine in an adversary proceeding whether the surveillance tainted the person's criminal conviction. *United States v. Zarzour*, 432 F.2d 1 (5th Cir. 1970).

No standing to object to wiretap. — Where none of appellant's fourth amendment rights were violated by initial wiretap of third party's telephone, and where no conversations of appellant were overheard on the tap nor was the tap on appellant's premises, appellant lacked standing to object to the wiretap. *Romano v. State*, 162 Ga. App. 816, 292 S.E.2d 533 (1982).

Standing to challenge tapping of codefendant's phone. — Defendant had no standing to challenge the electronic surveillance of a codefendant's telephone. *Ellis v. State*, 256 Ga. 751, 353 S.E.2d 19 (1987).

Defendant had no standing to object to a wiretap of a codefendant's telephone that resulted in the interception of telephone

calls between the defendant and the codefendant. *Rogers v. State*, 182 Ga. App. 599, 356 S.E.2d 546 (1987).

Standing to challenge recording of phone conversation. — If there is no evidence that a person was a party to a telephone conversation, nor did the person own, possess, or control the premises or telephones used in the conversations, the person has no standing to challenge the legality of a recording of the conversation. *United States v. Coley*, 441 F.2d 1299 (5th Cir. 1971), cert. denied, 404 U.S. 867, 92 S. Ct. 85, 30 L. Ed. 2d 111 (1971).

Exception to "fruit of poisonous tree" doctrine. — In a prosecution of defendant spouse for solicitation of murder, because there was no state participation in an illegal tapping of initial phone conversation by the other spouse, the "fruit of the poisonous tree" doctrine did not require suppression of an undercover agent's subsequent surreptitiously taped conversations with defendant. *Jordan v. State*, 211 Ga. App. 86, 438 S.E.2d 371 (1993).

Electronic Surveillance

Installation and monitoring of electronic surveillance device. — Law enforcement officials' reasonable suspicion of criminal activity justifies the placement and monitoring of an electronic tracking device or beeper. The monitoring does not violate rights under U.S. Const., amend. 4 where the actual installation of the beeper is much less intrusive than the typical stop and frisk, installation occurred in a public place, defendant was neither detained nor questioned and suffered no indignity, nothing from the interior or exterior of the automobile was seized or searched, the subsequent monitoring did not violate defendant's reasonable expectation of privacy, the beeper only aided the officials in the performance of their lawful surveillance, and the automobile traveled public roads and was exposed to public view. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Warrantless installation of device. — To constitute reasonable suspicion there must be specific and articulable facts, together with rational inferences from those facts, that a crime is afoot. Such reasonable suspicion is adequate to support warrantless in-

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stallation, by law enforcement officials, of electronic tracking device or beeper on an individual's automobile. *United States v. Michael*, 645 F.2d 252 (5th Cir.), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Information obtained from a pen register placed on telephone can be used as evidence in a criminal trial even if the court order authorizing its installation does not comply with statutory requirements. *United States v. Thompson*, 936 F.2d 1249 (11th Cir. 1991), cert. denied, 502 U.S. 1075, 112 S. Ct. 975, 117 L. Ed. 2d 139 (1992).

Inserting beeper in contraband or other object. — Possessors of contraband have no legitimate expectation of privacy in substances which they have no right to possess at all. Accordingly, the insertion of a beeper signaling device into such a package is constitutionally permissible. *United States v. Pringle*, 576 F.2d 1114 (5th Cir. 1978).

Mere insertion of beeper device either in contraband or in or onto an otherwise lawful object does not violate fourth amendment rights where there is no trespass involved and there exists probable cause to believe that a crime is intended. *Dunivant v. State*, 155 Ga. App. 884, 273 S.E.2d 621 (1980), cert. denied, 450 U.S. 998, 101 S. Ct. 1703, 68 L. Ed. 2d 199 (1981).

Placement of a "bumper beeper" on defendant's vehicle constitutes a search within the meaning of U.S. Const., amend. 4. *United States v. Park*, 531 F.2d 754 (5th Cir. 1976).

Reasonable suspicion is adequate to support warrantless attachment of electronic tracking device to the exterior of defendant's vehicle parked in a public place by Drug Enforcement Administration agents. *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981), cert. denied, 454 U.S. 950, 102 S. Ct. 489, 70 L. Ed. 2d 257 (1981).

Facts sufficient to warrant placing beepers in boxes of chemicals. — Call from a drug company, discovery that address given by purchasers of chemical was not one where chemical manufacturer would operate, and nature of chemicals purchased, in light of agent's familiarity with manufacture of controlled substances, together created sufficient basis for believing that criminal enter-

prise was underway and placing of electronic beepers in boxes containing chemicals to maintain continuous surveillance under such circumstances does not amount to an invasion of constitutionally protected right under U.S. Const., amend. 4 to privacy nor an impermissible intrusion upon protected property rights. *Dunivant v. State*, 155 Ga. App. 884, 273 S.E.2d 621 (1980), cert. denied, 450 U.S. 998, 101 S. Ct. 1703, 68 L. Ed. 2d 199 (1981).

Installation of homing beeper excused by independent radar tracking. — The tracking of an aircraft by radar provided an independent source for its location and, therefore, excused the claimed illegal "search" of the plane as the result of the installation and maintenance of a transponder ("beeper"). *United States v. Cotton*, 770 F.2d 940 (11th Cir. 1985).

Confessions

Fact that a confession may be voluntary for purposes of the fifth amendment is merely a threshold requirement for a fourth amendment analysis in determining whether the confession should be excluded as the fruit of an unlawful arrest. *Ryals v. State*, 186 Ga. App. 457, 367 S.E.2d 309 (1988).

Holding accused pending confession as violation of fourth amendment rights. — Defendant's argument that police violated defendant's "state and federal constitutional rights" by holding defendant in custody, and making it clear to defendant that defendant would not be allowed to leave the police station until defendant confessed, was sufficient to raise the contention that the confession was extracted in violation of defendant's due process rights under the fourth as well as the fifth amendment. *Ryals v. State*, 186 Ga. App. 457, 367 S.E.2d 309 (1988).

Confession was not tainted by an illegal arrest even though a police officer placed the defendant under arrest verbally without a warrant before the officer began the interrogation resulting in the confession, since the officer, having observed the results of the offense, knew that a felony had been committed and had probable cause to believe the defendant had committed the felony. *Jarrell v. Balkcom*, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985).

State Action

State action required for fourth amendment violation. — Because U.S. Const., amend. 14, through which U.S. Const., amend. 4 applies to the state, requires state action, absent some state action in a search context, there can be no fourth amendment violation. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975); *Gasaway v. State*, 137 Ga. App. 653, 224 S.E.2d 772, cert. denied, 429 U.S. 865, 97 S. Ct. 172, 50 L. Ed. 2d 144 (1976).

U.S. Const., amend. 4, through U.S. Const., amend. 14, applies to state induced or supported actions. Its purpose is to curtail abusive state action. In the absence of unreasonable state action to invade the privacy of a citizen or seize the citizen's property without probable cause, there is no protection afforded as a fence against a violation of U.S. Const., amend. 4. *State v. Misuraca*, 157 Ga. App. 361, 276 S.E.2d 679, cert. denied, 454 U.S. 846, 102 S. Ct. 163, 70 L. Ed. 2d 133 (1981).

U.S. Const., amend. 4 proscribes only governmental action and is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent to the government or with the participation of a government official. *Williams v. State*, 257 Ga. 788, 364 S.E.2d 569 (1988).

Rule inapplicable absent participation by federal or state officers in search. — U.S. Const., amend. 4 does not require the exclusion of evidence obtained through a search in which there was no participation or investigation by a federal or state law enforcement officer. *State v. Lamb*, 137 Ga. App. 437, 224 S.E.2d 51 (1976).

Authority to stop and question hunters. — A Department of Natural Resources officer may approach a hunter in a state-run wildlife management area to determine whether the hunter has the necessary license and permits and to ask the hunter questions about the hunt, regardless of whether the officer has reason to suspect that the hunter has broken any laws. *Elzey v. State*, 239 Ga. App. 47, 519 S.E.2d 751 (1999).

U.S. Const., amend. 4 cannot be evaded by the use of a private person to do what an officer of the state cannot do. *State v. Betsill*, 144 Ga. App. 267, 240 S.E.2d 781 (1977).

Search by private individual. — U.S. Const., amend. 4's protections against unreasonable search and seizure do not extend to a search or seizure made by a private individual, conducted without police participation. *Moye v. Hopper*, 234 Ga. 230, 214 S.E.2d 920 (1975).

Search by private person not covered. — With reference to searches by private persons, there is no prohibition under U.S. Const., amend. 4. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975); *State v. Lamb*, 137 Ga. App. 437, 224 S.E.2d 51 (1976).

A search by a private person is not covered by U.S. Const., amend. 4. U.S. Const., amend. 4 is intended as a restriction on the activities of the government and its agents, and is not addressed to actions, illegal or legal, of private persons. *Tootle v. State*, 135 Ga. App. 840, 219 S.E.2d 492 (1975).

U.S. Const., amend. 4 protects individuals against unlawful intrusions made by government, not against those made by private parties. Where no official of the federal government has any connection with a wrongful seizure, or any knowledge of it until after the fact, the evidence is admissible. *United States v. Jackson*, 578 F.2d 1162 (5th Cir. 1978).

U.S. Const., amend. 4, though textually not so limited, actually affords protection only against unreasonable searches and seizures made by governmental officers, so however unreasonable a search by a private person may be, absent participation by governmental agents, U.S. Const., amend. 4 is totally uninvolved. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

The fourth amendment proscribes only governmental action and is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation of a government official. *Marks v. State*, 174 Ga. App. 711, 330 S.E.2d 900 (1985).

With reference to searches by private persons, there is no fourth amendment prohibition and therefore no occasion for applying the exclusionary rule. *Lane v. State*, 180 Ga. App. 168, 348 S.E.2d 711 (1986).

There is no fourth amendment violation where an individual's privacy is initially invaded by a private act. Therefore, the discovery of illegal material by a private citizen and

State Action (Cont'd)

the verification of this evidence by an officer which leads ultimately to the issuance of an arrest warrant is reasonable and does not violate U.S. Const., amend. 4. *Hester v. State*, 187 Ga. App. 46, 369 S.E.2d 278 (1988).

Evidence illegally seized by private citizens admissible. — U.S. Const., amend. 4, though textually not so limited, actually affords protection only against unreasonable searches and seizures made by governmental officers. Therefore, however unreasonable a search by a private person may be, absent participation by governmental agents, U.S. Const., amend. 4 is totally uninvolved and the evidence, though illegally seized by private individuals, is admissible in a criminal prosecution. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039, 96 S. Ct. 576, 46 L. Ed. 2d 413 (1975).

Absent participation by governmental agents, U.S. Const., amend. 4 is totally uninvolved and the evidence, though illegally seized by private individuals, is admissible in a criminal prosecution. *Gasaway v. State*, 137 Ga. App. 653, 224 S.E.2d 772, cert. denied, 429 U.S. 865, 97 S. Ct. 172, 50 L. Ed. 2d 144 (1976).

Delivery to law enforcement officers of seized contraband by private parties. — If the seizure was not attended by law enforcement officers, simple delivery of the seized contraband to law enforcement officers does not involve those officers in the search and seizure. *State v. Lamb*, 137 Ga. App. 437, 224 S.E.2d 51 (1976).

Evidence inadmissible where obtained by private person as agent of government. — Evidence obtained by private person is incompetent where governmental agents, through suggestion, order, or request made a private person their agent for the purposes of criminal investigation, or where governmental agents participate in the search and seizure. *Gasaway v. State*, 137 Ga. App. 653, 224 S.E.2d 772, cert. denied, 429 U.S. 865, 97 S. Ct. 172, 50 L. Ed. 2d 144 (1976).

Bank officers not federal agents for purposes of constitutional liability. — Under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), victims of constitutional violations committed by federal officials have a right to recover damages without the need for an

authorizing statute, but the regulation of the banking industry does not make bank officers federal agents for the purposes of *Bivens*'s liability. *Morast v. Lance*, 631 F. Supp. 474 (N.D. Ga. 1986), aff'd, 807 F.2d 926 (11th Cir. 1987).

Entry or search of motel room by motel manager. — It is not unauthorized search for hotel management personnel, including security personnel, to open unlocked items found on their premises in an attempt to determine ownership so that the lost or misplaced property can be returned to its proper owner. *Berger v. State*, 150 Ga. App. 166, 257 S.E.2d 8 (1979), cert. denied, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980).

Where the initial entry into a motel room was made by the manager, a private citizen, it was not prohibited by the fourth amendment. *Smith v. State*, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

Where upon entering a motel room on which the rent was unpaid, the manager found a grocery sack with marijuana in plain sight and thereafter opened two suitcases and discovered more marijuana and called the police and allowed them in, since it was reasonably apparent to them that the prior occupant had abandoned the premises, the manager's invitation obviated the need for a warrant to authorize the officers' entry. *Smith v. State*, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

Because a motel manager testified that the manager made no connection between a police call regarding room 103 and the manager's subsequent entry into room 437, and that no rent having been paid for room 437, the manager's search of the luggage for identification was standard procedure, this does not mandate a conclusion that the manager was the agent of the state, in searching suitcases found in room 437. *Smith v. State*, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

Seizure by apartment employees. — The seizure of cocaine from an apartment, which seizure was accomplished by employees of the apartment complex, was not a violation of defendant's fourth amendment rights, because the apartment complex employees were neither agents of the state nor were they acting pursuant to any police instructions. *Green v. State*, 187 Ga. App. 373, 370 S.E.2d 348 (1988).

Neighbors of defendant. — Where no law enforcement officers or other state officials were involved when defendant's neighbors entered defendant's trailer and obtained an article of clothing, a shirt, from defendant, the seizure of defendant's shirt by these private parties did not implicate U.S. Const., amend. 4, and U.S. Const., amend. 4 was not violated when the shirt was later turned over to law enforcement officers. *Pruitt v. State*, 258 Ga. 583, 373 S.E.2d 192 (1988), cert. denied, 493 U.S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1072 (1990).

Resident of home. — Even though police officers requested defendant's spouse to search the marital home for evidence, admission of items the spouse found was not precluded because the spouse lived in the residence and had common authority over it and its contents. *Johnson v. State*, 231 Ga. App. 823, 499 S.E.2d 145 (1998).

Residents of trailer. — Where all objected to evidence was either turned over to the police by the residents of a trailer, to which the police were voluntarily admitted, this amounted to a search by private individuals, which is not prohibited by U.S. Const., amend. 4 even if unreasonable. *Tomlinson v. State*, 188 Ga. App. 213, 373 S.E.2d 25 (1988).

Search of suitcase by airline employee. — Where an airline employee searched a suitcase which had opened on a conveyor belt used for loading airplanes in order to prevent loss and breakage of its contents, the search was a private one and was not covered by U.S. Const., amend. 4. *Andreu v. State*, 124 Ga. App. 793, 186 S.E.2d 137 (1971).

Standing

One must have standing to move to suppress evidence. — The constitutional right violated must belong to the person seeking to suppress illegally seized evidence or the fruits thereof. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Suppression of product of violation of U.S. Const., amend. 4 can be urged only by one whose own rights have been infringed by the search itself. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Defendants charged with crimes of possession can secure the benefits of the exclusion-

ary rule only if their own rights have in fact been violated. *United States v. Robinson*, 504 F. Supp. 425 (N.D. Ga. 1980).

Rights may not be vicariously asserted. — Rights under U.S. Const., amend. 4 are personal rights which may not be vicariously asserted. *Tisdol v. State*, 158 Ga. App. 852, 282 S.E.2d 411 (1981); *United States v. Herbst*, 641 F.2d 1161 (5th Cir.), cert. denied, 454 U.S. 851, 102 S. Ct. 292, 70 L. Ed. 2d 141 (1981); *Romano v. State*, 162 Ga. App. 816, 292 S.E.2d 533 (1982); *Mann v. State*, 196 Ga. App. 730, 397 S.E.2d 17 (1990); *Bramblett v. State*, 205 Ga. App. 290, 422 S.E.2d 18 (1992); *Henderson v. State*, 211 Ga. App. 102, 438 S.E.2d 181 (1993).

That rights under U.S. Const., amend. 4 are personal in nature, and that such rights cannot bestow vicarious protection on those who do not have a reasonable expectation of privacy in the place to be searched, was recognized by the common law. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

The fact that the defendant's companion may have possessed a legitimate expectation of privacy in a carry-on bag was of no aid to the defendant. Rights secured by the fourth amendment are personal and cannot be vicariously asserted. *United States v. McKennon*, 814 F.2d 1539 (11th Cir. 1987).

Requirement for standing. — In order to qualify as a person aggrieved by an unlawful search and seizure, one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. *Wood v. State*, 224 Ga. 121, 160 S.E.2d 368 (1968).

Violation under U.S. Const., amend. 4 can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. *Grantling v. State*, 229 Ga. 746, 194 S.E.2d 405 (1972).

The rights assured by U.S. Const., amend. 4 are personal rights, and a person is aggrieved by a search and seizure only if that person's own protection under U.S. Const., amend. 4 has been infringed. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Standing (Cont'd)

A defendant has standing to contest the validity of a search if a reasonable expectation of privacy was violated by the intrusion. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

If a defendant does not show that the defendant was on the premises at the time of the contested search and seizure, or allege a proprietary or possessory interest in the premises, and is not charged with an offense requiring possession of the seized evidence at the time of the contested search and seizure, the defendant cannot be heard to question the constitutionality of the search. *United States v. Williams*, 613 F.2d 560 (5th Cir. 1980).

In order to establish standing, one must assert either a property or possessory interest in the premises searched or the property seized. *State v. Peabody*, 247 Ga. 580, 277 S.E.2d 668 (1981).

One wishing to suppress evidence obtained from one's person and car is "person aggrieved". — Because the evidence that the defendant sought to suppress was obtained during the execution of a search warrant authorizing the search of the defendant's person and automobile, the defendant would be a person aggrieved by the search, if it should be held to be unlawful. *Wood v. State*, 224 Ga. 121, 160 S.E.2d 368 (1968).

Person aggrieved by evidence seized from third party. — A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by search of a third person's premises or property has not had any of the defendant's rights under U.S. Const., amend. 4 infringed. *Cuevas v. State*, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980); *Romano v. State*, 162 Ga. App. 816, 292 S.E.2d 533 (1982).

It is the relationship of the person with the property searched that gives rise to the protection of the fourth amendment, and an individual who claims to be aggrieved by an illegal search and seizure only through the introduction of evidence secured by a search of a third person's premises has not had any of the individual's fourth amendment rights infringed. *Todd v. State*, 184 Ga. App. 750,

362 S.E.2d 400 (1987); *Morrill v. State*, 216 Ga. App. 468, 454 S.E.2d 796 (1995).

Visitors. — A person has no standing to object to a search of the premises, and particularly a limited one, where the person is a mere visitor (although a frequent one), since the person has no expectation of privacy in the premises of another, where the person has neither a proprietary nor a possessory interest. *Dennis v. State*, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

Defendant, who was merely a guest who came and went at irregular intervals, had neither a proprietary nor a possessory interest in the searched premises, and lacked standing to challenge the validity of the search. *State v. Scott*, 176 Ga. App. 887, 339 S.E.2d 276 (1985).

House guest, moving to suppress items found in search of house, lacked standing, failing to prove a sufficient connection to the residency to justify a reasonable expectation of privacy. An oral agreement to move into the house had not been effectuated (i.e., the guest's personal effects had not been moved) and the personal relationship between the guest and the resident was unsettled. *United States v. Gilley*, 608 F. Supp. 1065 (S.D. Ga. 1985).

Overnight guest in rented room. — Defendant's claim that the defendant was a frequent "overnight guest" and "social guest" in a room rented by another was not sufficient to show the defendant had standing to challenge officers' entry into the room. *Atwater v. State*, 233 Ga. App. 339, 503 S.E.2d 919 (1998).

Search of defendant's sibling's home. — Immunity from unreasonable search and seizure is privilege personal to those whose rights have been infringed, and the accused is not such a person, if the home of the sibling be considered searched unreasonably. *Marsh v. State*, 223 Ga. 590, 157 S.E.2d 273 (1967).

Standing of lessee to object to search of adjacent unleased area. — Since law enforcement agents did not enter property belonging to or under the control of the defendant and the defendant's family, who leased certain property from a landowner but grew marijuana in an adjacent unleased area, the defendant, who was not a caretaker of the owner's property, had no standing to object to the search of the unleased area.

Smallwood v. State, 171 Ga. App. 784, 321 S.E.2d 118 (1984).

Standing to contest warrantless search of automobile. — Objection that an automobile was illegally searched without a warrant is not available to one who makes no claim to the ownership or possession of the automobile or its contents and who was not present at the time of the search. *Gugliotta v. State*, 117 Ga. App. 212, 160 S.E.2d 266 (1968).

Because a warrantless search of an automobile was made, which was not the property of the accused and because the accused did not show that the accused was driving the same with permission of the owner or with permission of anyone entitled to possession of the automobile, the accused has no standing to invoke constitutional guarantees to exclude evidence found in the search. *Brisbane v. State*, 233 Ga. 339, 211 S.E.2d 294 (1974).

Passenger in car owned by another has no interest in car and no standing to object to search. *Autry v. State*, 150 Ga. App. 584, 258 S.E.2d 268, overruled on other grounds, *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Fact that defendant may have legitimately been on premises searched (i.e., as passenger in automobile) does not in and of itself entitle one to challenge the validity of the search and seizure. *Meyer v. State*, 150 Ga. App. 613, 258 S.E.2d 217 (1979), cert. denied, 445 U.S. 952, 100 S. Ct. 1602, 63 L. Ed. 2d 788 (1980).

Defendant-passenger in automobile, owned by another, being driven at time of arrest does not have standing to object to claimed violation of U.S. Const., amend. 4 regarding execution of warrantless search of automobile. *State v. Peabody*, 247 Ga. 580, 277 S.E.2d 668 (1981).

Passenger in rented automobile lacked standing. — Defendant, who was a mere passenger in a rented automobile, had no property or possessory interest in the vehicle and lacked standing to object to the lawfulness of a search of the trunk of the vehicle. *Mecale v. State*, 186 Ga. App. 276, 367 S.E.2d 52 (1988).

Because defendant driver and passenger had equal access to use of truck owned by the passenger's parent, each had legitimate expectation of privacy in the truck, and thus had standing to contest the admission of

evidence seized in the search of the truck. *Stone v. State*, 162 Ga. App. 654, 292 S.E.2d 525 (1982).

If owner of an automobile relinquishes actual possession to a third party, the owner thereby abandons any expectation of privacy in the automobile, and therefore lacks standing to contest the legality of the search and seizure of the vehicle. *Prothro v. State*, 186 Ga. App. 836, 368 S.E.2d 793 (1988).

Standing of one permitting intoxicated driver to operate automobile. — The question of whether a defendant, charged with permitting an intoxicated driver to operate an automobile, has standing to urge the violation of the driver's statutory rights as basis for excluding intoximeter evidence did not involve questions of constitutional guarantees against unreasonable search and seizure, but did require consideration of the language of the statute (§ 40-6-392) itself. *Munda v. State*, 172 Ga. App. 857, 324 S.E.2d 799 (1984).

Stolen car. — An accused can have no legitimate expectation of privacy in a stolen car. *Sanborn v. State*, 251 Ga. 169, 304 S.E.2d 377 (1983).

Abandoned or unclaimed luggage. — Defendant has no standing to challenge the search of an abandoned briefcase or an unclaimed suitcase, and has no legitimate expectation of privacy in the abandoned or unclaimed items. *United States v. Canady*, 615 F.2d 694 (5th Cir.), cert. denied, 449 U.S. 862, 101 S. Ct. 165, 166 L. Ed. 2d 78 (1980).

Abandoned bank currency bag. — A bank currency bag which is found on a public street under the accused's car is abandoned property, which does not fall within the ambit of the protection of U.S. Const., amend. 4, and the car's occupant lacks standing to protest its seizure. *Hawkins v. State*, 146 Ga. App. 312, 246 S.E.2d 343 (1978).

Ownership of seized contraband alone is not sufficient to entitle a defendant to challenge a search; the defendant bears the burden of proving not only that the search was illegal but also that the defendant had a legitimate expectation of privacy in the area searched. *Stone v. State*, 162 Ga. App. 654, 292 S.E.2d 525 (1982).

Standing of one charged with unlawful possession. — A defendant charged with a

Standing (Cont'd)

crime that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure does not have automatic standing to challenge the legality of the search and seizure. *United States v. Odum*, 625 F.2d 626 (5th Cir. 1980).

Where possession is a vital element of an offense, the defendant need not prove a possessory interest in real estate in order to contest an illegal search. *Dunbar v. State*, 163 Ga. App. 243, 292 S.E.2d 897 (1982).

When possession of seized evidence is itself an essential element of the offense with which the defendant is charged, the state is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. However, it is only where possession at the time of the contested search and seizure is an essential element of the offense charged that one is entitled to automatic standing. *Meyer v. State*, 150 Ga. App. 613, 258 S.E.2d 217 (1979), cert. denied, 445 U.S. 952, 100 S. Ct. 1602, 63 L. Ed. 2d 788 (1980).

Because the defendant disavowed any possessory or ownership interest in the 74.8 grams of cocaine found on the codefendant's person, the defendant had no standing to complain of its seizure. *Randall v. State*, 194 Ga. App. 153, 390 S.E.2d 74 (1990).

Codefendants and conspirators have no "special standing" and cannot prevent admission against them of information illegally obtained through electronic surveillance against another defendant. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Suppression as to defendant with standing requires suppression as to all defendants. — If the defendant with standing does move to suppress illegally seized evidence, the motion, if granted, should require suppression as to all defendants in a joint trial. Wrongful denial of a motion to suppress illegally seized evidence prejudices both the person making such motion as well as the codefendants and the right to have such evidence excluded cannot be limited to the defendant moving to do so. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd, 481 F.2d 1402 (5th Cir. 1973).

Motion to suppress sufficiently alleging standing. — A motion by a defendant to suppress evidence because of an unlawful search and seizure sufficiently alleges that defendant had standing to challenge the legality of defendant's arrest, the seizure of the vehicle, and the following search, if the facts alleged in the motion can be fairly construed to state that defendant was legitimately on the premises of a codefendant at the time of their arrest and of seizure of the latter's property and, therefore, the fruits of the search and seizure were proposed to be used against defendant so that defendant would be aggrieved by an unlawful search and seizure. *Bramblett v. State*, 135 Ga. App. 770, 219 S.E.2d 26 (1975).

Defendant failed to demonstrate requisite expectation of privacy to establish standing to challenge admission of evidence. — See *United States v. Perry*, 746 F.2d 713 (11th Cir. 1984), cert. denied, 470 U.S. 1054, 105 S. Ct. 1760, 84 L. Ed. 2d 822 (1985).

Admissibility of Evidence; Exclusionary Rule

1. In General

Under *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the sanction for an unconstitutional search is exclusion of the evidence obtained as a result of that search. *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

Fruits of an illegal arrest are not admissible in evidence in a criminal trial. *State v. Bishop*, 188 Ga. App. 881, 374 S.E.2d 808 (1988).

Limitation of "fruit of poisonous tree doctrine." — The "fruit of the poisonous tree" doctrine is limited to evidence which the police cannot trace to an independent and lawful source. *State v. Wright*, 204 Ga. App. 382, 419 S.E.2d 334, cert. denied, 204 Ga. App. 922, 419 S.E.2d 334 (1992).

Illegal arrest invokes exclusion only where Constitution violated. — Exclusionary sanction applies to any "fruits" of a constitutional violation and an illegal arrest does not necessarily violate the constitution. *Vaughn v. State*, 248 Ga. 127, 281 S.E.2d 594 (1981).

Exclusionary rule does not apply absent violation of U.S. Const., amend. 4, and sometimes does not apply when such viola-

tion occurs. *State v. Lamb*, 137 Ga. App. 437, 224 S.E.2d 51 (1976).

Purpose of exclusionary rule. — The purpose of U.S. Const., amend. 4 — that is, deterrence of governmental lawlessness — is served by application of the exclusionary rule regardless of the criminal or administrative nature of the proceedings involved, and regardless of the personal or corporate nature of the party aggrieved by the unlawful seizure. *FTC v. Page*, 378 F. Supp. 1052 (N.D. Ga. 1974).

The exclusionary rule was created and has been applied primarily for the purpose of deterring police invasions of a defendant's constitutional rights by banning evidence illegally seized from introduction at a criminal trial of that defendant. *Amiss v. State*, 135 Ga. App. 784, 219 S.E.2d 28 (1975).

The primary reason for the exclusionary rule is to deter police misconduct, whether it be negligent or intentional. *State v. Stringer*, 258 Ga. 605, 372 S.E.2d 426 (1988).

The exclusionary rule is designed to deter police misconduct rather than to punish the errors of issuing magistrates, it has been modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance by an officer on a search warrant that is subsequently held to be defective. *Bell v. State*, 204 Ga. App. 528, 419 S.E.2d 729 (1992).

Deterrent benefit of exclusion must outweigh interest in providing evidence. — For the exclusionary rule to be applied, the deterrent benefit of exclusion must outweigh the detriment to the public interest in providing factfinders with all relevant testimony. In many cases the deterrent purpose is served by merely precluding the government's use in its case-in-chief of any fruits of an illegal search at a criminal trial. *Jonas v. City of Atlanta*, 647 F.2d 580 (5th Cir. 1981).

No "good faith" exception. — In Georgia, a defendant's statutory right to exclusion of evidence has no "good faith" exception, so a court must determine the validity of a search based on the facts known to the officer at the time of the search, and if it concludes from those facts that the search was not valid, it cannot uphold it on grounds that, under the facts, the officer may have drawn a good-faith legal conclusion contrary to the court's conclusion. *Randolph v. State*, 264 Ga. App. 396, 590 S.E.2d 834 (2003).

Evidence from unlawful search or interrogation inadmissible. — Evidence of guilt that the defendant, either directly or indirectly, is compelled to disclose by an unlawful search and seizure of the defendant's person under illegal arrest, is not admissible in a criminal prosecution of the person thus illegally arrested. *Raif v. State*, 109 Ga. App. 354, 136 S.E.2d 169 (1964).

Evidence obtained as result of illegal search and seizure is not admissible in either federal or state courts. *Raif v. State*, 109 Ga. App. 354, 136 S.E.2d 169 (1964); *Cash v. State*, 222 Ga. 55, 148 S.E.2d 420 (1966).

Evidence obtained under illegal arrest not admissible in state courts. *Raif v. State*, 109 Ga. App. 354, 136 S.E.2d 169 (1964).

All evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court. *Carson v. State ex rel. Price*, 221 Ga. 299, 144 S.E.2d 384 (1965).

Because a warrant was illegally issued and the search under it was unlawful, it was error to deny the defendant's motion to suppress the evidence that was the fruit of the search. *Burns v. State*, 119 Ga. App. 678, 168 S.E.2d 786 (1969).

Neither evidence found in illegal search, nor knowledge acquired from such search, can be used legally in enforcing the law. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

If evidence is obtained by an unlawful search or by means of custodial interrogation in the absence of proper warnings, the knowledge acquired thereby cannot be legally used in enforcing the law. *United States v. Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), *aff'd*, 481 F.2d 1402 (5th Cir. 1973).

Evidence seized during unlawful search should not be admitted into evidence since the obtaining of it was tainted by the illegal arrest. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Evidence obtained under a void warrant is evidence illegally obtained and it has been settled once and for all that the taint of illegal procurement forbids its use as evidence. *Anderson v. State*, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

The law proscribes only unreasonable searches and seizures and prohibits the use of evidence seized as a result of lawless police activity. *State v. Sanders*, 155 Ga. App. 274, 270 S.E.2d 850 (1980).

Admissibility of Evidence; Exclusionary Rule (Cont'd)

1. In General (Cont'd)

Under the exclusionary rule, evidence obtained by state or federal government officials in violation of U.S. Const., amend. 4 cannot be used in a proceeding against the victim of the illegal search and seizure. *Romano v. Home Ins. Co.*, 490 F. Supp. 191 (N.D. Ga. 1980).

Unconstitutionally obtained evidence not to be used at all. — The essence of U.S. Const., amend. 4, forbidding the acquisition of evidence in a certain way, is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. *FTC v. Page*, 378 F. Supp. 1052 (N.D. Ga. 1974).

Evidence illegally obtained is not excluded because it is untrustworthy or lacks credibility, but simply because it was obtained in violation of the Constitution. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Exclusionary rule has nothing to do with reliability of fact-finding process in determining guilt or innocence, but is simply a means of making effective the protection of U.S. Const., amend. 4 against unreasonable searches and seizures. *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971).

Reason for different treatment of unconstitutional search and unconstitutional arrest. — The difference in treatment between an unconstitutional search (suppression of the items seized) and an unconstitutional arrest (no foreclosure of prosecution) has been explained as being in the "public interest in having the guilty brought to book." *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

Sanction for an unconstitutional arrest is not suppression of the prosecution. — The sanction for an unconstitutional arrest is exclusion of the evidence obtained as a result of that arrest. *Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

Sanction for an unconstitutional arrest is exclusion of any evidence obtained during the arrest, but a plea in bar of prosecution is not an authorized sanction. Thus, although it is arguable that a photograph of the defendant taken after the alleged illegal arrest should have been suppressed, the

purported illegal arrest would not act as a plea in bar to the prosecution, nor would it prevent the in-court identification of the defendant where such identification was based on the events surrounding the incident itself, and not on events following the purported illegal arrest. *Lindsey v. State*, 182 Ga. App. 10, 354 S.E.2d 650 (1987).

Exclusion of evidence to enforce guaranty unrelated to fact-finding applicable only prospectively. — Where concededly relevant evidence would be excluded in order to enforce a constitutional guaranty unrelated to the fact-finding process, the United States Supreme Court has consistently held that any such new constitutional principle would be accorded only prospective application. *State v. Patterson*, 143 Ga. App. 225, 237 S.E.2d 707 (1977).

Retroactive application of exclusionary rule not required. — If law enforcement officers reasonably believe in good faith that evidence seized was admissible at trial, judicial integrity is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner and, when this is shown, retroactive application of the new rule is not required. *Lawson v. State*, 143 Ga. App. 776, 240 S.E.2d 188 (1977).

Exclusionary rule not remedial in nature. — The main thrust of the exclusionary rule is to deter illegal conduct on the part of public officials; it was not intended to be remedial in nature. *Romano v. Home Ins. Co.*, 490 F. Supp. 191 (N.D. Ga. 1980).

When rule must be applied. — If there is a causal connection between an illegal arrest and a custodial statement of confession, then the exclusionary rule must be applied to ensure compliance with the fourth amendment. *State v. Stringer*, 258 Ga. 605, 372 S.E.2d 426 (1988).

An arrest unsupported by probable cause and made solely for the purpose of investigating a crime in the hope that something will turn up as a result of the ensuing investigation, intrudes so severely on the interest protected by the fourth amendment that exclusion of the statement is mandated. *State v. Stringer*, 258 Ga. 605, 372 S.E.2d 426 (1988).

Mere fact that action is taken by state officials is not adequate to invoke exclusion-

ary rule even if that action violates U.S. Const., amend. 4. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039, 96 S. Ct. 576, 46 L. Ed. 2d 413 (1975).

Good-faith exception. — Evidence which is seized in good-faith reliance upon a search warrant issued by a neutral and detached magistrate will generally not be subject to the suppression on fourth amendment grounds, regardless of whether the allegations upon which the magistrate based the issuance of the warrant were sufficient to establish the probable cause for the search. *Betha v. State*, 192 Ga. App. 789, 386 S.E.2d 515 (1989).

The good faith exception to the exclusionary rule for searches conducted pursuant to warrants applied, where the warrant was not so lacking in indicia of probable cause as to render official belief in the existence of probable cause entirely unreasonable. *United States v. Taxacher*, 902 F.2d 867 (11th Cir. 1990), cert. denied, 499 U.S. 919, 111 S. Ct. 1307, 113 L. Ed. 2d 242 (1991).

Because the exclusionary rule is designed to deter police misconduct rather than to punish the errors of issuing magistrates, it has been modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance by an officer on a search warrant that is subsequently held to be defective. *State v. Morris*, 198 Ga. App. 441, 402 S.E.2d 288 (1991).

The exclusionary rule has been modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance by an officer on a search warrant that is subsequently held to be defective. *Talley v. State*, 200 Ga. App. 442, 408 S.E.2d 463 (1991).

Existence of technical defects in a search warrant or its accompanying affidavit will not preclude the existence of objective good faith on the part of the police in relying on the validity of the warrant. *Talley v. State*, 200 Ga. App. 442, 408 S.E.2d 463 (1991).

Independent basis. — Denial of a defendant's motion to suppress was affirmed as the defendant's flight from an improper Terry stop gave the police officers an independent basis to arrest the defendant; thus, the methamphetamine found in close proximity to the defendant was admissible. *Reynolds v. State*, 280 Ga. App. 712, 634 S.E.2d 842 (2006).

Question whether evidence should be suppressed. — In those cases wherein a search

warrant has been sought and issued, the ultimate question of whether evidence should be suppressed is not dependent upon the magistrate's erroneous determination that the warrant should have issued, but upon the officer's objective good-faith reliance upon the magistrate's determination, erroneous though that determination might have been. *Debey v. State*, 192 Ga. App. 512, 385 S.E.2d 694 (1989).

Evidence not obtained by exploiting illegal arrest not suppressible. — Even if a warrantless arrest is illegal, neither a voluntary confession nor the fruits of a consensual search are suppressible where, in the totality of surrounding facts and circumstances of the case, neither was obtained by exploitation of the illegality of the arrest, there was in fact probable cause to obtain an arrest warrant, and the behavior and purpose of the police was neither a fishing expedition nor in purposeful and flagrant bad faith. *Knighton v. State*, 166 Ga. App. 390, 304 S.E.2d 512 (1983).

Evidence is not fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Thus, even if evidence would not have been discovered but for the illegal police conduct, if the derivative evidence has only an attenuated link to the illegality, it need not be suppressed. *Ruffin v. State*, 201 Ga. App. 792, 412 S.E.2d 850 (1991).

Purging of initial illegal taint. — Evidence is not "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which an objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *McKinney v. State*, 261 Ga. App. 218, 582 S.E.2d 463 (2003).

Discovery of outstanding warrant during routine check. — Police officer's discovery of

Admissibility of Evidence; Exclusionary Rule (Cont'd)

1. In General (Cont'd)

a valid outstanding warrant against the defendant during routine computer check attenuated the connection between the illegal stop and the search that revealed incriminating evidence. *Ruffin v. State*, 201 Ga. App. 792, 412 S.E.2d 850 (1991).

Evidence inadvertently discovered in course of justified intrusion. — On occasion where one, in the course of an intrusion for which a prior justification exists, comes inadvertently upon a piece of incriminating evidence, such evidence is admissible on the basis that no infraction of rights under U.S. Const., amend. 4 was intended. *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Inevitable discovery exception to exclusionary rule. — Under the inevitable discovery exception to the exclusionary rule, evidence is admissible that otherwise would be excludable if it inevitably would have been discovered by lawful means had the illegal conduct not occurred. The exception applies to inevitable lawful discoveries by private parties as well as by government agents. *United States v. Hernandez-Cano*, 808 F.2d 779 (11th Cir.), cert. denied, 482 U.S. 918, 107 S. Ct. 3194, 96 L. Ed. 2d 682 (1987).

Statement made during illegal detention inadmissible. — If the search and arrest are illegal, then an admission given during the illegal detention is tainted and is therefore inadmissible. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Exclusionary rule does not apply to evidence derived from a voluntary but Miranda-tainted statement. *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092, 103 S. Ct. 580, 74 L. Ed. 2d 940 (1982), but see, *Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996).

Although certain evidence may be admissible under the fifth amendment, it may still be excludable under the fourth amendment, if the evidence was obtained by exploitation of an illegal arrest. *Griffith v. State*, 172 Ga. App. 255, 322 S.E.2d 921 (1984).

Miranda warnings do not necessarily cure taint. — Though statements by the defendant may possibly be voluntary under U.S.

Const., amend. 5, it does not necessarily mean they were voluntary under U.S. Const., amend. 4 since they might be tainted by an illegal arrest and detention. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Miranda warnings do not, without more, dissipate the taint of an illegal seizure. *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), rev'd on other grounds, 690 F.2d 869 (11th Cir. 1982).

Even though proper Miranda warnings may have been given prior to a defendant's making an incriminatory statement and even though the statement may have been voluntary for U.S. Const., amend. 5 purposes, the statement is nonetheless inadmissible under U.S. Const., amend. 4 if it is the product of an illegal seizure. *Dupree v. State*, 247 Ga. 470, 277 S.E.2d 18 (1981).

There is no per se rule that Miranda warnings in and of themselves suffice to cure a fourth amendment violation involved in obtaining inculpatory statements during custodial interrogation following a formal arrest on less than probable cause. In order to use such statements, the prosecution must show not only that the statements meet fifth amendment requirements (voluntariness), but also that the causal connection between the statements and the illegal arrest is sufficiently attenuated so as to purge the primary taint of the illegal arrest in light of the distinct policies and interests of the fourth amendment. *Robinson v. State*, 166 Ga. App. 741, 305 S.E.2d 381 (1983).

Even though proper Miranda warnings may have been given prior to a defendant's making an incriminatory statement and even though the statement may have been voluntary for fifth amendment purposes, the statement is nonetheless inadmissible under U.S. Const., amend. 4 if it is the product of an illegal seizure. *Green v. State*, 168 Ga. App. 558, 309 S.E.2d 687 (1983).

For confession given after illegal seizure to be admissible in evidence, government must prove two things: that the confession was voluntary for purposes of U.S. Const., amend. 5, and that the confession was not the product of the illegal seizure. The same requirements apply where the evidence has been obtained by means of a consent to search rather than a confession. *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), rev'd on other grounds, 690 F.2d 869 (11th Cir. 1982).

Burden on state to show admissibility of statements made during unlawful custody. — Each case is to be judged individually on its facts, and the burden is on the prosecution to show the admissibility of statements made by the defendant while in unlawful custody. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Burden of proof on state to show testimony not induced to validate illegally obtained evidence. — If a defendant's testimony is induced in order to overcome the impact of illegally obtained evidence, then the defendant's testimony is tainted by the illegally obtained evidence, and the state has the burden to show that its illegal action did not induce the defendant's testimony. *Smith v. State*, 140 Ga. App. 94, 230 S.E.2d 101 (1976).

Effect of unlawfully seized evidence on lawfully seized evidence. — There is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to the discovery of the evidence which was admitted. *Waller v. State*, 251 Ga. 124, 303 S.E.2d 437 (1983), rev'd on other grounds, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

No constitutional right to suppress evidence solely on ground that others have access to it. *Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981).

Entrapment is not a rationale for suppressing evidence but is an affirmative defense to a criminal prosecution. *State v. Baker*, 216 Ga. App. 66, 453 S.E.2d 115 (1995).

Consideration of all sworn testimony regarding probable cause on motion to suppress. — A trial judge in a hearing on a motion to suppress certain evidence on the grounds that there was no probable cause for issuing the search warrant is duty bound to consider all of the sworn testimony given to the magistrate, whether it be favorable or unfavorable to the finding of probable cause. *State v. Causey*, 132 Ga. App. 17, 207 S.E.2d 225 (1974).

Evidence obtained under fatally defective affidavit inadmissible. — An affidavit based on an informer's tip is fatally defective as the basis for a search warrant if it recites absolutely nothing that would show the informer's reliability nor states how the informer

obtained the information, and, under former Code 1933, § 27-313(2) (see O.C.G.A. § 17-5-30) the evidence so obtained must be suppressed. *Grebe v. State*, 125 Ga. App. 873, 189 S.E.2d 698 (1972).

Admissibility of in-court identification following tainted identification. — When a victim has sufficient independent basis for an in-court identification, even a tainted pretrial identification process that is suggestive will not require exclusion of the in-court identification unless there was a fourth amendment violation. *Rivers v. State*, 225 Ga. App. 558, 484 S.E.2d 519 (1997).

Admissibility of defendant's pretrial testimony on motion to suppress. — If a defendant testifies in support of a motion to suppress evidence on grounds under U.S. Const., amend. 4, the defendant's testimony may not thereafter be admitted against the defendant at trial on the issue of guilt unless the defendant makes no objection. *Culpepper v. State*, 132 Ga. App. 733, 209 S.E.2d 18 (1974); *Cervi v. State*, 248 Ga. 325, 282 S.E.2d 629 (1981), cert. denied, 456 U.S. 938, 102 S. Ct. 1995, 72 L. Ed. 2d 457 (1982).

Error to admit incriminating statements made in support of pretrial motion to suppress. — It is error for a trial court to admit in evidence on the issue of guilt incriminating statements given by a defendant in support of an unsuccessful pretrial motion to suppress; such a practice would require a defendant to surrender the defendant's right under U.S. Const., amend. 4 against unreasonable search and seizure in order to maintain the defendant's right to remain silent under U.S. Const., amend. 5. *Sharp v. United States*, 410 F.2d 969 (5th Cir. 1969).

Evidence of commission of a crime other than the one charged is generally not admissible. *Bixby v. State*, 234 Ga. 812, 218 S.E.2d 609 (1975).

Exclusionary rule not applicable to public school students aggrieved by seizure by school officials. — Granting that public primary and secondary school students have minimal rights under U.S. Const., amend. 4 to be free from searches and seizures by school officials, nonetheless, the exclusionary rule is not applicable to enforce those rights, and students aggrieved by the action of their officials must fall back upon such other legal remedies as applicable law may allow them. Although school officials are

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1. In General (Cont'd)

governmental officers subject to some limitations under U.S. Const., amend. 4 in searching their students, if they violate those limitations the exclusionary rule is not available to the students to exclude from evidence items illegally seized. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039, 96 S. Ct. 576, 46 L. Ed. 2d 413 (1975); *Harris v. State*, 199 Ga. App. 457, 405 S.E.2d 501 (1991).

Search warrants based on information obtained from officer's illegal entry suppressible. — Search warrants based upon the information derived from the officer's previous illegal entry are tainted by the prior illegality and must be suppressed. *Clare v. State*, 135 Ga. App. 281, 217 S.E.2d 638 (1975).

Exclusionary rule has also been justified on grounds that judicial integrity would be impaired were the courts to sanction defiance of the Constitution by admitting illegally seized evidence into criminal trials. *Amiss v. State*, 135 Ga. App. 784, 219 S.E.2d 28 (1975).

Void search warrant cannot be validated nor property illegally seized introduced in evidence merely because the officers were in fact reliably informed and did in fact recover contraband. *Garner v. State*, 124 Ga. App. 33, 182 S.E.2d 902 (1971).

Evidence obtained under defective warrant admissible if warrant not required. — Evidence gained by a search conducted under authority of a defective search warrant may still be admissible if an exception to the warrant requirement is present. *United States v. Clark*, 559 F.2d 420 (5th Cir.), cert. denied, 434 U.S. 969, 98 S. Ct. 516, 54 L. Ed. 2d 457 (1977).

Availability of estoppel for violation of administrative rules. — If a defendant cannot invoke the exclusionary rule based upon a violation of U.S. Const., amend. 4, a court will not compel an equivalent right based upon estoppel because of a violation of administrative rules. *State v. Lamb*, 137 Ga. App. 437, 224 S.E.2d 51 (1976).

Exclusionary rule available to codefendants only if rights violated by search of defendant. — Where several defendants

were charged with possession of the cocaine found taped to leg of a particular defendant, the former could claim the benefit of the exclusionary rule only if their rights under U.S. Const., amend. 4 were in fact violated by the search of the latter. *United States v. Herbst*, 641 F.2d 1161 (5th Cir.), cert. denied, 454 U.S. 851, 102 S. Ct. 292, 70 L. Ed. 2d 141 (1981).

Evidence illegally obtained by state officers outside jurisdiction inadmissible in federal court. — The fact that state officers, making a warrantless search, were, at the time of the search, outside of their state-granted jurisdiction does not make such officers, thereby, merely private citizens so as to enable the federal government to freely use anything that was discovered by the state officers as evidence in a federal prosecution which would otherwise have been inadmissible. *United States v. Hogue*, 283 F. Supp. 846 (N.D. Ga. 1968).

Evidence legally obtained admissible against other than person arrested. — Evidence procured by lawful search and seizure is not limited in its admissibility only against the person whose lawful arrest made the search and seizure lawful. *Cash v. State*, 222 Ga. 55, 148 S.E.2d 420 (1966).

Evidence admissible where obtained during lawful search for evidence connected with another charge. — Evidence obtained by federal agents legally searching for evidence in connection with another charge against the accused, is not obtained in violation of the provision of U.S. Const., amend. 4 against unreasonable searches and seizures. *Cash v. State*, 222 Ga. 55, 148 S.E.2d 420 (1966).

No jury prejudice where arguments on motion to suppress heard outside their presence. — Defendants cannot argue that they have to prejudice themselves in the eyes of the jury in order to establish standing to object to the claimed violation of U.S. Const., amend. 4 where the arguments of counsel on the motion to suppress are heard outside of the presence of the jury. *State v. Peabody*, 247 Ga. 580, 277 S.E.2d 668 (1981).

Use at civil trial of evidence seized in violation of amendment. — The seizure of evidence in violation of U.S. Const., amend. 4 does not always preclude use of the evidence at a civil trial. Indeed, whether the

exclusionary rule may ever bar the introduction of evidence in a civil trial is uncertain. *Jonas v. City of Atlanta*, 647 F.2d 580 (5th Cir. 1981).

A motion to suppress which is procedurally defective is properly overruled, and in Georgia a motion to suppress which is made orally is procedurally defective and a denial thereof is authorized. *Graves v. State*, 135 Ga. App. 921, 219 S.E.2d 633 (1975).

Hearing on motion to suppress unnecessary absent allegations of fact warranting relief. — Where a defendant in a motion to suppress fails to allege facts that if proved would require the grant of relief, the law does not require that the court hold a hearing independent of the trial to receive evidence on any issue necessary to the determination of the motion. *United States v. Sneed*, 732 F.2d 886 (11th Cir. 1984).

If admission of tainted evidence is harmless beyond reasonable doubt conviction will stand. When the properly admitted evidence to sustain a guilty verdict is overwhelming so as to negate the possibility that the tainted evidence contributed to the verdict, the constitutional error may be harmless. *Green v. State*, 187 Ga. App. 373, 370 S.E.2d 348 (1988).

Factual and credibility determinations made by judge at suppression hearing must be accepted by appellate courts unless such determinations are clearly erroneous. *Mancil v. State*, 177 Ga. App. 663, 340 S.E.2d 279 (1986).

The trial court's decision on questions of fact and credibility at a suppression hearing must be sustained unless clearly erroneous. *Jothier v. State*, 177 Ga. App. 655, 340 S.E.2d 624 (1986).

Motion to suppress filed three days after verdict properly denied. — Because the appellant filed a written motion to suppress based on alleged violation of U.S. Const., amend. 4 three days after the verdict, the motion was not timely, and the trial court did not err in denying it. *Burnette v. State*, 156 Ga. App. 441, 275 S.E.2d 94 (1980).

Failure to interpose a timely motion to suppress constitutes a waiver of the constitutional guarantee with respect to the search and seizure in question. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). But see *Stewart v. State*, 232 Ga. App. 565, 502 S.E.2d

502 (1998); *Burnette v. State*, 156 Ga. App. 441, 275 S.E.2d 94 (1980).

Failure to move to suppress timely under statute constitutes waiver of objection. — An oral objection to evidence obtained by unlawful search and seizure is not sufficient unless preceded by suppression of the evidence pursuant to a motion to suppress in compliance with former Code 1933, § 27-313 (see O.C.G.A. § 17-5-30). Failure to interpose a timely motion to suppress in compliance therewith amounts to a waiver of the constitutional guaranty in respect to the search and seizure in question. *Graves v. State*, 135 Ga. App. 921, 219 S.E.2d 633 (1975).

Defendant's failure to comply with former Code 1933, § 27-313 (see O.C.G.A. § 17-5-30) by interposing written motion to suppress constitutes waiver of the constitutional guaranty in respect to the search and seizure in question. *West v. State*, 120 Ga. App. 390, 170 S.E.2d 698 (1969).

Exclusionary rule not applicable to evidence admitted without timely challenge. — The requirement that all evidence obtained by searches and seizures in violation of U.S. Const., amend. 4 is inadmissible in state courts, is only an exclusionary rule and does not affect the competence of evidence admitted without timely challenge. *Graves v. State*, 135 Ga. App. 921, 219 S.E.2d 633 (1975).

Waiver of right to object to evidence upon failure to object before trial. — If the defendant knows before the trial of the possession by the prosecution of physical evidence and the manner in which it was obtained, the defendant cannot wait until the trial to make objection thereto, but must make the objection beforehand, and failing to do so, waives the right to object to the introduction of the evidence at the trial. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

The trial court did not err by refusing to consider a defendant's motion to suppress, which was untimely filed on the day of trial, where no written extension for a late filing had been requested prior to trial. *Thompson v. State*, 195 Ga. App. 18, 392 S.E.2d 732 (1990).

Burden of proof where arrests and searches conducted without warrants. — Be-

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1. In General (Cont'd)

cause arrests and searches were conducted without a warrant, the government had the burden of proving that the arrests were supported by probable cause; the burden then shifted to the defendants to establish violations of their fourth amendment interests to those items seized or searched, other than those taken from them personally. *United States v. Luck*, 560 F. Supp. 258 (N.D. Ga. 1983), *aff'd sub nom. United States v. Crump*, 736 F.2d 1527 (11th Cir. 1984).

De novo review. — Because a trial court credited a police officer's testimony and decided defendant's suppression motion on an issue of law rather than on any issue of conflicting evidence, the court of appeals correctly used the *de novo* standard of review. *Silva v. State*, 278 Ga. 506, 604 S.E.2d 171 (2004).

On appeal, trial court's findings adopted unless clearly erroneous. — On appeal of a denial of a motion to suppress, the evidence is to be construed most favorably to the upholding of the findings and judgment made. The trial court's findings must be adopted unless determined to be clearly erroneous. *Dennis v. State*, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

2. Illustrative Cases

Exclusionary rule is not to be applied in federal grand jury proceedings. *Reaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978).

Grand jury witness cannot refuse to answer questions on ground they are product of unlawful searches and seizures. *United States v. Worobytz*, 522 F.2d 196 (5th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S. Ct. 1507, 47 L. Ed. 2d 761 (1976).

Use of illegally obtained evidence an infringement of probationer's rights. — Use of the fruits of an illegal search as evidence is no less an invasion of the constitutional rights of a defendant because the evidence illegally seized is used in a hearing to revoke the defendant's probation rather than in a criminal trial. *Amiss v. State*, 135 Ga. App. 784, 219 S.E.2d 28 (1975).

A defendant's probation may not be revoked on basis of illegally seized evidence. Evidence obtained in an illegal search and

seizure may not be admitted in a hearing to revoke probation in determining whether there has been a violation of the conditions of the probation. *Amiss v. State*, 135 Ga. App. 784, 219 S.E.2d 28 (1975).

One doing business as corporation may not vicariously enjoy privilege of corporation under U.S. Const., amend. 4; documents that the person could have protected from seizure, if they had been the person's own, may be used against the person, no matter how they were obtained from the corporation. *United States v. Britt*, 508 F.2d 1052 (5th Cir.), *cert. denied*, 423 U.S. 825, 96 S. Ct. 40, 46 L. Ed. 2d 42 (1975).

Confession made by appellant when not under arrest not illegally obtained. — Because the appellant was not under arrest at the time of making a confession, the confession could not have been the product of an illegal arrest. *Vaughn v. State*, 247 Ga. 136, 274 S.E.2d 479 (1981).

Seizure from pretrial detainee's cell. — Because the state properly sought and obtained a search warrant before it seized written materials from a pretrial detainee's cell, it was error to grant the detainee's motion to suppress. *State v. Henderson*, 271 Ga. 264, 517 S.E.2d 61 (1999), *cert. denied*, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680 (2000).

Testimony of inmate acting in self interest admissible. — An inmate who acts upon the expectation of an unpromised reward in testifying as to the jailhouse confession of a fellow inmate does not thereby become an agent for the state so as to bar introduction of the testimony. *Baxter v. State*, 254 Ga. 538, 331 S.E.2d 561 (1985), *cert. denied*, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 275 (1985).

Where causal connection between illegal arrest and confession not broken, confession inadmissible. — If the causal connection between an illegal arrest and a confession is not broken by any intervening events, but a suspect is interrogated from the time of the suspect's arrival until the suspect confesses a short time later, the trial court errs by admitting the confession into evidence, and a conviction based solely on the confession cannot stand. *Robinson v. State*, 166 Ga. App. 741, 305 S.E.2d 381 (1983).

Incriminary statement held not illegally obtained. — Where the appellant did nothing prior to making the incriminary state-

ment, such as requesting to leave or speak with an attorney, that would require a finding that the appellant had been placed involuntarily in police custody, the trial judge did not err in ruling that the statement made by the appellant was not the product of an illegal arrest. *Dupree v. State*, 247 Ga. 470, 277 S.E.2d 18 (1981).

Later trespass does not render inadmissible in evidence knowledge legally obtained. *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, cert. denied, 454 U.S. 823, 102 S. Ct. 109, 70 L. Ed. 2d 95 (1981).

Testimony made after admission of illegally obtained evidence unconstitutionally impelled. — In the absence of a contrary showing by the state, a defendant's testimony in a case after the admission into evidence of illegally seized evidence is unconstitutionally impelled by that erroneous admission. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Impeachment on cross-examination. — Illegally obtained evidence may be used to impeach a statement made by a defendant on cross-examination when the statement being impeached is in response to a question that was reasonably suggested by the defendant's direct testimony. *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983).

Evidence obtained under warrant issued by one affiliated with law enforcement inadmissible. — If a magistrate had such an affiliation with law enforcement as to disqualify the magistrate from issuing a search warrant, the evidence obtained thereby must be excluded. *State v. Guhl*, 140 Ga. App. 23, 230 S.E.2d 22 (1976), rev'd on other grounds sub nom. *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509 (1977).

Evidence held legally seized and admissible as: (1) evidence seized from the defendant's residence as a result of an interrogation was sufficiently attenuated from any illegality to be admissible; (2) the duration of the search had no bearing on the subsequent consent given by the defendant's roommate; (3) the consent was not a product of any illegal conduct; and (4) there was no evidence of any flagrant misconduct and coercion on the part of the investigating law enforcement officers involved. *Spence v. State*, Ga. , S.E.2d , 2007 Ga. LEXIS 293 (Apr. 10, 2007).

Warrant containing false statement. — Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, U.S. Const., amend. 4 requires that a hearing be held at the defendant's request; in the event the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Cuevas v. State*, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980).

Evidence obtained on basis of false information central to affidavit inadmissible. — If it is established at a hearing on a motion to suppress that evidence was seized on the basis of false information which strikes at the heart of a supporting affidavit's showing of probable cause, the court must grant the defendant's motion. *United States v. Black*, 344 F. Supp. 537 (N.D. Ga. 1972), aff'd, 476 F.2d 267 (5th Cir. 1973).

Unsigned confession held admissible. — The fact that a statement amounting to a confession by the defendant was unsigned and the fact that the stenographer who transcribed it was not present at the trial and did not testify as to its verity is not ground for excluding it from evidence. *Freeman v. State*, 230 Ga. 85, 195 S.E.2d 416 (1973).

Conversation overheard by arresting officers admissible. — Evidence of statements made by the defendant in a conversation overheard by the arresting officers who had concealed themselves, as planned between them and the person with whom the defendant talked, does not amount to evidence given by the defendant involuntarily and without the advice of counsel, and is not coerced from the defendant in violation of the defendant's rights not to be compelled to be a witness against oneself. *Blackwell v. State*, 113 Ga. App. 536, 148 S.E.2d 912 (1966).

Defendant not under arrest. — Because the defendant's encounters with the police

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2. Illustrative Cases (Cont'd)

remained consensual and voluntary, and the defendant consented to a continued detention for further questioning, a motion to suppress the evidence seized based on an illegal detention by the police was properly denied. *Smith v. State*, 281 Ga. 185, 640 S.E.2d 1 (2006).

Evidence obtained during unlawful detention of vehicle inadmissible. — Where no circumstances at all appear which might give rise to an articulable suspicion (less than probable cause, but greater than mere caprice) that the law has been violated, the act of following and detaining a vehicle and its occupants must be judged as an impermissible intrusion on the rights of the citizen. Where this occurs, the penalty exacted by the law is that evidence turned up as a result of such intrusion may not be introduced against the defendant on the trial of the defendant's case. *Brooks v. State*, 144 Ga. App. 97, 240 S.E.2d 593 (1977).

Clothing named in warrant and seized during lawful search admissible. — Because the evidence showed that the police officers had been informed that the defendant had on a certain type of clothing on the day the defendant discussed the murder with an informant, and the police, using a valid warrant, found the clothing in the defendant's apartment and seized it, it was not error to admit the clothing into evidence. *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971).

Films inadmissible where warrant improperly issued. — Admission in evidence of allegedly obscene motion picture films seized under the authority of a warrant issued by a justice of the peace on a police officer's affidavit giving the films' titles, and stating that the officer had determined from personal observation of the films and of the theater's billboard that they were obscene, is erroneous, as the issuance of the warrant without the justice of the peace's inquiry into the factual basis for the officer's conclusions falls short of constitutional requirements demanding necessary sensitivity to freedom of expression. *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

The seizure as obscene of a motion pic-

ture film being exhibited to the general public at a commercial theater, without the authority of a constitutionally sufficient warrant, is unreasonable, and the evidence is not admissible. *Hall v. State*, 139 Ga. App. 488, 229 S.E.2d 12 (1976).

No federal interference in pending state case by requiring release of illegally obtained evidence. — Where allegedly obscene films and projectors are seized as evidence of a violation of former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80), and the case is pending in the state courts, federal courts will not interfere with the pending case by requiring release of the contraband as an unconstitutional seizure. *G & E Bus. Servs., Inc. v. McAuliffe*, 480 F. Supp. 239 (N.D. Ga. 1979).

Gun given to sheriff by relative in latter's house admissible. — If a sheriff goes into the house of a relative and takes possession of a gun offered to the sheriff, the evidence is insufficient to show an unreasonable search and seizure and to require suppression of the gun as evidence. *Marsh v. State*, 223 Ga. 590, 157 S.E.2d 273 (1967).

Rifle found in unkept area in trailer park. — The defendant's motion to suppress a rifle connected with the robbery with which the defendant was charged was properly denied where the rifle was found in an unkept area between two trailers in a trailer park of which the defendant was not an occupant or resident and where probable cause existed for a search of the area. *Dunbar v. State*, 163 Ga. App. 243, 292 S.E.2d 897 (1982).

Pistol admissible where procured in search incidental to arrest of another. — It is not error, in the trial of the accused for armed robbery, to admit in evidence, over objection, a pistol procured by FBI agents in the search of an apartment in Los Angeles, where the search was made incidental to the lawful arrest of another person, as the search and seizure of the evidence was lawful. *Cash v. State*, 222 Ga. 55, 148 S.E.2d 420 (1966).

Lottery tickets and money allegedly obtained from a defendant are not obtained by a search of the person but of the premises when found on the floor where the defendant had been standing after the defendant had moved from the spot and which were not there before the defendant had stood there, and if the search of the premises was

lawful, then there is no ground to suppress this evidence. *Logan v. State*, 135 Ga. App. 879, 219 S.E.2d 615 (1975).

Heroin inadmissible where burden of proof showing legal arrest not met. — Heroin seized from defendant's automobile following arrest for prowling is inadmissible as evidence where the state failed to carry its burden of proof for showing that the arrest itself was legal by introducing an exemplified copy of the city ordinance, if such existed, under which defendant was arrested. *Traylor v. State*, 127 Ga. App. 409, 193 S.E.2d 876 (1972).

Tourist camp registration cards admissible. — Objection to admission in evidence of registration cards kept by tourist camp under former Code 1933, §§ 52-308 and 52-312 (see O.C.G.A. §§ 43-21-56 and 43-21-52), on grounds that the acquisition of such cards was in violation of U.S. Const., amends. 4, 5, and 14, was without merit in view of the provision of former Code 1933, § 52-112 that the permanent record for the registration of guests should be available at all times for inspection by any peace or law enforcement officer. *Copeland v. Leathers*, 206 Ga. 280, 56 S.E.2d 530 (1949).

Evidence admissible if probable cause existed at time of arrest and seizure. — Certain evidence consisting of bloodstained carpet removed from the premises where the deceased and defendant lived is admissible if probable cause existed at the time the evidence was removed and when the defendant was arrested. *Ray v. State*, 235 Ga. 467, 219 S.E.2d 761 (1975).

Scope of pat down search exceeded. — Trial court erred in denying the defendant's motion to suppress the evidence since the investigating police officer exceeded the scope of a Terry pat down search when the officer pulled open defendant's pocket to discover what was in it; the officer provided no facts which would lead the officer to suspect that the pill bottles the officer felt in defendant's pocket were some type of atypical weapon so as to justify intruding into defendant's pocket for the officer's protection. *Howard v. State*, 253 Ga. App. 158, 558 S.E.2d 745 (2002).

Evidence obtained during inventory tainted by unlawful arrest inadmissible. — If the state fails to prove any statutory basis for a defendant's arrest, a subsequent inventory

of a defendant's pocketbook is tainted by the preceding illegal arrest, and fruits of an illegal arrest are not admissible in evidence in a criminal trial. *Adams v. State*, 153 Ga. App. 41, 264 S.E.2d 532 (1980).

Photographs of automobile and paint scrapings taken from exterior of vehicle were not subject to defendant's motion to suppress. *Deshazier v. State*, 155 Ga. App. 526, 271 S.E.2d 664 (1980).

Evidence held legally seized and admissible. — There was probable cause for arrest where radio report described blacks in a Buick, and the persons stopped were blacks in a Buick similar in color and style to that described, and matching leather jackets in plain view on the car's back seat corresponded with and corroborated the report that the robbers had been wearing such jackets; therefore evidence was legally seized. *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979).

Because a search warrant affidavit provided the issuing magistrate with sufficient probable cause connecting the defendant to the residence of a female friend for the magistrate logically to conclude that there was a fair probability that evidence of a crime would be found therein, despite the omission of additional evidence by the affiant, an order granting suppression of the evidence seized therein was reversed. *State v. Hunter*, Ga. , S.E.2d , 2007 Ga. LEXIS 360 (May 14, 2007).

Statement granting consent to search suppressed. — The trial court properly suppressed evidence as to the defendant's statement granting consent for the search of defendant's vehicle after applying the "reasonable person" test; the trial court determined that after the defendant was placed in the back of the trooper's car, the defendant was "in custody" for Miranda purposes even though defendant was not "under arrest" and then concluded that a reasonable person in the defendant's circumstances would not feel that they were at liberty to terminate any interrogation and leave based on the officer's retention of possession of the defendant's driver's license and an above average amount of cash while placing defendant in the back of the patrol car to await the arrival of a drug dog. *Cotton v. State*, 237 Ga. App. 18, 513 S.E.2d 763 (1999).

Failure to object to no ruling made on motion to suppress. — In the absence of a

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ruling on a pretrial motion to suppress and of an objection when the evidence was offered at trial, a defendant waived his right to contest the admissibility of the evidence on appeal. *Castillo v. State*, 281 Ga. 579, 642 S.E.2d 8 (2007).

Abandoned property. — Trial court did not err in denying defendant's motion to suppress as the police search of a bag containing the items purportedly stolen from the burglary and theft victims was not illegal; the bag was located in a closet of a bedroom in a friend's residence, and because the evidence showed the defendant had abandoned it, the defendant did not have a reasonable expectation of privacy in the bag and the defendant could not claim that the fourth amendment prohibited a search of the bag by police. *Gray v. State*, 260 Ga. App. 197, 581 S.E.2d 279 (2003).

Warrant for vehicle following search of home proper. — Defendant's suppression motion was properly denied as a magistrate's issuance of a search warrant for defendant's home was supported by probable cause for purposes of the fourth amendment, Ga. Const. 1983, Art. I, Sec. I, Para. XIII, and O.C.G.A. § 17-5-30 where: (1) witnesses reported seeing defendant at the victim's home near the time that the victim disappeared; (2) the farm manager who located the victim's body told police that defendant commonly used the farm for hunting; (3) defendant had a tumultuous relationship with the victim; and (4) defendant's mailbox was painted in a similar camouflage as the cattle trough in which the victim was found; as the warrant for the house was proper, the warrant for defendant's truck was not fruit of the poisonous tree. *Fortson v. State*, 277 Ga. 164, 587 S.E.2d 39 (2003).

Trial court did not abuse its discretion in refusing to suppress photographs that were developed from film that was in a disposable camera found in the defendant's duffle bag at the time of the defendant's arrest because: (1) the defendant lacked standing to challenge the admission of the evidence since the camera belonged to the defendant's sibling, most of the photographs had been taken by the sibling, and the camera had

only been borrowed by the defendant; (2) the film was admissible under the same rationale as an inventory search because the police had to develop the film to determine to whom the camera belonged before they could return it to its owner; and (3) the film was the fruit of a search incident to the defendant's lawful arrest because it was found in the defendant's duffle bag in a search incident to the defendant's arrest. *Wright v. State*, 276 Ga. 454, 579 S.E.2d 214 (2003), cert. denied, 540 U.S. 1106, 124 S. Ct. 1059, 157 L. Ed. 2d 892 (2004).

Consent to search. — Trial court erred in granting defendant's motion to suppress evidence of contraband, namely, defendant's possession of marijuana, as police officer's discovery of the marijuana was not pursuant to an impermissible pat-down search that two other officers conducted on a group of students, including defendant, but was pursuant to defendant's invitation for the officer to search defendant after the officer asked defendant why defendant's license had been suspended; however, a remand was necessary to determine whether defendant's consent to search was voluntarily given. *State v. Baker*, 261 Ga. App. 258, 582 S.E.2d 133 (2003).

Multiple blood samples. — Although a first search warrant for defendant's blood was defective, a second blood sample that was later drawn from defendant was not "fruit of the poisonous tree" because there was no evidence that the second search warrant for the blood was defective or that the second blood sample was obtained by exploitation of the original defective warrant; the second sample was separate and distinguishable from the first sample so as to be purged of the primary taint and, therefore, the trial court did not err in refusing to suppress the second sample. *McKinney v. State*, 261 Ga. App. 218, 582 S.E.2d 463 (2003).

Remedies for Violation of Rights

Constitutional tort claim depends on conduct's reasonableness. — Where the factual allegations clearly established a factual dispute which impacted on the reasonableness of federal agents' conduct in serving a subpoena and where, given the factual circumstances, a jury was entitled to find whether the agents' search and seizure of business

records and material violated established constitutional rights of which a reasonable officer would have known, the district court correctly denied summary judgment to the agents on the question of qualified immunity on the plaintiffs' constitutional tort claim for unlawful search and seizure. *Goddard v. Urrea*, 847 F.2d 765 (11th Cir. 1988).

Defendant must show harm from challenged warrant. — Where defendant failed to show any harm resulting from the issuance of a challenged warrant, there was nothing for the court to review on appeal. *Soto v. State*, 252 Ga. 164, 312 S.E.2d 306 (1984).

Plaintiff was not required to show significant injury as an essential ingredient to a fourth amendment excessive force claim. *Gardner v. Rogers*, 224 Ga. App. 165, 480 S.E.2d 217 (1996).

Compensation for invasion of fourth amendment rights. — Courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of rights under U.S. Const., amend. 4. The same may not be true, however, with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted. *Polakoff v. Henderson*, 370 F. Supp. 690 (N.D. Ga. 1973), *aff'd*, 488 F.2d 977 (5th Cir. 1974).

Subjective intent in making arrest. — Because a police officer's subjective intent in making an arrest is irrelevant to a finding of probable cause, a plaintiff need not establish intentional conduct or even gross negligence to establish a violation of the fourth amendment. *McKenna v. County of Clayton*, 657 F. Supp. 221 (N.D. Ga. 1987).

Good faith and reasonable belief in validity of arrest are the appropriate standards in testing the arresting officer's liability for a warrantless arrest. *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

Federal constitutional standards proper measure of conduct of state officer. — Where an unlawful state arrest is the basis of an action for violation of rights under U.S. Const., amends. 4 and 14, federal constitutional standards are the appropriate measure of the conduct of the arresting officer.

Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975).

Liability under federal civil rights statute.

— Even if a police officer violates a state arrest statute, the officer is not liable under the Federal Civil Rights Act, 42 U.S.C. § 1983, unless the officer also violated federal constitutional law governing warrantless arrests. *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

A supervisory or nonsupervisory official's failure or refusal to intervene when a constitutional violation such as the use of a chokehold once an arrestee is shackled is taking place in the official's presence establishes direct liability under 42 U.S.C. § 1983 for excessive use of force against the arrestee in violation of the arrestee's rights under the fourth and fourteenth amendments. *McQuarter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

A municipality cannot be held liable under the federal civil rights statute, 42 U.S.C. § 1983, for an illegal arrest absent a showing that the arrest without probable cause was the result of a custom, pattern, or practice of the municipality. *Shelby v. City of Atlanta*, 578 F. Supp. 1368 (N.D. Ga. 1984).

Where a governing body has worked constitutional deprivation of a citizen pursuant to an impermissible or corrupt policy which is intentional and deliberate, a cause of action is accrued against the governing body and its employees under the federal Civil Rights Act in spite of the doctrine of sovereign immunity. *City of Cave Spring v. Mason*, 252 Ga. 3, 310 S.E.2d 892 (1984).

An unprovoked beating and killing of a suspect by police officers was sufficiently serious to be actionable, as a federal civil rights claim, under U.S. Const., amend. 4, notwithstanding the existence of a state tort remedy. *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985), *aff'd* in part, *rev'd* in part and vacated in part, 774 F.2d 1495 (11th Cir. 1985), cert. denied, 476 U.S. 1115, 106 S. Ct. 1970, 90 L. Ed. 2d 654, 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673 (1986), 493 U.S. 817, 110 S. Ct. 70, 107 L. Ed. 2d 37 (1989).

In a federal civil rights action by a state prisoner alleging violations of fourth amendment rights, federal abstention was proper until the state appellate court decided the

Remedies for Violation of Rights (Cont'd)

issue upon its review of the conviction. *Doby v. Strength*, 758 F.2d 1405 (11th Cir. 1985).

In a case involving use of excessive force by police officers brought under 42 U.S.C. § 1983, the balancing test for determining whether a substantive due process violation has been committed, while similar in many respects to that for assessing a fourth amendment claim, requires a plaintiff to show that the force used by a defendant officer was applied maliciously and sadistically for the very purpose of causing harm. The fourth amendment balancing test, on the other hand, does not include a "malicious and sadistic" element; rather, the reasonableness of the seizure or intrusion is the central inquiry, as is the case with respect to fourth amendment analyses outside of the police abuse context. *Thompson v. Spikes*, 663 F. Supp. 627 (S.D. Ga. 1987).

Recognizing that 42 U.S.C. § 1983 clearly requires a showing of something more than common law tort elements, the court analyzed a deputy sheriff's tort claims for malicious prosecution, abuse of process, false arrest and false imprisonment, in the context of the fourth and fourteenth amendments, and found that claims thereunder were validly inferable for alleged conspiracy by fellow officers to force the deputy to give false testimony against a county sheriff. *Mastroianni v. Deering*, 835 F. Supp. 1577 (S.D. Ga. 1993).

In an action brought pursuant to 42 U.S.C. § 1983, because where the facts indicated that the plaintiff's arrest had not ended at the time of the defendant police officers' use of excessive force, U.S. Const., amend. 4 applied to the plaintiff's excessive force claims even if the plaintiff was in post-arrest, pre-charge custody at the time of the use of such force. *Albritten v. Dougherty County, Ga.*, 973 F. Supp. 1455 (M.D. Ga. 1997).

In an action brought pursuant to 42 U.S.C. § 1983, where there were genuine issues of material fact as to whether defendant police officers' use of physical force against plaintiff violated U.S. Const., amend. 4, defendants were not entitled to qualified immunity in their individual capacities. *Albritten v. Dougherty County, Ga.*, 973 F. Supp. 1455 (M.D. Ga. 1997).

Because a plaintiff in a civil rights case prosecuted under 42 U.S.C. § 1983 alleging excessive force used in arrest may receive compensatory damages for such things as physical pain and suffering and mental and emotional anguish, and because such a plaintiff whose constitutional rights are violated is entitled to receive nominal damages even if the plaintiff fails to produce any evidence of compensatory damages, the district court erred in granting judgment to defendant officers as a matter of law. *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000).

In an arrestee's 42 U.S.C. § 1983 suit that alleged that the arrestee's fourth amendment right against the use of excessive force was violated when a sheriff's deputy crashed a cruiser into the car during a high-speed pursuit, rendering the arrestee a quadriplegic, the arrestee's deliberate indifference claim against the sheriff in an individual capacity was dismissed on summary judgment because the sheriff had provided the deputies with all of the training that was required by the State of Georgia; even if there were a causal connection between the sheriff's failure to train the deputies in the techniques of making high-pursuit stops, the sheriff was entitled to qualified immunity. *Harris v. Coweta County*, F. Supp. 2d , 2003 U.S. Dist. LEXIS 27348 (N.D. Ga. Sept. 25, 2003).

Internal Revenue Service Commissioner absolutely immune from liability. — The United States is absolutely immune from damages in a suit seeking damages under the Constitution, as is the Commissioner of the Internal Revenue Service insofar as the Commissioner is acting within the scope of the Commissioner's official capacity. *Sellers v. United States*, 569 F. Supp. 1149 (N.D. Ga. 1983).

Commissioner of the Internal Revenue Service cannot be held vicariously liable for the fourth and fifth amendment violations of the Internal Revenue Service agents. *Sellers v. United States*, 569 F. Supp. 1149 (N.D. Ga. 1983).

Police officers' use of deadly force against suspect who was armed with knife and had just stabbed several people was reasonable and hence within the bounds of the fourth amendment. *O'Neal v. DeKalb County*, 850 F.2d 653 (11th Cir. 1988).

Habeas corpus. — If the petitioner is aggrieved by unconstitutional search and

seizure, the petitioner is entitled to habeas relief on that basis alone. *Wilson v. Hopper*, 234 Ga. 859, 218 S.E.2d 573 (1975).

In federal habeas corpus court the test of legality of state arrest is "federal probable cause." *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

The state habeas corpus procedure finally determines fourth amendment constitutional claims, and may very well be determinative of and foreclose consideration of other substantial issues in the federal proceeding because a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction, shall be presumed to be correct in the federal proceeding. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

If the state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial. *Anglin v. Green*, 639 F. Supp. 490 (S.D. Ga. 1986), aff'd, 853 F.2d 930 (11th Cir. 1988), cert. denied, 488 U.S. 1031, 109 S. Ct. 841, 102 L. Ed. 2d 973 (1989).

Right to acquittal on ground of unlawful arrest. — A defendant in a criminal case cannot claim a verdict declaring the defendant to be not guilty on the ground that the defendant was illegally arrested. *Morton v. State*, 132 Ga. App. 329, 208 S.E.2d 134 (1974).

When illegal arrest not grounds for rever-

sal. — Assuming that the warrantless arrest was illegal, it is not in and of itself a ground for reversal where defendant has been indicted and convicted. *Thompson v. State*, 157 Ga. App. 600, 278 S.E.2d 62, aff'd, 248 Ga. 343, 285 S.E.2d 685 (1981).

Conviction based on evidence illegally admitted must be reversed. — The fruits of an illegal arrest are not admissible in evidence against a defendant, and a conviction which is based upon evidence thus illegally admitted must be reversed and set aside. *Traylor v. State*, 127 Ga. App. 409, 193 S.E.2d 876 (1972).

Mere claim of illegal arrest insufficient for new trial or release. — If there is no claim that the conviction rested upon evidence seized as a result of an illegal arrest, or upon a confession secured pursuant to the illegal arrest, etc., but simply that the defendant was illegally arrested, then this, alone, does not entitle the defendant to release or a new trial. *Johnson v. State*, 128 Ga. App. 69, 195 S.E.2d 676 (1973).

When objections raised. — The lack of probable cause to arrest should be raised before trial if possible, and certainly at trial. A court, nevertheless, is bound to consider error apparent on the face of the record which rises to the level of "plain" or "fundamental" error. *United States v. McGee*, 464 F.2d 542 (5th Cir.), cert. denied, 409 U.S. 989, 93 S. Ct. 346, 34 L. Ed. 2d 255, 409 U.S. 1078, 93 S. Ct. 697, 34 L. Ed. 2d 667 (1972).

Fourth amendment objections may be raised in proceedings other than criminal trials. *FTC v. Page*, 378 F. Supp. 1052 (N.D. Ga. 1974).

OPINIONS OF THE ATTORNEY GENERAL

Authority of state drug enforcement officer to search and seize. — The Chief Drug Inspector of the State Board of Pharmacy and the Inspector's assistants have the authority to make arrests for violations of former Code 1933, Chs. 79A-7 and 79A-8 (see O.C.G.A. Arts. 2 and 3, Ch. 13, T. 16), and to search and seize evidence necessary for presentation before courts of this state or before the State Board of Pharmacy; the Chief Drug Inspector and the Inspector's assistants do not have the authority to seize prescription from a pharmacy without prop-

erly acquiring a valid search warrant. 1970 Op. Att'y Gen. No. 70-112.

Authority to seize prescriptions. — Any law enforcement official who has obtained search warrant may lawfully search and seize prescriptions retained for inspection by a pharmacy as required by Georgia law. 1970 Op. Att'y Gen. No. 70-112.

Constitutionality of fingerprint requirement. — Requiring applicants for driver's license or identification card to submit fingerprints does not violate constitutional rights. 1997 Op. Att'y Gen. No. U97-7.

Regulation allowing search of vehicles entering hospital grounds valid. — A regulation established by the Department of Human Resources which makes vehicles entering the grounds of Central State Hospital subject to search is a valid exercise of the department's power, and does not violate U.S. Const., amend. 4. 1974 Op. Att'y Gen. No. 74-15.

Unauthorized dormitory searches. — A college may not rely absolutely on a contractual provision in a dormitory contract to

conduct a search of a student's dormitory room in the absence of a valid warrant or consent. 1994 Op. Att'y Gen. No. 94-13.

Use of metal detectors in schools. — The use of a metal detector to screen everyone or to randomly screen students as they enter school is not an unreasonable search and thus is not unconstitutional. However, the metal detector could be used in some manner, such as selective screening, which could violate the prohibition against unreasonable searches. 1994 Op. Att'y Gen. No. U94-9.

RESEARCH REFERENCES

ALR. — Constitutional guaranties against unreasonable searches and seizures as applied to a search for or seizure of intoxicating liquor, 13 ALR 1316; 27 ALR 709; 39 ALR 811; 74 ALR 1418.

Federal Constitution as a limitation upon the powers of the states in respect of search and seizure, 19 ALR 644.

Right to arrest without a warrant for unlawful possession or transportation of intoxicating liquor, 44 ALR 132.

Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, 53 ALR 1485; 66 ALR 397; 134 ALR 614.

Search of automobile without a warrant by officers relying on description of persons suspected of a crime, 60 ALR 299.

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Admissibility, in civil case, of evidence obtained by lawful search and seizure, 5 ALR3d 670.

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Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.

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Lawfulness of search of motor vehicle following arrest for traffic violation, 10 ALR3d 314.

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Admissibility of videotape film in evidence in criminal trial, 60 ALR3d 333; 41 ALR4th 812; 41 ALR4th 877.

Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure, 77 ALR3d 636.

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Admissibility of evidence discovered in search of defendant’s property or residence authorized by domestic employee or servant, 99 ALR3d 1232.

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Propriety of requiring suspect or accused to alter, or to refrain from altering, physical or bodily appearance, 24 ALR4th 592.

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Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 ALR4th 1112.

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Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement, 11 ALR5th 52.

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Propriety of execution of search warrant at nighttime, 41 ALR5th 171.

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When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale — State cases, 111 ALR5th 239.

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Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Motions and objections during trial and matters other than pretrial motions, 117 ALR5th 513.

Validity of warrantless search of other than motor vehicle or occupant of vehicle based on odor of marijuana — State cases, 122 ALR5th 439.

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When is warrantless entry of house or other building justified under "hot pursuit" doctrine, 17 ALR6th 327.

Validity, under federal constitution, of regulations, rules or statutes allowing drug testing of students, 87 ALR Fed. 148.

Validity, construction, and effect of domestic currency transaction reporting requirement based upon 31 U.S.C.S. § 5313(a), 89 ALR Fed. 770.

Warrantless search by government employer of employee's workplace locker, desk, or the like as violation of fourth amendment privacy rights — federal cases, 91 ALR Fed. 226.

Physical examination of child's body for evidence of abuse as violative of fourth amendment or as raising fourth amendment issue, 93 ALR Fed. 530.

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Admissibility of evidence not related to air travel security, disclosed by airport security procedures, 108 ALR Fed. 658.

Warrantless detention of mail for investigative purposes as violative of fourth amendment, 115 ALR Fed. 439.

Permissibility under fourth amendment of detention of motorist by police, following lawful stop for traffic offense, to investigate matters not related to offense, 118 ALR Fed. 567.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of the fourth amendment, 150 ALR Fed. 399.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor relative, 152 ALR Fed. 475.

Admissibility of evidence discovered in

search of defendant's property or residence authorized by defendant's spouse, 154 ALR Fed. 579.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse, 160 ALR Fed. 165.

Validity of warrantless administrative inspection of business that is allegedly closely or pervasively regulated; cases decided since *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970), 182 ALR Fed. 467.

When are facts offered in support of search warrant for evidence of federal nondrug offense so untimely as to be stale, 187 ALR Fed. 415.

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Validity of warrantless search of other than motor vehicle or occupant of motor vehicle based on odor of marijuana — Federal cases, 191 ALR Fed. 303.

Validity of warrantless search of motor vehicle occupant based on odor of marijuana — Federal cases, 192 ALR Fed. 391.

Sufficiency of information provided by confidential informant, whose identity is known to police, to provide probable cause for federal search warrant where there was indication that informant provided reliable information to police in past — Cases decided after *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), 196 ALR Fed. 1.

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[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Cross references. — Protection of life, liberty, and property, Ga. Const. 1983, Art. I, Sec. I, Para. I. Privilege against self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI and §§ 15-11-31, 17-7-93, 17-7-95, 24-9-27. Double jeopardy generally, Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and §§ 16-1-7, 16-1-8, 17-7-53, 38-2-438. Guarantee of just compensation, Ga. Const. 1983, Art. I, Sec. III, Para. I and § 22-1-5. Right to grand jury process, § 17-7-50. Self-incrimination in courts-martial, § 38-2-411. Double jeopardy in courts-martial, § 38-2-438. Use of evidence of driver's refusal to submit to chemical test for alcohol or drugs in blood, § 40-6-392.

Editor's notes. — The Supreme Court has declared that the due process clause of U.S. Const., amend. 14 protects a person from multiple jeopardy and compulsory self-incrimination in state, as well as federal, criminal proceedings. See *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) (multiple jeopardy) and *Malloy v. Hogan*, 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1964) (compulsory self-incrimination).

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F.2d 245 (9th Cir. 1957), cert. denied, 356 U.S. 914, 78 S. Ct. 672, 2 L. Ed. 2d 586 (1958), holding that evidence gained in bodily search of defendant who was attempting to cross the United States border was not obtained through unreasonable search and seizure and did not violate constitutional protections, see 21 Ga. B.J. 269 (1958). For comment on the right to belong to a labor union, in light of *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 262 F.2d 359 (6th Cir. 1958), cert. denied, 359 U.S. 935, 79 S. Ct. 648, 3 L. Ed. 2d 636 (1959), see 8 J. of Pub. L. 580 (1959). For comment discussing the constitutionality of the statutory prohibition against expenditures by labor unions in connection with federal elections, 18 U.S.C. § 610, see 21 Ga. B.J. 575 (1959). For comment on *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958), holding suspension of retirement pay for pleading this amendment to be violation of due process, see 22 Ga. B.J. 114 (1959). For comment regarding right of witness in congressional contempt proceeding to refuse to testify under this amendment and U.S. Const., Amend. 1, in light of *Barrenblatt v. United States*, 360 U.S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959), see 22 Ga. B.J. 404 (1960). For comment on *Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), holding exposure of jurors to newspaper articles regarding prior convictions when court refused to permit prosecutor to present such evidence was denial of due process, see 22 Ga. B.J. 413 (1960). For comment on *Nelson v. County of Los Angeles*, 362 U.S. 1, 80 S. Ct. 527, 4 L. Ed. 2d 494 (1959), holding due process not denied employees summarily dismissed for invocation of this amendment and U.S. Const., Amend. 5 before congressional subcommittee, see 23 Ga. B.J. 267 (1960). For comment discussing constitutionality of legislation requiring employees to pay dues to railway union in order to maintain employment, in light of *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 784, 6 L. Ed. 2d 1141 (1961), see 24 Ga. B.J. 432 (1962). For comment on *Cohen v. Hurley*, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961), upholding constitutionality of disbarment by state court of attorney who refused to answer questions in judicial investigation pertaining to profes-

sional misconduct, see 24 Ga. B.J. 522 (1962). For comment discussing admissibility of voluntary statements made after indictment and release on bail in absence of retained counsel, in light of *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), see 16 Mercer L. Rev. 343 (1964). For comment on *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 653 (1964), see 1 Ga. St. B.J. 358 (1965). For comment on *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), appearing below, as to measure of damages for condemnation, see 17 Mercer L. Rev. 471 (1966). For comment on *Busbee v. State*, 183 So. 2d 27 (Fla. Dist. Ct. App. 1966), discussing multiple prosecutions of distinct offenses arising from the same transaction, see 18 Mercer L. Rev. 304 (1966). For comment on *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965), see 2 Ga. St. B.J. 504 (1966). For comment on *State Hwy. Dep't v. Branch*, 222 Ga. 770, 152 S.E.2d 372 (1966), discussing regulation of outdoor advertising and billboards as a constitutional taking, see 18 Mercer L. Rev. 499 (1967). For comment discussing *Miranda* warnings in criminal tax prosecutions, see 18 Mercer L. Rev. 502 (1967). For comment on *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968), applying this amendment's privilege to disclosure of gambling income, see 19 Mercer L. Rev. 433 (1968). For comment on *State v. Rand*, 20 Ohio Misc. 98, 247 N.E.2d 342 (Com. Pleas 1969), holding criminal defendant competent to stand trial under properly administered tranquilizing drugs, see 18 J. of Pub. L. 503 (1969). For comment discussing limits on the military's jurisdiction and the constitutional rights of servicemen in light of *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), see 21 Mercer L. Rev. 311 (1969). For comment on *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969) as to the constitutionality of Art. 2, Ch. 19, T. 15, see 21 Mercer L. Rev. 355 (1969). For comment on *Smith v. State*, 225 Ga. 328, 168 S.E.2d 587 (1969), see 6 Ga. St. B.J. 294 (1970). For comment on *United States v. Barash*, 428 F.2d 328 (2d Cir. 1970), as to the constitutionality under the principle of double jeopardy, of increasing severity of punishment on retrial following successful appeal, see 5 Ga. L. Rev. 194 (1971). For comment on *Anderson v. Laird*,

316 F. Supp. 1081 (D.D.C. 1970), as to religious regulations at military academies, see 5 Ga. L. Rev. 400 (1971). For comment on *Freeman v. Wilcox*, 119 Ga. App. 325, 167 S.E.2d 163 (1969) and a juvenile's right to counsel at pre-adjudicatory stages of juvenile proceedings, see 22 Mercer L. Rev. 597 (1971). For comment on *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) and Georgia's coconspirator exception to the hearsay rule, see 22 Mercer L. Rev. 791 (1971). For comment on *In re Kras*, 331 F. Supp. 1207 (E.D.N.Y. 1971), holding the required prepayment of a filing fee by an indigent in a bankruptcy proceeding violative of equal protection and due process, see 21 J. of Pub. L. 239 (1972). For comment as to custodial interrogation at the suspect's home, in light of *Knowles v. State*, 124 Ga. App. 377, 183 S.E.2d 617 (1971), see 23 Mercer L. Rev. 983 (1972). For comment discussing the application of this amendment's privilege against self-incrimination to a federal tax scheme requiring disclosure of potentially incriminating information on one's tax return, see 8 Ga. L. Rev. 160 (1973). For comment discussing treatment of premeditated murder and felony murder as one offense under the theory of continuing jeopardy, in light of *United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir. 1972), see 24 Mercer L. Rev. 679 (1973). For comment on *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972), see 24 Mercer L. Rev. 687 (1973). For comment on *Scarpa v. United States Bd. of Parole*, 477 F.2d 278 (5th Cir.), vacated and remanded, 414 U.S. 809, 94 S. Ct. 79, 38 L. Ed. 2d 44 (1973), declining to accord parole release hearings, judicial review and procedural due process rights, see 23 Emory L.J. 597 (1974). For comment on *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), as to probationer's rights at probation revocation, see 23 Emory L.J. 617 (1974). For comment discussing due process and equal protection rights of illegitimate child denied social security benefits due to birth after father's disability, in light of *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), see 23 Emory L.J. 861 (1974). For comment criticizing *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), permitting imposition of increased sentence by jury after retrial, see 23 Emory L.J. 879

(1974). For comment on *Construction Indus. Assoc. v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), as to the authority of local governments to restrict population growth by means other than by the operation of demographic and market demands in light of the right to travel, see 9 Ga. L. Rev. 260 (1974). For comment on *James v. State*, 230 Ga. 29, 195 S.E.2d 448 (1973), appearing below, see 25 Mercer L. Rev. 935 (1974). For comment discussing elements of due process required for nonprobationary employee discharged without prior evidentiary hearing where administrative appeal is available, in light of *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974), see 26 Mercer L. Rev. 1429 (1974). For comment on *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973), holding compelled production of taxpayers records in possession of accountant not violative of taxpayer's right against self-incrimination, see 10 Ga. St. B.J. 648 (1974). For comment on *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), as to effect of *Miranda* warnings on admissibility of a confession made after an unconstitutional arrest, see 25 Emory L.J. 227 (1976). For comment on *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), upholding employment test with a racially disproportionate impact absent discriminatory purpose against an equal protection attack under this amendment, see 25 Emory L.J. 737 (1976). For comment on *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), regarding the resumption of questioning after the right to remain silent has been exercised, see 27 Mercer L. Rev. 1203 (1976). For comment on *United States v. Security Nat'l Bank*, 546 F.2d 492 (2d Cir. 1976), regarding protection of corporate defendant under the double jeopardy clause, see 11 Ga. L. Rev. 694 (1977). For comment on *Andresen v. Maryland*, 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976), as to nonapplicability of privilege against self-incrimination to seizure with search warrant of incriminatory personal business records, see 28 Mercer L. Rev. 581 (1977). For comment on *Maher v. New Orleans*, 516 F.2d 1051 (5th Cir. 1975), cert. denied, 426 U.S. 905, 96 S. Ct. 2225, 48 L. Ed. 2d 830 (1976), upholding the constitutionality of a

municipal zoning ordinance regulating the preservation and maintenance of a historical district, see 28 Mercer L. Rev. 591 (1977). For comment on *United States v. Grayson*, 438 U.S. 41, 98 S. Ct. 2610, 57 L. Ed. 2d 582 (1978), regarding consideration by sentencing judge of his belief that defendant falsely testified during trial, see 28 Emory L.J. 159 (1979). For comment discussing whether a mother may challenge a state child custody ruling in a federal habeas corpus proceeding in light of *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103 (1st Cir. 1978), see 13 Ga. L. Rev. 662 (1979). For comment, "The Tacit Admission Rule: Unreliable and Unconstitutional — A Doctrine Ripe for Abandonment," see 14 Ga. L. Rev. 27 (1979). For comment on *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979). For comment on *DeKalb County v. Trustees, Decatur Lodge No. 1602*, 242 Ga. 707, 251 S.E.2d 243 (1978), see 31 Mercer L. Rev. 367 (1979). For comment on *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979), see 31 Mercer L. Rev. 375 (1979). For comment, "Bivens and the Creation of a Cause of Action for Money Damages Arising Directly From the Due Process Clauses," see 29 Emory L.J. 231 (1980). For comment on *Fare v. Michael C.*, 442 U.S. 707 (1979), regarding this amendment and Miranda rights of juveniles, see 29 Emory L.J. 563 (1980). For comment on *Fulcher v. United States*, 632 F.2d 278 (4th Cir. 1980), see 15 Ga. L. Rev. 516 (1981). For comment on *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980), regarding the constitutionality of the ten percent set aside for minority contractors, etc., see 29 Emory L.J. 1127 (1980). For comment discussing the forcible medication of involuntarily committed mental patients with antipsychotic drugs in light of *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), see 15 Ga. L. Rev. 739 (1981). For comment, "Free Press, Privacy, and Privilege: Protection of Researcher-Subject Communications," see 17 Ga. L. Rev. 1009 (1983). For case comment discussing *Miranda v. Arizona* ambiguous requests for counsel, see 20 Ga. L. Rev. 221 (1985). For comment, "Gary Dotson as

Victim: The Legal Response to Recanting Testimony," see 35 Emory L.J. 969 (1986). For comment, "Enforcing the Right to a Public Education for Children Afflicted with AIDS," see 36 Emory L.J. 603 (1987). For comment, "Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas," see 36 Emory L.J. 1219 (1987). For comment, "The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome — AIDS," see 37 Emory L.J. 217 (1988). For case comment, "*First English Evangelical Lutheran Church v. County of Los Angeles*: Compensation of Landowners for Temporary Regulatory Takings," see 21 Ga. L. Rev. 1169 (1987). For comment, "*Batson v. Kentucky*: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges," see 37 Emory L.J. 755 (1988). For comment, "*Grady v. Corbin*: An Unsuccessful Effort to Define Same Offense," see 25 Ga. L. Rev. 143 (1990). For comment, "*McNeil v. Wisconsin*: Invocation of Right to Counsel Under Sixth Amendment by Accused at Judicial Proceeding Does Not Constitute Invocation of Miranda Right to Counsel for Unrelated Charge," see 26 Ga. L. Rev. 1049 (1992). For comment, "A Trend Ephemeral? Eternal? Neither?: A Durational Look at the New Judicial Federalism," see 42 Emory L.J. 209 (1993). For comment, "*First Covenant Church v. City of Seattle*: The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions," see 27 Ga. L. Rev. 589 (1993). For comment, "*Ramseur v. Beyer*: The Third Circuit Upholds Race-Based Treatment of Prospective Grand Jurors," see 27 Ga. L. Rev. 621 (1993). For comment, "The Government's Right to Read: Maintaining State Access to Digital Data in the Age of Impenetrable Encryption," see 49 Emory L.J. 711 (2000). For comment, "The Takings Clause As a Vehicle for Judicial Activism: *Eastern Enterprises v. Apfel* Presents a New Twist to Takings Analyses," see 16 Ga. St. U.L. Rev. 689 (2000). For comment, "A Deep Breath Before the Plunge: Undoing *Miranda*'s Failure Before It's Too Late," see 55 Mercer L. Rev. 1375 (2004).

JUDICIAL DECISIONS

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General Consideration

Nature of rights under fifth amendment.

— Assurance that a person's fifth amendment right against compelled self-incrimination was not violated does not necessarily overcome a failure to protect the person's right under the fourth amendment against unreasonable search and seizure.

State v. Guillory, 236 Ga. App. 230, 511 S.E.2d 591 (1999).

Defense counsel cannot invoke defendant's rights without consulting defendant.

— Defense counsel, acting without having consulted the defendant, is not empowered to invoke the defendant's personal rights under the fifth and sixth amendments.

General Consideration (Cont'd)

Edwards v. State, 167 Ga. App. 681, 307 S.E.2d 264 (1983).

Waiver of rights. — Implicit in a finding that the defendant was properly advised of the defendant's rights, that the defendant understood those rights, and that the defendant voluntarily signed a written waiver of those rights is the factual determination that the defendant was mentally competent to waive the defendant's rights. *Hance v. Zant*, 696 F.2d 940 (11th Cir.), cert. denied, 463 U.S. 1210, 103 S. Ct. 3544, 77 L. Ed. 2d 1393 (1983), overruled on other grounds, 762 F.2d 1383 (11th Cir. 1985).

There is no requirement that waiver of constitutional rights be in writing. *Brown v. State*, 162 Ga. App. 198, 290 S.E.2d 540 (1982).

Failure to voice objection. — The refusal to grant a mistrial, on the grounds that the state's cross-examination of a witness was improper, is not an abuse of discretion if the defendant failed to voice an objection during the questioning. *Kirk v. State*, 168 Ga. App. 226, 308 S.E.2d 592 (1983), aff'd, 252 Ga. 133, 311 S.E.2d 821 (1984).

Plaintiff's allegations of statutory and constitutional predicates mandates federal court jurisdiction. — Where a plaintiff alleges 28 U.S.C. § 1343(3), in conjunction with 42 U.S.C. § 1983, as the jurisdictional predicate, and alleges federal constitutional predicates, such as fourteenth amendment property rights, first amendment rights to free speech and association, and fifth amendment just compensation or "taking" clause, a federal court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief, as well as to determine issues of fact arising in the controversy. *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D. Ga. 1983), aff'd, 746 F.2d 761 (11th Cir. 1984).

No habeas evidentiary hearing where no evidence of underrepresentation on grand and traverse juries. — Because a habeas petitioner offered to produce no evidence that proved underrepresentation of blacks and women on the grand and traverse juries which indicted and convicted the petitioner in violation of the petitioner's fifth amendment rights, no federal evidentiary hearing

is required. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), aff'd in part, rev'd in part on other grounds, 756 F.2d 1483 (11th Cir. 1985).

Standing to complain about violations of voter's constitutional rights. — Election candidate and chairman of county board of elections lacked standing to complain about alleged violations of a voter's constitutional rights under U.S. Const., amend. 5 and Ga. Const. 1983, Art. II, Sec. I, Para. I. *Hammill v. Valentine*, 258 Ga. 603, 373 S.E.2d 9 (1988).

Effect of sovereign immunity. — Claims against the United States based directly on fifth amendment violations are barred by sovereign immunity. *United States v. Article or Device Consisting of Biotone Model 4*, 557 F. Supp. 141 (N.D. Ga. 1982).

Claims against Internal Revenue Service Commissioner. — The United States is absolutely immune from damages in a suit seeking damages under the Constitution, as is the Commissioner of the Internal Revenue Service insofar as the Commissioner is acting within the scope of the Commissioner's official capacity. *Sellers v. United States*, 569 F. Supp. 1149 (N.D. Ga. 1983).

Commissioner of the Internal Revenue Service cannot be held vicariously liable for the fourth and fifth amendment violations of Internal Revenue Service agents. *Sellers v. United States*, 569 F. Supp. 1149 (N.D. Ga. 1983).

Cited in *Hall v. State*, 41 Ga. App. 455, 153 S.E. 534 (1930); *Reynolds v. Brosnan*, 170 Ga. 773, 154 S.E. 264 (1930); *Ventimiglia v. Aderhold*, 51 F.2d 308 (N.D. Ga. 1931); *Waugh v. Aderhold*, 52 F.2d 702 (N.D. Ga. 1931); *Buie v. Buie*, 175 Ga. 27, 165 S.E. 15 (1932); *State v. Thompson*, 175 Ga. 189, 165 S.E. 34 (1932); *Interstate Co. v. Richardson*, 177 Ga. 9, 169 S.E. 373 (1933); *Donalson v. City of Bainbridge*, 177 Ga. 7, 169 S.E. 886 (1933); *Cowart v. State*, 177 Ga. 377, 170 S.E. 253 (1933); *Gaskins v. Varn*, 178 Ga. 502, 173 S.E. 695 (1934); *Richmond Hosier Mills v. Camp*, 7 F. Supp. 139 (N.D. Ga. 1934); *Colson v. Aderhold*, 73 F.2d 191 (5th Cir. 1934); *Jones v. City of Atlanta*, 51 Ga. App. 218, 179 S.E. 922 (1935); *United States v. Griffin*, 12 F. Supp. 135 (S.D. Ga. 1935); *Consolidated Utils. Co. v. Commissioner*, 84 F.2d 548 (5th Cir. 1936); *Jenkins v. United States*, 86 F.2d 123 (5th Cir. 1936); *Anniston*

Mfg. Co. v. Davis, 301 U.S. 337, 57 S. Ct. 816, 81 L. Ed. 1143 (1937); United States v. Weathers, 21 F. Supp. 763 (N.D. Ga. 1937); Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938); Mulford v. Smith, 307 U.S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939); Beard v. Sanford, 105 F.2d 141 (5th Cir. 1939); McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5 (1940); Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940); Anthony v. City of Atlanta, 66 Ga. App. 506, 18 S.E.2d 82 (1941); FDIC v. Beasley, 193 Ga. 727, 20 S.E.2d 23 (1942); Zugar v. State, 194 Ga. 285, 21 S.E.2d 647 (1942); United States v. A Certain Tract or Parcel of Land, 44 F. Supp. 712 (S.D. Ga. 1942); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9 (1943); In re Burke, 51 F. Supp. 552 (S.D. Ga. 1943); Perkins v. Brown, 53 F. Supp. 176 (S.D. Ga. 1943); Upchurch Packing Co. v. United States, 53 F. Supp. 791 (N.D. Ga. 1943); Davis v. United States, 138 F.2d 406 (5th Cir. 1943); Creaser v. Durant, 197 Ga. 531, 29 S.E.2d 776 (1944); Spreckels Sugar Co. v. South Atl. S.S. Line, 55 F. Supp. 670 (S.D. Ga. 1944); United States v. Ryals, 56 F. Supp. 772 (N.D. Ga. 1944); Monge v. Sanford, 145 F.2d 227 (5th Cir. 1944); Williams v. State, 199 Ga. 504, 34 S.E.2d 854 (1945); Miller v. Sanford, 59 F. Supp. 812 (N.D. Ga. 1945); Jackson v. Houston, 200 Ga. 399, 37 S.E.2d 399 (1946); Morakes v. State, 201 Ga. 425, 40 S.E.2d 120 (1946); Morris v. Peacock, 202 Ga. 524, 43 S.E.2d 531 (1947); Durant v. Hiatt, 81 F. Supp. 948 (N.D. Ga. 1948); Brown v. Sanford, 170 F.2d 344 (5th Cir. 1948); Boyett v. State, 205 Ga. 370, 53 S.E.2d 919 (1949); Walton v. City of Atlanta, 89 F. Supp. 309 (N.D. Ga. 1949); Sweeney v. Hiatt, 89 F. Supp. 416 (N.D. Ga. 1949); Martin v. Hiatt, 174 F.2d 350 (5th Cir. 1949); Hiatt v. Brown, 339 U.S. 103, 70 S. Ct. 495, 94 L. Ed. 691 (1950); Notis v. State, 84 Ga. App. 199, 65 S.E.2d 622 (1951); Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1951); United States v. Forrester, 105 F. Supp. 136 (N.D. Ga. 1952); Atlanta-New Orleans Motor Freight Co. v. United States, 155 F. Supp. 68 (N.D. Ga. 1953); Screven County v. Brier Creek Hunting & Fishing Club, Inc., 202 F.2d 369 (5th Cir. 1953); Humthlett v. Reeves, 211 Ga. 210, 85 S.E.2d 25 (1954); City of Moultrie v. Colquitt County Rural Elec. Co., 211 Ga. 842, 89 S.E.2d 657 (1955); United States v. Willis, 145 F. Supp. 365 (M.D. Ga. 1955); United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956); Kivette v. United States, 230 F.2d 749 (5th Cir. 1956); Heyward v. Public Hous. Admin., 238 F.2d 689 (5th Cir. 1956); Looper v. Georgia, S. & Fla. Ry., 213 Ga. 279, 99 S.E.2d 101 (1957); Daniels v. State, 213 Ga. 833, 102 S.E.2d 27 (1958); Stark v. Waters, 214 Ga. 597, 106 S.E.2d 401 (1958); Deloach v. Rogers, 268 F.2d 928 (5th Cir. 1959); Suggs v. Brotherhood of Locomotive Firemen & Enginemen, 219 F. Supp. 770 (M.D. Ga. 1960); Backer v. Commissioner, 275 F.2d 141 (5th Cir. 1960); International Ass'n of Machinists v. Street, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961); Warnell v. United States, 291 F.2d 687 (5th Cir. 1961); Atlantic Coast Line R.R. v. United States, 205 F. Supp. 360 (M.D. Ga. 1962); Ferguson v. State, 219 Ga. 33, 131 S.E.2d 538 (1963); Pistor v. State, 219 Ga. 161, 132 S.E.2d 183 (1963); Pugh v. State, 219 Ga. 166, 132 S.E.2d 203 (1963); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); Walther v. Walther, 219 Ga. 644, 135 S.E.2d 401 (1964); Raif v. State, 109 Ga. App. 354, 136 S.E.2d 169 (1964); Chatterton v. State, 221 Ga. 424, 144 S.E.2d 726 (1965); Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965); Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965); Woods v. State, 222 Ga. 321, 149 S.E.2d 674 (1966); Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818 (1966); Givens v. Dutton, 222 Ga. 756, 152 S.E.2d 358 (1966); State Hwy. Dep't v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966); Elkins v. State, 222 Ga. 746, 152 S.E.2d 377 (1966); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966); Nicholson v. United States, 355 F.2d 80 (5th Cir. 1966); O'Neal v. State, 115 Ga. App. 100, 153 S.E.2d 663 (1967); Abrams v. State, 223 Ga. 216, 154 S.E.2d 443 (1967); Arkwright v. State, 223 Ga. 768, 158 S.E.2d 370 (1967); Hurst v. United States, 370 F.2d 161 (5th Cir. 1967); Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118 (5th Cir. 1967); Grogan v. United States, 394 F.2d 287 (5th Cir. 1967); Price v. State, 224 Ga. 306, 161 S.E.2d 825 (1968); Johnson v. Smith, 295 F. Supp. 835 (N.D. Ga. 1968); Gilstrap v. United States, 389 F.2d 6 (5th Cir. 1968); Chamblee v. United States, 402 F.2d 296 (5th Cir. 1968); Anderson v. United States, 403 F.2d 206 (5th Cir. 1968); Shoffeitt v. United States, 403 F.2d 991 (5th Cir. 1968); Robinson v. State, 225 Ga. 167, 167 S.E.2d 158 (1969); Sullivan v. State, 225 Ga. 301,

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County v. Greater Atlanta Homebuilders Ass'n, 255 Ga. App. 764, 565 S.E.2d 925 (2002); Bentley v. State, 262 Ga. App. 541, 586 S.E.2d 32 (2003).

Presentments and Indictments

1. In General

U.S. Const., amend. 5 requires that persons charged with crimes shall be indicted. United States v. Contris, 592 F.2d 893 (5th Cir. 1979).

Not intended to limit court jurisdiction but to protect individuals. — The language of the pertinent part of U.S. Const., amend. 5 is that "No person shall be held to answer", not that "No court shall hold any person to answer," as would likely have been the language had the provision been intended to be a limitation on the jurisdiction or the power of the court instead of a privilege for the protection of the individual. Barkman v. Sanford, 162 F.2d 592 (5th Cir.), cert. denied, 332 U.S. 816, 68 S. Ct. 155, 92 L. Ed. 393 (1947).

Adequacy of notice of criminal charges. — The test as to whether one accused of crime is given adequate notice in a charge against the accused is whether the charge is definite and specific enough to meet the test of reasonably apprising the accused of what the accused must defend against and enable the accused to avoid a second conviction for the same offense or included offenses. Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied sub nom. Calley v. Hoffman, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Waiver of right to protections afforded by presentment or indictment. — The first provision in U.S. Const., amend. 5 is intended as a protection to the individual to the same extent as were the other four provisions of U.S. Const., amend. 5, and each provision therein may be waived as fully as the accused may waive the rights under U.S. Const., amend. 6. Barkman v. Sanford, 162 F.2d 592 (5th Cir.), cert. denied, 332 U.S. 816, 68 S. Ct. 155, 92 L. Ed. 393 (1947).

Validity of indictment. — Validity of an indictment is to be determined by reading it as a whole. United States v. Contris, 592 F.2d 893 (5th Cir. 1979).

Sufficiency of indictment as question of law. — Whether an indictment sufficiently charges a crime is a question of law, not of fact. United States v. Contris, 592 F.2d 893 (5th Cir. 1979).

Indictment is sufficient which charges the offense in the language of the statute, or so plainly that its nature may be easily understood by the jury. State v. Siebert, 133 Ga. App. 775, 213 S.E.2d 7 (1975).

Minor deficiencies in indictment. — Indictments are read for their clear meaning and convictions will not be reversed because of minor deficiencies which do not prejudice the accused. United States v. Contris, 592 F.2d 893 (5th Cir. 1979).

Practical rather than technical considerations are determinative. — Sufficiency of an indictment is to be tested by practical rather than technical considerations, and the test of sufficiency is not whether the indictment could have been more artfully or precisely drawn, but whether it states the elements of the offense intended to be charged and adequately apprises the defendant of that which the defendant must be prepared to meet. United States v. Contris, 592 F.2d 893 (5th Cir. 1979).

Criteria for testing sufficiency of indictment. — The two criteria by which the sufficiency of an indictment is to be tested are whether the facts stated show the essential elements of the offense and whether the facts alleged are sufficient to permit the defendant to plead former jeopardy in a subsequent prosecution. Marshall v. State, 127 Ga. App. 805, 195 S.E.2d 469 (1972); Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 47 L. Ed. 2d 760, 96 S. Ct. 1505 (1976); United States v. Contris, 592 F.2d 893 (5th Cir. 1979).

Use in indictment of trade name. — An indictment containing a trade name which does not designate an individual or import a corporation is not void where it satisfies the requisites of informing the defendant with reasonable certainty of the nature of the accusation for defense purposes and does not subject defendant to the possibility of double jeopardy, particularly where the trade name is unique to the area and the accused's dealings have been in such trade name. Marshall v. State, 127 Ga. App. 805, 195 S.E.2d 469 (1972).

Indictment may rest upon hearsay, but informal unsworn hearsay from the mouth

Presentments and Indictments (Cont'd)**1. In General (Cont'd)**

of the prosecutor only is interdicted by U.S. Const., amend. 5. *United States v. Hodge*, 496 F.2d 87 (5th Cir. 1974).

When motion to quash must be filed. — In order for the defendant's motion to quash the indictment and challenge to the array of the grand jurors to be entertained by the trial court, it must be made prior to the return of the indictment or the defendant must show that the defendant had no knowledge, either actual or constructive, of such alleged illegal composition of the grand jury prior to the time the indictment was returned. Otherwise, the objection is deemed to be waived. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Charging at trial for conspiracy where not indicted for such. — It is not, on the trial of one of two or more persons jointly indicted for a crime, inappropriate to charge upon the law of conspiracy merely because the indictment does not, in terms, allege that there was a conspiracy to commit the offense. *Talley v. State*, 120 Ga. App. 365, 170 S.E.2d 444 (1969).

Requirements of proof for indictment for conspiracy. — In a conspiracy case the government should not be able to procure an indictment without having to prove to the satisfaction of a jury that at least one act was done in the district of the indictment. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Indictment charging theft by taking must describe property sufficiently to protect accused from double jeopardy. *Chesser v. State*, 159 Ga. App. 261, 283 S.E.2d 24 (1981).

Amendability of criminal indictments. — Criminal indictments are not amendable to conform to the evidence. *Bowers v. State*, 177 Ga. App. 36, 338 S.E.2d 457 (1985).

There was no fatal variance or due process violation in juvenile petition as the petition contained sufficient information, including the date of the incident and the fact that it involved egg-throwing, to inform defendant of the charge, enable defendant to prepare a defense, and protect defendant from subsequent prosecutions for the same offense; the discrepancy between the delinquency allega-

tions and the evidence regarding the number of windows damaged did not demand reversal as the petition fully informed defendant. In the Interest of M.M., 265 Ga. App. 381, 593 S.E.2d 919 (2004).

2. Grand Juries

Impartiality of grand juries. — U.S. Const., amend. 6, expressly provides that the trial jury in a criminal case must be impartial. No such requirement in respect to grand juries is found in U.S. Const., amend. 5, which contains the guaranty against prosecutions for infamous crimes unless on a presentment or indictment of a grand jury. *Creamer v. State*, 150 Ga. App. 458, 258 S.E.2d 212 (1979).

Defendant has the right to be tried solely on charges returned by a grand jury; this preserves the defendant's right to be accused by the defendant's fellow citizens, and also insures that the defendant will have adequate notice of the charges against the defendant and will be protected against double jeopardy. *United States v. Johnson*, 713 F.2d 633 (11th Cir. 1983), cert. denied, 465 U.S. 1081, 104 S. Ct. 1447, 79 L. Ed. 2d 766 (1984).

Discrimination in selection of grand jury forepersons. — A criminal defendant may attack a conviction on the grounds of purposeful discrimination against an identifiable group in the selection of the grand jury foreperson of the grand jury indicting the defendant. *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984).

Even if discrimination entered into the selection of grand jury forepersons, such discrimination did not warrant a reversal of conviction and the dismissal of the indictment absent an infringement of the fundamental right to fairness. *United States v. Lewis*, 743 F.2d 859 (11th Cir. 1984), cert. denied, 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 500 (1985).

Permissible criteria for grand jury foreman selection. — The grand jury foreman is not required to be a cross section of the community, and the appointing officer has wide discretion based on acceptable criteria that is race and gender neutral. *United States v. Browning-Ferris Indus. of Ga., Inc.*, 555 F. Supp. 595 (N.D. Ga. 1982).

Purported showing of low "non-white" representation not a prima facie case. — The defendant, who submitted statistics

comparing the representation of white and “non-white” people on the qualified grand jury wheel, failed to establish a prima facie case of discrimination, “non-white” persons not comprising a distinctive group singled out for special treatment under the law. *United States v. Lewis*, 743 F.2d 859 (11th Cir. 1984), cert. denied, 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 500 (1985).

Systematic and arbitrary exclusion of Negroes from jury venires. — Negroes may not be systematically and arbitrarily excluded from the jury venires from which the grand jury that has indicted a Negro is selected, for such constitutes a denial of due process and equal protection of the laws. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Grand jury witness cannot refuse to answer questions on the ground that they are the product of unlawful searches and seizures. *United States v. Worobytz*, 522 F.2d 196 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1507, 47 L. Ed. 2d 761 (1976).

Double Jeopardy

1. In General

Double jeopardy prohibition applies to the states through U.S. Const., amend 14. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970); *Staggers v. Stynchcombe*, 319 F. Supp. 1305 (N.D. Ga. 1970), aff’d, 436 F.2d 585 (5th Cir. 1971); *Alexander v. State*, 129 Ga. App. 395, 199 S.E.2d 918 (1973); *Clark v. State*, 144 Ga. App. 69, 240 S.E.2d 270 (1977).

Scope of protection generally. — The double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question is whether a statute imposes a criminal sanction. *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed. 2d 71 (1970); *Middlebrook v. Allen*, 234 Ga. 481, 216 S.E.2d 331 (1975).

The Georgia constitution is less protective than the fifth amendment, for it recognizes an exception to the bar against double jeopardy when the first trial ends in mistrial. *State v. Oliver*, 188 Ga. App. 47, 372 S.E.2d 256 (1988).

The double jeopardy clause protects a criminal defendant against successive, rather than simultaneous, prosecutions. *United*

States v. Farmer, 923 F.2d 1557 (11th Cir. 1991).

Prosecution for separate and similar offense allowed. — Precedent supports the conclusion that simultaneous prosecution for carjacking and using or carrying a firearm during a crime of violence (18 U.S.C. §§ 2119, 924) does not offend the double jeopardy clause. *United States v. Grant*, 860 F. Supp. 843 (M.D. Ga. 1994), aff’d without op. sub nom., *United States v. Williams*, 81 F.3d 175 (11th Cir. 1996).

Procedural double jeopardy prevents successive prosecutions for the same offense; it does not prevent prosecutions for offenses which are separate from and similar to a prior prosecuted offense. *Loden v. State*, 199 Ga. App. 683, 406 S.E.2d 103 (1991).

Where defendant was convicted of driving under the influence in municipal court and then prosecuted for vehicular homicide and driving under the influence in superior court, the latter prosecution was not barred by principles of double jeopardy since the offenses did not arise from the same transaction and, because the offenses were completed at different times and in different locations, there was no single court with jurisdiction over all the crimes. *Lefler v. State*, 210 Ga. App. 609, 436 S.E.2d 777 (1993).

Double jeopardy clause did not prohibit additional punishment for a separate offense which the Georgia General Assembly deemed to warrant separate sanction; therefore, the trial court did not err in refusing to merge defendant’s armed robbery and hijacking convictions because O.C.G.A. § 16-5-44.1(d) specifically provided that the offense of hijacking would be considered a separate offense and would not merge with any other offense. *Boykin v. State*, 264 Ga. App. 836, 592 S.E.2d 426 (2003).

Defense of previously overcome charges. — The double jeopardy clause of U.S. Const., amend. 5 protects against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. *United States v. Johnson*, 709 F.2d 639 (11th Cir.), cert. denied, 464 U.S. 1010, 104 S. Ct. 531, 78 L. Ed. 2d 713 (1983).

A defendant should not be forced to defend against charges or factual allegations

Double Jeopardy (Cont'd)**1. In General (Cont'd)**

that the defendant overcame in an earlier trial. *Albert v. Montgomery*, 732 F.2d 865 (11th Cir. 1984).

Questions of double jeopardy in Georgia must be determined under the expanded statutory proscriptions found in O.C.G.A. §§ 16-1-6, 16-1-7, and 16-1-8, which place limitations upon multiple prosecutions, convictions, and punishments for the same criminal conduct. *Stone v. State*, 166 Ga. App. 245, 304 S.E.2d 94 (1983).

O.C.G.A. §§ 16-1-7 and 16-1-8 are broader in scope than constitutional standards regarding double jeopardy. *Trimble v. State*, 156 Ga. App. 9, 274 S.E.2d 10 (1980), overruled on other grounds, *McCannon v. State*, 252 Ga. 515, 315 S.E.2d 413 (1984).

Continuation of a trial for two months before the same jury, absent exceptional circumstances or consent of the parties, was improper; however, the continuance did not constitute a "termination" within the meaning of O.C.G.A. § 16-1-8 and later proceedings were not barred by double jeopardy; overruling *Paquin v. Town of Tyrone*, 261 Ga. 418, 405 S.E.2d 497 (1991). *Morris v. State*, 264 Ga. 823, 452 S.E.2d 100 (1995).

Effect of statutory double jeopardy provisions and cases decided before their enactment. — The Criminal Code of Georgia, enacted by Ga. L. 1968, p. 1249, expanded the proscription of double jeopardy beyond that provided for in the federal and state Constitutions. Therefore questions of double jeopardy in this state must now be determined under the expanded statutory proscriptions of Code Ann. §§ 26-506, 26-506, and 26-507 (see O.C.G.A. §§ 16-1-6 through 16-1-8). Consequently, previous Georgia decisions applying constitutional standards of double jeopardy will generally not be applicable. *State v. Estevez*, 232 Ga. 316, 206 S.E.2d 475 (1974), overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006); *State v. Warren*, 133 Ga. App. 793, 213 S.E.2d 53 (1975).

Bar to successive prosecutions is referred to as the procedural aspect of the double jeopardy rule. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

Rationale behind the bar to successive prosecutions is to prevent harassment of the accused. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

Bar to multiple convictions is referred to as the substantive aspect of the double jeopardy rule. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

Rationale behind the bar to multiple convictions is to prevent multiple and excessive punishments. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

Double jeopardy clause provides three related protections: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense. *United States v. Dunbar*, 591 F.2d 1190 (5th Cir. 1979), aff'd, 611 F.2d 985 (5th Cir.), cert. denied, 447 U.S. 926, 100 S. Ct. 3022, 65 L. Ed. 2d 1120 (1980); *United States v. Cowart*, 595 F.2d 1023 (5th Cir. 1979).

The double jeopardy clause affords the defendant three basic protections. The clause protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. *United States v. Cochran*, 883 F.2d 1012 (11th Cir. 1989).

Fundamental protection against double jeopardy guards against the risk or potential that an accused may again be convicted of the same offense for which the accused was initially tried. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970); *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976); *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

The state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting that individual to embarrassment, expense, and ordeal and compelling the individual to live in a continuing state of anxiety and insecurity.

city, as well as enhancing the possibility that, even though innocent, the individual may be found guilty. *United States v. Starling*, 571 F.2d 934 (5th Cir. 1978); *United States v. Tammaro*, 636 F.2d 100 (5th Cir. 1981).

The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *United States v. Bizzard*, 493 F. Supp. 1084 (S.D. Ga. 1980), *aff'd*, 674 F.2d 1382 (11th Cir.), *cert. denied*, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

The double jeopardy clause bars retrial where bad faith conduct by judge or prosecutor, threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. *Chatham v. State*, 247 Ga. 95, 274 S.E.2d 473 (1981).

Prohibition against double jeopardy is not against being twice punished, but against being twice put in jeopardy. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970); *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383, *cert. denied*, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Double jeopardy addresses potential or risk of trial and conviction. — Double jeopardy clause is written in terms of potential or risk of trial and conviction, not punishment. *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383, *cert. denied*, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Multiple conviction and punishment for the same offense is prohibited. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd on other grounds*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Multiple convictions arising from successive prosecutions. — If multiple convictions arising out of a single prosecution are barred, they will likewise be barred from successive prosecution. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), *cert. denied*, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

Violation of plea agreement. — Trial court did not err in granting the state's motion to set aside defendant's plea agreement and retry defendant for the crimes covered by that agreement, as defendant breached the agreement by agreeing to tes-

tify truthfully in exchange for a lesser sentence and then falsely testified at a codefendant's trial that defendant was not involved in an armed robbery that defendant had admitted being involved in at defendant's plea agreement hearing; defendant could not argue that trying defendant on the crimes that were the subject of the plea agreement violated double jeopardy principles since defendant chose to voluntarily violate the plea agreement and a double jeopardy argument was not available to shield defendant from the consequences of a defendant's voluntary choice. *Brown v. State*, 261 Ga. App. 115, 582 S.E.2d 13 (2003).

Criminal and administrative convictions not double jeopardy. — The criminal and administrative conviction and punishment of a defendant for the same act does not constitute double jeopardy. *Culbertson v. State*, 198 Ga. App. 513, 402 S.E.2d 111 (1991).

Suspension of defendant's operator's license pursuant to administrative proceedings did not constitute former punishment foreclosing prosecution for driving under the influence. *Jackson v. State*, 218 Ga. App. 677, 462 S.E.2d 802 (1995).

Suspension of a driver's license at an administrative hearing is not punishment, nor is the hearing a prosecution for the purposes of double jeopardy. *Kirkpatrick v. State*, 219 Ga. App. 307, 464 S.E.2d 882 (1995).

Forfeiture proceedings not a bar to prosecution. — Double jeopardy did not attach to bar prosecution of a defendant on state drug charges following federal civil forfeiture proceedings because the defendant's failure to contest the forfeiture meant the defendant was not placed in jeopardy in those proceedings and, also, Georgia constitutional and statutory provisions did not bar the prosecution because they apply only to criminal proceedings, not civil proceedings. *Waye v. State*, 219 Ga. App. 22, 464 S.E.2d 19 (1995); *Lundy v. State*, 226 Ga. App. 197, 482 S.E.2d 516 (1997).

The forfeiture proceeding under O.C.G.A. § 16-13-49 is legitimately a civil sanction and does not constitute punishment for purposes of double jeopardy. *Murphy v. State*, 267 Ga. 120, 475 S.E.2d 907 (1996); *Rojas v. State*, 226 Ga. App. 688, 487

Double Jeopardy (Cont'd)**1. In General (Cont'd)**

S.E.2d 455 (1997); Cuellar v. State, 230 Ga. App. 203, 496 S.E.2d 282 (1998).

Indictment as recidivist. — A defendant's complaint that the defendant's indictment as a recidivist violated the double jeopardy clause was patently without merit. McCoy v. Newsome, 953 F.2d 1252 (11th Cir.), cert. denied, 504 U.S. 944, 112 S. Ct. 2283, 119 L. Ed. 2d 208 (1992).

Reprosecution on substantive count after acquittal on conspiracy count not barred. — Reprosecution of a defendant on a substantive count alleging violation of the federal civil rights law, after the defendant's acquittal on a conspiracy count, was not a successive prosecution barred by double jeopardy but rather, a mere continuation of the initial prosecution, and the second prosecution on the substantive count therefore did not implicate the double jeopardy clause. United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991).

Resolving reasonable doubts. — Reasonable doubts must be resolved in favor of the accused in double jeopardy cases. United States v. Starling, 571 F.2d 934 (5th Cir. 1978).

Waiver of protection. — The second provision of U.S. Const., amend. 5 "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," is a personal privilege which may be waived. Barkman v. Sanford, 162 F.2d 592 (5th Cir.), cert. denied, 332 U.S. 816, 68 S. Ct. 155, 92 L. Ed. 393 (1947).

No jeopardy unless court has jurisdiction. — Before a person can be said to have been put in jeopardy of life or limb the court in which the person was acquitted or convicted must have had jurisdiction to try the person for the offense charged. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446, (5th Cir.), cert. denied, 451 U.S. 909, 101 S. Ct. 1979, 68 L. Ed. 2d 298 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

A person is not put in jeopardy unless the court in which the person was tried the first time had jurisdiction to try the person for the charge the person now seeks to avoid. Potts v. Zant, 575 F. Supp. 374 (N.D. Ga. 1983), aff'd, 734 F.2d 526 (11th Cir. 1984),

cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610, judgment vacated, 478 U.S. 1017, 106 S. Ct. 3328, 92 L. Ed. 2d 734 (1986), (remanded for further consideration in light of Rose v. Clark, 478 U.S. 570 (1986)), aff'd, 814 F.2d 1512 (11th Cir. 1987), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

An acquittal before a court having no jurisdiction is absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. Ed. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Failure to establish venue does not bar re-trial in a court where venue is proper and proven. Kimmel v. State, 261 Ga. 332, 404 S.E.2d 436 (1991).

Failure to properly establish venue does not bar retrial, because evidence of venue does not go to the guilt or innocence of the accused, and hence it does not invoke double jeopardy concerns. Jones v. State, 272 Ga. 900, 537 S.E.2d 80 (2000).

"Jeopardy," in its constitutional and common law sense, has a strict application to criminal prosecutions only. Cushway v. State Bar, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed. 2d 71 (1970).

Only actions intended to authorize criminal punishment, as distinguished from remedial actions, subject the defendant to jeopardy. Cushway v. State Bar, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed. 2d 71 (1970).

Two proceedings not necessary for jeopardy to attach twice. — While the idea of double jeopardy normally arises from an accused's involvement in two proceedings, it is not necessary that there be two proceedings before jeopardy can attach twice. Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Pendency of a former indictment for same ground. — The pendency of a former indictment for the same offense does not provide a ground for a plea of double jeopardy because even if an accused has been arraigned and has entered a plea, the ac-

cused is not placed in jeopardy until a jury is impanelled and sworn. *Teal v. State*, 203 Ga. App. 440, 417 S.E.2d 666, cert. denied, 203 Ga. App. 908, 417 S.E.2d 666 (1992).

The pendency of a prior indictment for the same offense based on the same facts for which the defendant was arraigned and entered a plea did not place the defendant in jeopardy. The defendant did not face a repeated prosecution simply because the defendant was tried on a subsequent indictment. *Hubbard v. State*, 225 Ga. App. 154, 483 S.E.2d 115 (1997).

Use of facts underlying dismissed indictment to charge another offense. — If a prior indictment is dismissed, the government is not barred from using the underlying facts in that offense as the basis for a charge that the defendant committed a different offense. *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

Use of same witnesses and evidence at second trial not double jeopardy. — A defendant is not placed in double jeopardy just because the same witnesses testify in the second trial and much of the same evidence is introduced. *United States v. Dunbar*, 591 F.2d 1190 (5th Cir. 1979), aff'd, 611 F.2d 985 (5th Cir. 1980), cert. denied, 447 U.S. 926, 100 S. Ct. 3022, 65 L. Ed. 2d 1120 (1980).

Bifurcated trial of case in which death penalty may be imposed. — Double jeopardy clause does not prohibit the bifurcated trial of a case in which the death penalty may be imposed for the reason that although such a trial is divided into two stages, it is but one trial. *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. denied, 439 U.S. 882, 99 S. Ct. 218, 58 L. Ed. 2d 194 (1978).

With respect to cumulative sentences imposed in single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the Legislature intended. *United States v. Eley*, 723 F.2d 1522 (11th Cir. 1984).

No violation where act results in injury to two or more persons. — Upon defendant's conviction of three counts of homicide by vehicle (O.C.G.A. § 40-6-393) through a violation of O.C.G.A. § 40-6-391, driving under the influence, it was not a violation of double jeopardy to sentence defendant to 15 years for each of the homicide counts. *Cox v.*

State, 243 Ga. App. 668, 533 S.E.2d 435 (2000).

Failure to file written plea does not defeat right. — The failure to file a written plea of former jeopardy prior to trial will not defeat an accused's right to be free of multiple convictions for the criminal act. *McClure v. State*, 179 Ga. App. 245, 345 S.E.2d 922 (1986); *Dotson v. State*, 213 Ga. App. 7, 443 S.E.2d 650 (1994).

Right may be waived by failure to file written plea. — The procedural bar against double jeopardy can, at least in some circumstances, be waived by failure to assert it in writing prior to trial. *McClure v. State*, 179 Ga. App. 245, 345 S.E.2d 922 (1986).

Double jeopardy clause, by its own terms, applies to retrial for same offense. *Neal v. State*, 159 Ga. App. 450, 283 S.E.2d 671 (1981).

First conviction set aside because of error. — The double jeopardy clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting the first conviction set aside because of some error in the proceedings leading to conviction. *Allen v. State*, 262 Ga. 240, 416 S.E.2d 290 (1992).

After the defendant's conviction for possession of cocaine was reversed due to a finding that trial counsel rendered ineffective assistance for failing to object to the admission of cocaine without establishing an adequate chain of custody, and for failing to preserve objections to the jury instructions, retrial was not barred by the double jeopardy clause of Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5, as the evidence offered by the state and admitted by the trial court — whether erroneous or not — would have been sufficient to sustain a guilty verdict against the defendant. *Wilson v. State*, 271 Ga. App. 359, 609 S.E.2d 703 (2005).

Acquittal on earlier charge resolves "identity" factor. — Where the defendant's identity as the perpetrator of two separate offenses of rape was in dispute, the jury's acquittal of the defendant on the earlier charge resolved the "identity" factor in the defendant's favor and the state could not relitigate the issue in the later trial. *Lucas v. State*, 178 Ga. App. 150, 342 S.E.2d 377 (1986).

Double Jeopardy (Cont'd)**1. In General (Cont'd)**

Prosecution of prior offense after conviction of subsequent offense not barred. — The defendant was not placed in double jeopardy by a second prosecution for driving under the influence, even though the second incident occurred prior to the filing of the first accusation upon which the defendant was convicted and the state failed to allege the date of the first offense, since the pending charge stemmed from a different incident than the first. *Grogan v. State*, 179 Ga. App. 300, 346 S.E.2d 378 (1986).

Submission of same issue in successive trials. — Because, in the first trial, the trial court never dismissed the lesser-included offense but merely agreed not to submit it to the first jury as a separate count, under Georgia law the defendant was at risk, both in the first and second trials, of being convicted of violating the defendant's oath as a public officer, a lesser-included offense of the bribery count. The double jeopardy clause of the fifth amendment did not prohibit submission of that issue to the second jury, following a hung jury in the first trial. *Nave v. Helms*, 845 F.2d 963 (11th Cir. 1988).

Victim of felony dying after conviction. — If victim of felony dies as a result of that felony after defendant has already been convicted of the felony, double jeopardy considerations do not prevent subsequent prosecution for felony-murder. *Bell v. State*, 249 Ga. 644, 292 S.E.2d 402 (1982).

Dismissal of a rule nisi, without prejudice, by the court in a parole revocation case where the state is not ready to proceed is, in effect, dismissal of the court's own show-cause order to appellant, and not a ruling on the merits of the probation revocation; and, absent abuse, such action does not subject a parolee to double jeopardy nor denial of due process of law. *Brooks v. State*, 162 Ga. App. 485, 292 S.E.2d 89 (1982).

Double jeopardy clause applies to juvenile proceedings. *United States v. Whitney*, 632 F.2d 654 (5th Cir. 1980), *aff'd*, 649 F.2d 296 (5th Cir.), *cert. denied*, 450 U.S. 969, 101 S. Ct. 1490, 67 L. Ed. 2d 620 (1981); *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981); *In re J.B.W.*, 230 Ga. App. 673, 497 S.E.2d 1 (1998).

Extension of juvenile disposition order. — Provision permitting the juvenile court to

extend an order of disposition for two years does not violate constitutional prohibitions against double jeopardy since it operates to further the accomplishment of the juvenile's treatment and rehabilitation. *In re T.B.*, 268 Ga. 149, 486 S.E.2d 177 (1997).

Improper revocation of bond. — Incarceration of the defendant resulting from the improper revocation of the defendant's bond was not a bar to prosecution for vehicular homicide and related offenses. *Shaw v. State*, 225 Ga. App. 193, 483 S.E.2d 646 (1997).

Parole and probation revocation proceedings do not constitute a stage of a criminal prosecution. *United States v. Whitney*, 632 F.2d 654 (5th Cir. 1980), *aff'd*, 649 F.2d 296 (5th Cir.), *cert. denied*, 450 U.S. 969, 101 S. Ct. 1490, 67 L. Ed. 2d 620 (1981); *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981).

Permitting defendant to be prosecuted in successive actions for probation revocation based on violations that were part of the same conduct did not violate double jeopardy. *Perry v. State*, 213 Ga. App. 220, 444 S.E.2d 150 (1994).

Double jeopardy clause is not applicable to parole or probation revocation proceedings. *United States v. Whitney*, 632 F.2d 654 (5th Cir. 1980), *aff'd*, 649 F.2d 296 (5th Cir.), *cert. denied*, 450 U.S. 969, 101 S. Ct. 1490, 67 L. Ed. 2d 620 (1981); *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981).

Double jeopardy clause does not bar consideration of certain acts in probation revocation proceedings where those acts formed the basis of a previous parole revocation. *United States v. Whitney*, 632 F.2d 654 (5th Cir. 1980), *aff'd*, 649 F.2d 296 (5th Cir.), *cert. denied*, 450 U.S. 969, 101 S. Ct. 1490, 67 L. Ed. 2d 620 (1981); *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981).

Use of a crime as a ground for revocation of probation. — Double jeopardy protection does not preclude the use of a crime, for which a probationer has been acquitted by a jury, as a ground for revocation of probation. *Johnson v. State*, 240 Ga. 526, 242 S.E.2d 53, *cert. denied*, 439 U.S. 881, 99 S. Ct. 221, 58 L. Ed. 2d 194 (1978).

Double jeopardy protections inapplicable to cases of contempt. — Constitutional prohibition against double jeopardy is inapplicable to cases of contempt. *Sumbry v. Land*,

127 Ga. App. 786, 195 S.E.2d 228 (1972), cert. denied, 414 U.S. 1079, 94 S. Ct. 598, 38 L. Ed. 2d 486 (1973).

Double jeopardy protections applicable to courts martial. — The provision of U.S. Const., amend. 5, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”, is applicable to courts martial. The immediately preceding exception of “cases arising in the land or naval forces” from the requirement of an indictment, abundantly shows that such cases were in contemplation but not excepted from the other provisions. *Sanford v. Robbins*, 115 F.2d 435 (5th Cir. 1940), cert. denied, 312 U.S. 697, 61 S. Ct. 737, 85 L. Ed. 1132 (1941).

Former conviction is a defense in a court-martial. — In a court-martial, former conviction is a defense to be heard in the exercise of jurisdiction, and not a fact destroying jurisdiction. The defense must be claimed and is waived by not asserting it. When claimed and adversely determined, there is an adjudication which if not reviewed is conclusive. *Sanford v. Robbins*, 115 F.2d 435 (5th Cir. 1940), cert. denied, 312 U.S. 697, 61 S. Ct. 737, 85 L. Ed. 2d 1132 (1941).

No jeopardy protection as to character and fitness investigation for bar examination. — The investigation of the character and fitness of an applicant to take a bar examination is not a criminal proceeding, and the principle of double jeopardy has no application to such investigation. Therefore, the dismissal of an investigation, without action, when it is learned that an individual has failed to pass an examination, does not preclude a new investigation into an incident on the individual reapplication to take the examination. *Gardner v. Gwinnett Circuit Bar Ass'n*, 241 Ga. 614, 247 S.E.2d 64 (1978).

Disciplinary proceedings of State Bar of Georgia do not place accused in jeopardy. — The accused in a disciplinary proceeding by the State Bar of Georgia is not placed in jeopardy of life or liberty since the power of the grievance tribunal is limited to making findings of fact and recommendations to the court as to appropriate sanctions, and the power of the court is limited to reprimanding, suspending or disbarring. A matter is criminal only if imprisonment or the assess-

ment of a fine may follow conviction. *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed. 2d 71 (1970).

No double jeopardy can arise out of a decision in an extradition proceeding. *Broughton v. Griffin*, 244 Ga. 365, 260 S.E.2d 75 (1979).

Effect of grant of writ of habeas corpus in extradition proceedings. — While the grant of a writ of habeas corpus is generally to be given *res judicata* effect in a subsequent habeas proceeding based on the same issues of law and fact, where a previous writ of habeas corpus in an extradition proceeding was granted because of the insufficiency of the supporting documents or other technical defects which may be subsequently corrected, the prior judgment granting the writ of habeas corpus will not be *res judicata* in a subsequent extradition demand brought to avoid the technical objections fatal to the first proceeding. *Broughton v. Griffin*, 244 Ga. 367, 260 S.E.2d 75 (1979).

Use in aggravated assault case of prior incident found not to involve criminal intent constituted double jeopardy. — Introduction of evidence of a previous incident in which the defendant had attacked someone but had been found not guilty of aggravated assault by reason of insanity, admitted as a similar transaction solely to prove the defendant's motive, bent of mind, plan, scheme, course of conduct or other matters dependent on a person's state of mind, permitted the jury to determine that the defendant had made the first attack with criminal intent although the defendant had already been found by a jury to have acted without criminal intent at that time. Accordingly, the defendant was subjected to double jeopardy when that issue was permitted to be retried, and it could not be said beyond a reasonable doubt that the error did not contribute to the jury's verdict of guilty. *Riley v. State*, 181 Ga. App. 667, 353 S.E.2d 598 (1987).

Transfer to superior court following juvenile adjudication violates double jeopardy prohibition. — The attempt to transfer a juvenile to superior court after an adjudicatory hearing violates O.C.G.A. § 15-11-39(a) and places the juvenile in jeopardy twice, in violation of the fifth and fourteenth amendments. *In re T.E.D.*, 169 Ga. App. 401, 312 S.E.2d 864 (1984).

Double Jeopardy (Cont'd)**1. In General (Cont'd)**

Increase in amount of child-support payments constitutional. — Court's increase in the amount of the child-support payments pursuant to the provisions of O.C.G.A. § 42-8-34 does not constitute double punishment or jeopardy. *Hudson v. State*, 248 Ga. 397, 283 S.E.2d 271 (1981).

Evidentiary use of independent offenses is not per se prohibited where an acquittal was obtained; rather, the application of collateral estoppel requires an examination of what facts were in issue and necessarily resolved in the defendant's favor at the first trial. *Moore v. State*, 254 Ga. 674, 333 S.E.2d 605 (1985).

When plea of former conviction good against motion to dismiss. — A plea of former conviction is good as against demurrer (now motion to dismiss) only when it sets out the record of the former trial and conviction and judgment, and such a state of facts as will show that the former conviction was for the same offense for which the defendant is about to be arraigned. *Gresham v. State*, 52 Ga. App. 77, 182 S.E. 416 (1935).

Where double jeopardy raised in motion in arrest of judgment. — A motion in arrest of judgment, being narrow and restricted in its province, is limited to the face of the pleadings in determining whether a violation of the constitutional double jeopardy provisions is presented by the record. *Hall v. State*, 202 Ga. 42, 42 S.E.2d 130 (1947).

Determination as to frivolousness of double jeopardy motion. — The district courts, in any denial of a double jeopardy motion, should make written findings determining whether the motion is frivolous or nonfrivolous, and if the claim is found to be frivolous, the filing of a notice of appeal by the defendant shall not divest the district court of jurisdiction over the case. *United States v. Dunbar*, 611 F.2d 985 (5th Cir.), *aff'd* on reh'g, 614 F.2d 39 (5th Cir.), cert. denied, 447 U.S. 926, 100 S. Ct. 3022, 65 L. Ed. 2d 1120 (1980).

Proof of plea of former acquittal or conviction. — In all pleas of former acquittal or conviction, proof of the plea has to consist partly of matter of record and partly not of record. The identity of the two cases is the

part of the plea which it is the peculiar business of the evidence, which is not of record, to make out. *Gower v. State*, 71 Ga. App. 127, 30 S.E.2d 298 (1944).

Burden of proof as to double jeopardy motion. — In considering a double jeopardy motion, the district court must determine whether a defendant has tendered a prima facie nonfrivolous double jeopardy claim before shifting the burden of persuasion to the government. *United States v. Dunbar*, 611 F.2d 985 (5th Cir.), *aff'd* on reh'g, *Windsor v. State*, 122 Ga. App. 767, 178 S.E.2d 751 (1970), cert. denied, 447 U.S. 926, 100 S. Ct. 3022, 65 L. Ed. 2d 1120 (1980); *United States v. Futch*, 637 F.2d 386 (5th Cir. 1981).

Standard of proof as to frivolousness. — To satisfy the test of frivolousness it is essential to find beyond doubt and under any arguable construction, both in law and in fact of the substance of the plaintiff's claim that he would not be entitled to relief. *United States v. Bizzard*, 493 F. Supp. 1084 (S.D. Ga. 1980), *aff'd*, 674 F.2d 1382 (11th Cir.), cert. denied, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

Findings as to frivolousness. — The federal district courts, in any denial of a double jeopardy motion, should make written findings determining whether the motion is frivolous or nonfrivolous. If the claim is found to be frivolous, the filing of a notice of appeal by the defendant shall not divest the district court of jurisdiction over the case. If nonfrivolous the trial cannot proceed until a determination is made of the merits of an appeal. *United States v. Bizzard*, 493 F. Supp. 1084 (S.D. Ga. 1980), *aff'd*, 674 F.2d 1382 (11th Cir.), cert. denied, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

A timely filed plea of double jeopardy is directly appealable without resort to the interlocutory appeal procedures set forth in O.C.G.A. § 5-6-34. *Rogers v. State*, 166 Ga. App. 299, 304 S.E.2d 108 (1983).

Jury instructions as constructive amendment to indictment. — Jury instructions that altered an essential element of the offense of conspiracy to rob, and thereby broadened the possible bases for conviction by allowing the jury to convict the defendant if the defendant conspired with anyone, when the indictment alleged the defendant conspired solely with a named individual, constituted a

constructive amendment of the indictment and therefore violated the defendant's fifth amendment right to be charged by grand jury indictment. *United States v. Keller*, 916 F.2d 628 (11th Cir. 1990), cert. denied, 499 U.S. 978, 111 S. Ct. 1628, 113 L. Ed. 2d 724 (1991).

Trial court's direction to jury to continue deliberating after return of verdict not double jeopardy. — Georgia does not recognize an inconsistent verdict rule which would permit a defendant to challenge the factual findings underlying a guilty verdict on one count as inconsistent with the findings underlying a not guilty verdict on a different count. A conviction on one count and an acquittal on another related count may reflect a compromise or lenity by the jury rather than inconsistent factual conclusions and Georgia courts will generally not look behind the jury's decision to convict on certain counts and acquit on certain counts. Furthermore, a trial court's request that a jury continue deliberations after the jury failed to comply with the court's instructions concerning a mutually exclusive verdict was proper. *Easley v. State*, 262 Ga. App. 144, 584 S.E.2d 629 (2003).

Provisions of the Tort Reform Act (O.C.G.A. § 51-12-5.1), relating to punitive damages, violated the due process and equal protection clauses of the federal and state constitutions, violated the excessive fines provisions of both constitutions, and violated the double jeopardy provision of the fifth amendment to the federal constitution. *McBride v. GMC*, 737 F. Supp. 1563 (M.D. Ga. 1990).

Implied acquittal barred rewritten verdict. — Because a jury's verdict found the defendant "guilty" of only the "intent" to traffic in narcotics, a rewritten verdict for "attempt" was void for double jeopardy since the original verdict amounted to an acquittal. *Douglas v. State*, 206 Ga. App. 740, 426 S.E.2d 628 (1992).

2. Attachment of Jeopardy

Threshold question is attachment of jeopardy. — The threshold question to be addressed in any case involving double jeopardy is whether jeopardy has attached to the defendant during the proceedings which the defendant contends preclude further prose-

cution. *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

Where the Georgia Supreme Court had previously ruled that evidence seized from defendant's former car and apartment had to be suppressed, the trial court was not precluded on double jeopardy grounds from re-hearing the issue of the admissibility of the blood evidence seized from these places pursuant to fresh search warrants. As defendant had never been put to trial, jeopardy had not attached. *State v. Lejeune*, 277 Ga. 749, 594 S.E.2d 637, cert. denied, 543 U.S. 861, 125 S. Ct. 187, 160 L. Ed. 2d 103 (2004).

Before any double jeopardy considerations arise, one must have been placed in jeopardy. *United States v. Pitts*, 569 F.2d 343 (5th Cir.), cert. denied, 436 U.S. 959, 98 S. Ct. 3076, 57 L. Ed. 2d 1125 (1978).

Defendant is placed in constitutional jeopardy if, in a court of competent jurisdiction with a sufficient indictment, the defendant has been arraigned, has pled, and a jury has been impaneled and sworn. *State v. Martin*, 173 Ga. App. 370, 326 S.E.2d 558 (1985).

No jeopardy where jurisdiction lacking. — Because the defendant's original trial was before a court that lacked jurisdiction the trial court did not err in denying the defendant's plea of former jeopardy. *Jackett v. State*, 209 Ga. App. 112, 432 S.E.2d 586 (1993).

No jeopardy where prior judgment was void. — Because a uniform traffic citation was deliberately withheld from filing, and the state did not authorize or participate in the prosecution of the case, the probate court lacked authority to accept defendant's plea to the proposed charge and impose a fine, making its resulting judgment void; hence, the trial court did not err in denying defendant's plea in bar based on double jeopardy, since the probate court's void judgment could not serve as the basis for barring the subsequent indictment and prosecution of defendant in the superior court. *Roberts v. State*, 280 Ga. App. 672, 634 S.E.2d 790 (2006).

Retrial after not guilty finding returned by an unsworn jury was not barred by the double jeopardy principles under both the U.S. and Georgia Constitutions, as said jury lacked any authority to pass upon any of the issues at trial, and hence, could not make any determinations whatsoever as to the

Double Jeopardy (Cont'd)**2. Attachment of Jeopardy (Cont'd)**

defendant's guilt or innocence. *Spencer v. State*, 281 Ga. 533, 640 S.E.2d 267 (2007).

Trial in county other than where crime occurred. — If a defendant is tried in one county in a court having jurisdiction of the offense, but the crime occurred in another county, no jeopardy attaches. *Schiefelbein v. State*, 258 Ga. 623, 373 S.E.2d 354 (1988), cert. denied, 489 U.S. 1026, 109 S. Ct. 1156, 103 L. Ed. 2d 215 (1989).

When jeopardy attaches in jury trial. — For a jury trial, jeopardy attaches when that body is empaneled and sworn. *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 9 S. Ct. 1705, 26 L. Ed. 2d 71 (1970); *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied sub nom. *Calley v. Hoffman*, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976); *White v. State*, 143 Ga. App. 315, 238 S.E.2d 247 (1977); *United States v. Pitts*, 569 F.2d 343 (5th Cir.), cert. denied, 436 U.S. 959, 98 S. Ct. 3076, 57 L. Ed. 2d 1125 (1978); *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980); *United States v. Futch*, 637 F.2d 386 (5th Cir. 1981).

Defendants were not placed in jeopardy before the trial court granted the state's Batson challenge and dismissed a jury that was selected to try them on charges of armed robbery and possession of a firearm during the commission of a crime because the jury was never empaneled and sworn, and the trial court did not err when it denied defendants' plea in bar and proceeded with trial. *Garlington v. State*, 268 Ga. App. 264, 601 S.E.2d 793 (2004).

When jeopardy attaches in bench trial. — For a bench trial, jeopardy attaches when the judge begins to receive evidence. *White v. State*, 143 Ga. App. 315, 238 S.E.2d 247 (1977); *United States v. Pitts*, 569 F.2d 343 (5th Cir.), cert. denied, 436 U.S. 959, 98 S. Ct. 3076, 57 L. Ed. 2d 1125 (1978); *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

When first jeopardy is complete. — First jeopardy is complete on the swearing of a jury or on the submission of evidence if the trial is stopped for insufficient cause. *Sanford v. Robbins*, 115 F.2d 435 (5th Cir. 1940), cert. denied, 312 U.S. 697, 61 S. Ct. 737, 85 L. Ed. 1132 (1941).

Amendment of accusation. — Where amendment of accusation was made in open court prior to the selection of the jury, there was no violation of double jeopardy even though the defendant was not served with the amended accusation until after the jury was selected. *Reed v. State*, 205 Ga. App. 209, 422 S.E.2d 15, cert. denied, 205 Ga. App. 901, 422 S.E.2d 15 (1992).

Jeopardy does not attach at a probation revocation hearing so as to invoke the double jeopardy clause. *Smith v. State*, 171 Ga. App. 279, 319 S.E.2d 113 (1984).

Admission of crimes at juvenile transfer hearing. — Jeopardy did not attach so as to preclude further proceedings against a juvenile for crimes he admitted at a transfer hearing, where the juvenile court accepted the admission for the limited purpose of determining whether the case should be transferred to superior court. *In re M.E.J.*, 260 Ga. 805, 401 S.E.2d 254 (1991).

Federal civil forfeiture actions. — Double jeopardy does not apply in criminal trial where federal civil forfeiture judgment was entered after criminal convictions because the double jeopardy clause reaches only subsequent punishments, not the initial punishment imposed for the criminal act. *Durfee v. State*, 221 Ga. App. 211, 471 S.E.2d 32 (1996).

Carjacking and robbery. — Defendant's conviction of hijacking a motor vehicle and armed robbery were properly entered, despite defendant's contention that the state used the same facts to establish both offenses, and that defendant should have only been convicted of and sentenced for one of the offenses, as: (1) hijacking a motor vehicle was considered a separate offense and did not merge with any other offense; (2) O.C.G.A. § 16-5-44.1 superseded the double jeopardy provisions of O.C.G.A. § 16-1-7 in motor vehicle hijacking cases; (3) O.C.G.A. § 16-5-44.1(d) did not violate the prohibition against double jeopardy, since the double jeopardy clause of the Georgia Constitution did not prohibit additional punishment for a separate offense which the legislature deemed to warrant separate sanction; and (4) defendant failed to offer any evidence in support of defendant's allegation that O.C.G.A. § 16-5-44.1(d) otherwise violated defendant's double jeopardy rights. *Holman v. State*, 272 Ga. App. 890, 614 S.E.2d 124 (2005).

3. Prosecution by More Than One Sovereign

When multiple prosecution not prohibited. — Double jeopardy provisions of the Constitution do not prohibit multiple prosecution for the same act if that act constituted an offense against more than one sovereign. *Dorsey v. State*, 237 Ga. 876, 230 S.E.2d 307 (1976).

Double jeopardy provision of U.S. Const., amend. 5 does not bar federal prosecution despite a previous conviction or acquittal in the state courts based on the same act. *Jolley v. United States*, 232 F.2d 83 (5th Cir. 1956).

An act denounced as a crime by both national and state sovereignties may be punished by each without violation of the double jeopardy provision. *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).

Person may not be convicted by both the state and a municipality for the same crime. — The test for determining if there is a fatal identity between the crime and the ordinance is whether the ordinance contains an ingredient or element, essential to the city's peace but not essential to the state offense, or if the offense created by the ordinance lacks some element essential to the state crime. *Barrett v. State*, 123 Ga. App. 210, 180 S.E.2d 271 (1971).

Nor may same state prosecute both a felony and lesser included misdemeanor. — Prosecutions of the same defendant in different courts of the same state, one prosecution being for a felony and the other being for a misdemeanor which was included in the felony offense, must be viewed as the acts of a single sovereign under the double jeopardy clause. *Brock v. State*, 146 Ga. App. 78, 245 S.E.2d 442 (1978).

Prosecution on state and federal charges of murder and kidnapping held proper. — Since the facts necessary to prove the federal charges of kidnapping and interstate travel with intent to commit murder for extortion are different from the facts necessary to prove the Georgia charges of murder and aggravated assault, there was no violation of Georgia's statutes barring multiple prosecutions, O.C.G.A. §§ 16-1-7, 16-1-8, nor the constitutional prohibition against double jeopardy, when the defendants were prosecuted in federal and state courts for all of the above offenses. *Satterfield v. State*, 256 Ga.

593, 351 S.E.2d 625 (1987).

Multi-county crime spree. — Where a criminal defendant goes on a multi-county crime spree, the double jeopardy clause does not preclude successive prosecutions in separate counties for separate crimes arising out of a single criminal episode — even if they have factual elements in common — where they are not the “same offense” as a matter of fact or of law. *Potts v. State*, 261 Ga. 716, 410 S.E.2d 89 (1991).

Prosecution of lesser included offense in different county. — A prosecution for a lesser included offense, which includes the underlying felony in a felony murder case, after a conviction for the greater offense in a different county violates O.C.G.A. § 16-1-6, Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, and the fifth and fourteenth amendments to the United States Constitution. *Perkinson v. State*, 273 Ga. 491, 542 S.E.2d 92 (2001).

4. Determination as to Whether Same Offenses are Involved

Prohibition against double jeopardy forbids double punishment for what is the same offense, not eo nomine, but the same transaction. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied sub nom. *Calley v. Hoffman*, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Double jeopardy clause's prohibition of multiple punishments for the same offense is not violated as long as the “same evidence” test is satisfied. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).

To support a claim of double jeopardy, a defendant must show that the two offenses charged are the same in law and fact. *United States v. Futch*, 637 F.2d 386 (5th Cir. 1981); *United States v. Henry*, 661 F.2d 894 (5th Cir. 1981), cert. denied, 455 U.S. 992, 102 S. Ct. 1619, 71 L. Ed. 2d 853 (1982).

Doctrine of collateral estoppel is a part of U.S. Const., amend. 5's guarantee against double jeopardy. *Clark v. State*, 144 Ga. App. 69, 240 S.E.2d 270 (1977).

Double Jeopardy (Cont'd)**4. Determination as to Whether Same Offenses are Involved (Cont'd)**

Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in a future lawsuit. In a criminal case it is a protection embodied in the fifth amendment guarantee against double jeopardy. *United States v. Mulherin*, 710 F.2d 731 (11th Cir.), cert. denied, 464 U.S. 964, 104 S. Ct. 402, 78 L. Ed. 2d 343 (1983), cert. denied, 465 U.S. 1034, 104 S. Ct. 1305, 79 L. Ed. 2d 703 (1984).

But the concept of collateral estoppel is distinct from double jeopardy in the sense that the traditional bar of double jeopardy prohibits the prosecution of the crime itself, whereas collateral estoppel, in a more modest fashion, simply forbids the government from relitigating certain facts in order to establish the fact of the crime. *United States v. Mulherin*, 710 F.2d 731 (11th Cir.), cert. denied, 464 U.S. 964, 104 S. Ct. 402, 78 L. Ed. 2d 343 (1983), cert. denied, 465 U.S. 1034, 104 S. Ct. 1305, 79 L. Ed. 2d 703 (1984).

Second prosecution for the same offense occurs when the state attempts to relitigate issues of fact necessarily determined in a defendant's favor at a prior trial. *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).

Test of whether collateral estoppel bars later prosecution is whether the jury could not have rationally based its verdict on any other issue than the one the defendants seek to foreclose. That the jury may have based its verdict on this issue is not enough; the defendant has the burden to show that an issue was necessarily determined in the defendant's favor in the former trial. *United States v. Mulherin*, 710 F.2d 731 (11th Cir.), cert. denied, 464 U.S. 964, 104 S. Ct. 402, 78 L. Ed. 2d 343 (1983), cert. denied, 465 U.S. 1034, 104 S. Ct. 1305, 79 L. Ed. 2d 703 (1984).

Although collateral estoppel is a corollary of the double jeopardy clause, a defendant may not invoke collateral estoppel unless the facts sought to be foreclosed were determined in the defendant's favor in the prior

trial. *Humphrey v. United States*, 888 F.2d 1546 (11th Cir. 1989).

Even assuming that the defendant's position that O.C.G.A. § 40-6-395 set out two distinct offenses, wilful failure to stop and fleeing and eluding a police officer, the defendant was tried, first in a bench trial and again on remand after an appeal, on an accusation charging the defendant with fleeing and eluding an officer and was found guilty and sentenced both times for fleeing and eluding; hence, because the defendant was not tried on the offense of wilful failure to stop, the defendant's contention that double jeopardy considerations prohibited a jury trial on that charge was moot. *Harbuck v. State*, 280 Ga. 775, 631 S.E.2d 351 (2006).

Multiple convictions and punishments for single crime improper. — Appeals court agreed that because there was only one homicide victim, only one life sentence, and not three, could be imposed, because such improperly subjected the defendant to multiple convictions and punishments for one crime. *Turner v. State*, 281 Ga. 487, 640 S.E.2d 25 (2007).

Prosecution under more than one statute not barred where each requires element of proof which other does not. — The test is not whether the defendant has already been tried for the same act, but whether the defendant has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact that the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. *Ballerini v. Aderholt*, 44 F.2d 352 (5th Cir. 1930); *Brock v. State*, 146 Ga. App. 78, 245 S.E.2d 442 (1978); *United States v. Dunbar*, 591 F.2d 1190 (5th Cir. 1979); *United States v. Cowart*, 595 F.2d 1023 (5th Cir. 1979); *State v. Burroughs*, 244 Ga. 288, 260 S.E.2d 5 (1979); *United States v. Caston*, 615 F.2d 1111 (5th Cir.), cert. denied, 449 U.S. 831, 101 S. Ct. 99, 66 L. Ed. 2d 36 (1980); *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *United States v. Tammamro*, 636 F.2d 100 (5th Cir. 1981).

A defendant may properly be prosecuted under the general federal conspiracy statute and a specific conspiracy statute so long as

each statute requires proof of an element not required by the other. *United States v. Lanier*, 920 F.2d 887 (11th Cir.), cert. denied, 502 U.S. 872, 112 S. Ct. 208, 116 L. Ed. 2d 166 (1991).

Lesser or greater included offense is the same offense for double jeopardy purposes. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

By charging a lesser offense in accordance with O.C.G.A. § 16-1-6, the trial court did not permit the jury to convict defendant in a manner not alleged in the indictment in violation of defendant's due process rights. *Rupnik v. State*, 273 Ga. App. 34, 614 S.E.2d 153 (2005).

Conviction for greater offense bars conviction for lesser offense. — A person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser included offense, that is, an offense consisting solely of one or more of the elements of the crime for which the person has already been convicted. *Ballerini v. Aderholt*, 44 F.2d 352 (5th Cir. 1930); *State v. Burroughs*, 246 Ga. 393, 271 S.E.2d 629 (1980).

Defendant's conviction of voluntary manslaughter under O.C.G.A. § 16-5-2 was improper, as the defendant was also convicted of felony murder under O.C.G.A. § 16-5-1(c) for the same transaction, and this would have subjected the defendant to multiple convictions and punishments for one crime, which would have placed the defendant in double jeopardy in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5. *Lawson v. State*, 280 Ga. 881, 635 S.E.2d 134 (2006).

Conviction of lesser included offense bars subsequent trial on greater offense. *State v. Burroughs*, 246 Ga. 393, 271 S.E.2d 629 (1980).

In order for the rule that jeopardy for an offense ends after a jury convicts a defendant of a lesser offense to apply, there must be an unambiguous conviction of the lesser offense, and the trial court must have given the jury full opportunity to return a verdict on the greater charge. *Potts v. State*, 258 Ga. 430, 369 S.E.2d 746 (1988), cert. denied, 489 U.S. 1068, 109 S. Ct. 1347, 103 L. Ed. 2d 815 (1989).

Conviction of lesser offense amounts to implicit acquittal of greater offense. — If a defendant is tried on more than one count, and the jury returned no verdict on the greater offense, but convicted on a lesser included offense, the defendant may not be retried for the greater offense after the conviction is overturned, because the jury had implicitly acquitted the defendant of that greater offense. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970).

Reversal of conviction for greater offense does not bar retrial for that offense. — If there is a conviction of two crimes in a single prosecution, one of which is included in the other, and the defendant obtains a reversal of the major crime for lack of jurisdiction, the remaining conviction of the lesser crime does not bar a retrial on the major crime. In the event the defendant is then convicted on retrial for the major crime, an invalidation of the defendant's conviction of the lesser included offenses for the same conduct would be authorized in appropriate proceedings. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

No merger absent conviction for greater offense. — No merger of greater and lesser included offenses when there is no conviction for the greater offense. *Hill v. State*, 207 Ga. App. 65, 426 S.E.2d 915 (1993).

Where second indictment may be proved under first, offenses are same for double jeopardy purposes. — In determining what is the same offense for the purposes of U.S. Const., amend. 5, the test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be. *Bertsch v. Snook*, 36 F.2d 155 (5th Cir. 1929); *Ballerini v. Aderholt*, 44 F.2d 352 (5th Cir. 1930).

Evidence insufficient to convict under second indictment. — If the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of an additional fact would be necessary to constitute the offense charged in the second, the former conviction or acquittal could not be pleaded in bar to the second indictment. *Price v. State*, 76 Ga. App. 108, 45 S.E.2d 84 (1947).

Double Jeopardy (Cont'd)**4. Determination as to Whether Same Offenses are Involved (Cont'd)****Where counts charge same offense and maximum sentence is imposed for one. —**

Where counts of an indictment to which the defendant pleads guilty charge the same offense, and the maximum imprisonment authorized for a single conspiracy was imposed on one count, imposition of an additional sentence of imprisonment on the second count is void. *Bertsch v. Snook*, 36 F.2d 155 (5th Cir. 1929).

Double jeopardy clause is not violated by treating single agreement as two offenses where Congress intends to impose multiple punishment, as where there is an agreement to trade firearms for drugs and defendants are charged under two separate conspiracy statutes, a drug conspiracy under 21 U.S.C. § 846 and a firearm conspiracy under 18 U.S.C. § 371. *United States v. Mulherin*, 710 F.2d 731 (11th Cir.), cert. denied, 464 U.S. 964, 104 S. Ct. 402, 78 L. Ed. 2d 343 (1983), cert. denied, 465 U.S. 1034, 104 S. Ct. 1305, 79 L. Ed. 2d 703 (1984).

Underlying felony in felony murder. — As felony murder is defined under Georgia law, the underlying felony is a lesser included offense of felony murder and thus the same offense for double jeopardy purposes. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Previous conviction for underlying felony bars prosecution for felony murder. — Once the state tried and convicted petitioner for kidnapping, it would be barred from prosecuting him for felony murder only if the underlying felony upon which that prosecution was based were that same kidnapping. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Bifurcated trial of malice murder and felony murder not double jeopardy. — Double jeopardy principles were used to bar prosecution of a defendant in a second proceeding after the defendant was tried on a charge in a former proceeding, but defendant's trial on a charge of felony murder in a case where the trial was bifurcated and

defendant was first tried on a malice murder charge did not violate defendant's double jeopardy rights since the delay between the proceedings did not constitute the termination of the prosecution and, thus, trial on the malice murder charge did not involve a former prosecution; rather, the charges were different phases of the same trial, and, thus, the fact that the malice murder charge had already been tried did not bar a trial on the felony murder charge. *Jones v. State*, 276 Ga. 663, 581 S.E.2d 546 (2003).

No exposure to double jeopardy. — Trial court did not err in allowing the manufacturing methamphetamine offense to proceed to the jury under O.C.G.A. § 16-13-30(b); despite the poor wording of the caption of the count at issue, which stated "trafficking in methamphetamine," because the body of the count clearly charged the defendant with manufacturing methamphetamine, and the defendant failed to show how the defendant was misled by the presentment, nor did it expose the defendant to double jeopardy in violation of U.S. Const., amend. 5 or Ga. Const. 1983, Art. I, Sec. I, Para. XVIII. *Gentry v. State*, 281 Ga. App. 315, 635 S.E.2d 782 (2006), cert. denied, 2007 Ga. LEXIS 78 (Ga. 2007).

Malice murder and kidnapping are not the same offense for double jeopardy purposes under Georgia law, even though they involve the same transaction and considerably overlap each other factually. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

Malice murder and kidnapping with bodily injury have separate and distinct elements and require proof of different facts. Thus, even if they involve the same transaction and considerably overlap each other factually, they are not the "same offense" under the double jeopardy clause. *Potts v. Zant*, 575 F. Supp. 374 (N.D. Ga. 1983), aff'd, 734 F.2d 526 (11th Cir. 1984), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610, judgment vacated, 478 U.S. 1017, 106 S. Ct. 3328, 92 L. Ed. 2d 734 (1986) (remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570 (1986)), aff'd, 814 F.2d 1512 (11th Cir. 1987), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

Hijacking and armed robbery. — Defendant's separate convictions for armed robbery and hijacking a motor vehicle did not violate the prohibitions against double jeopardy as O.C.G.A. § 16-5-44.1(d) provided that hijacking a motor vehicle was a separate offense and did not merge and it therefore superseded the state statutory double jeopardy provision; further, the Georgia Constitution did not prohibit additional punishment for a separate offense that the Georgia legislature had deemed to warrant a separate sanction; the defendant failed to show how the hijacking statute violated the federal double jeopardy clause. *Mullins v. State*, 280 Ga. App. 689, 634 S.E.2d 850 (2006).

Essence of a double jeopardy determination in a conspiracy case is whether there was more than one agreement. *United States v. Tammaro*, 636 F.2d 100 (5th Cir. 1981).

Factors to be considered in concluding that events charged in two indictments were part of a single agreement: (1) time; (2) persons acting as coconspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place. *United States v. Futch*, 637 F.2d 386 (5th Cir. 1981).

Test for existence of unified conspiracy. — The usual tests for determining the existence of a unified conspiracy are whether: the participants shared a continuing, common goal; the operations of the conspiracy followed an unbroken and repetitive pattern; and the cast of coconspirators remained the same. *United States v. Futch*, 637 F.2d 386 (5th Cir. 1981).

Central question in narcotics conspiracies is existence of larger unified conspiracy. — The question that is central to double jeopardy claims arising in the context of a narcotics conspiracy is whether the particular transactions alleged in the indictment were within a larger unified conspiracy. *United States v. Futch*, 637 F.2d 386 (5th Cir. 1981); *United States v. Henry*, 661 F.2d 894 (5th Cir. 1981), cert. denied, 455 U.S. 992, 102 S. Ct. 1619, 71 L. Ed. 2d 853 (1982).

Conspiracy to commit a crime and the crime itself are separate offenses and a

defendant may be tried in separate trials for both. *United States v. Tallant*, 547 F.2d 1291 (5th Cir.), cert. denied, 434 U.S. 889, 98 S. Ct. 262, 54 L. Ed. 2d 174 (1977).

Since whatever evidence is introduced in a trial on a substantive offense, later prosecution for conspiracy based upon the same evidence cannot amount to a double jeopardy violation because the conspiracy and the substantive offense are distinct, where the situation was reversed, the first charges were for conspiracy and the pending charges involved substantive crimes, there was no double jeopardy violation. *United States v. Eley*, 968 F.2d 1143 (11th Cir. 1992).

Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy. *United States v. Tallant*, 547 F.2d 1291 (5th Cir.), cert. denied, 434 U.S. 889, 98 S. Ct. 262, 54 L. Ed. 2d 174 (1977).

Conviction and punishment for conspiracy as well as aiding and abetting does not violate the double jeopardy clause because the offenses are separate and distinct, even where the evidence adduced serves "double duty" in establishing the elements of both offenses. *United States v. Cowart*, 595 F.2d 1023 (5th Cir. 1979).

Attempt and conspiracy. — Prosecuting a defendant on attempt and conspiracy charges does not violate double jeopardy even though both offenses arose out of a single narcotics transaction. There can be no double jeopardy bar, therefore, to punishing a defendant for both crimes. *United States v. Cochran*, 883 F.2d 1012 (11th Cir. 1989).

Possession of cocaine and conspiracy to sell and distribute. — Charging the defendant with conspiracy to sell and distribute cocaine after the defendant had pled guilty to a substantive crime, possession of cocaine, did not constitute double jeopardy because the second prosecution required proof of facts not required on the prior prosecution. *Rogers v. State*, 201 Ga. App. 426, 411 S.E.2d 289 (1991).

Disorderly conduct conviction precludes retrial for battery. — An individual may not be retried for a simple battery based upon a striking and kicking incident for which the individual was convicted of disorderly conduct. *State v. Burroughs*, 246 Ga. 393, 271 S.E.2d 629 (1980).

Trial on an indictment for simple battery

Double Jeopardy (Cont'd)**4. Determination as to Whether Same Offenses are Involved (Cont'd)**

and criminal damage to property in the second degree constituted double jeopardy where these charges were based on the same facts underlying defendant's plea and conviction for disorderly conduct. *Henderson v. State*, 206 Ga. App. 642, 426 S.E.2d 264 (1992).

Crimes of illegal possession of heroin and illegal sale of heroin. — As a matter of law, the crime of illegal possession of heroin is not included in the crime of illegal sale of heroin for the purposes of double jeopardy and multiple prosecution. *Wilson v. Hopper*, 234 Ga. 859, 218 S.E.2d 573 (1975).

Possession of a controlled substance is separate and distinct from the conduct required to establish the offense of driving under the influence of intoxicants, although the offenses may arise out of the same conduct, i.e., driving. *Rogers v. State*, 166 Ga. App. 299, 304 S.E.2d 108 (1983).

Acquittal of use of obscene and vulgar language no bar to prosecution for soliciting for prostitution. — After defendant's acquittal on charge of communicating to a virtuous female by writing obscene and vulgar language and an improper proposal under former Code 1933, § 26-6303 (see O.C.G.A. § 16-11-39.1), the defendant is not placed in double jeopardy by being placed on trial for charge of soliciting another for the purpose of prostitution under former Code 1933, § 26-6201 (see O.C.G.A. § 16-6-12), on grounds that the two cases are based on the same transaction. *Price v. State*, 76 Ga. App. 108, 45 S.E.2d 84 (1947).

Revocation of probation for offense of escape and criminal prosecution for the same offense is not double jeopardy. *Aldridge v. State*, 155 Ga. App. 916, 273 S.E.2d 656 (1980).

Convictions for both driving under the influence and public drunkenness not barred. — Where convictions for both driving under the influence and public drunkenness are not based upon proof of the same facts, the defendant has no viable claim of double jeopardy under the United States Constitution; moreover, the fact that both crimes arose from the same intoxication has no bearing on this issue. *Fuller v. State*, 169

Ga. App. 468, 313 S.E.2d 745 (1984).

DUI and unlawful blood alcohol level. — Where charges of driving under the influence of alcohol (O.C.G.A. § 40-6-391(a)(1)) and driving with an unlawful blood alcohol level (O.C.G.A. § 40-6-391(a)(4)) were based on the same conduct, they merged under the substantive double jeopardy rule, requiring vacating of conviction of latter offense. *Hoffman v. State*, 208 Ga. App. 574, 430 S.E.2d 886 (1993).

Burglary and robbery. — No double jeopardy violation occurred when defendant was convicted of and sentenced for both burglary and robbery. *Luke v. State*, 171 Ga. App. 201, 318 S.E.2d 833 (1984).

Malice murder and armed robbery. — Conviction of a defendant for armed robbery, a lesser included offense of the malice murder for which the defendant was also convicted, subjected the defendant to double jeopardy. *Huynh v. King*, 95 F.3d 1052 (11th Cir. 1996).

Rape and battery. — Defendant's right to be free from double jeopardy was not violated by rape prosecution in second trial after defendant was acquitted in a first trial on a charge of battery, as the facts used to prove the rape charge in the second trial were distinct from the factual allegations cited in support of the battery charge in the first trial, and, thus, the state was not barred by double jeopardy from retrying defendant on the rape charge in the second trial after the trial court declared a mistrial on that charge in the first trial. *Dawson v. State*, 260 Ga. App. 824, 581 S.E.2d 371 (2003).

Where defendant was charged with five traffic violations and disorderly conduct, a guilty plea having been accepted for the latter, trial court's denial of defendant's plea of former jeopardy to preclude prosecution for the traffic violations was not in error where the offense of disorderly conduct for which the defendant was earlier tried did not arise from the same transaction as the five traffic offenses with which the defendant was also charged, as they were completed at a different time and at different locations; therefore, prosecution for the traffic offenses did not constitute double jeopardy for defendant. *Boyette v. State*, 172 Ga. App. 683, 324 S.E.2d 540 (1984).

Carjacking and armed robbery. — Defendant's prosecution for a car hijacking was

not barred by the double jeopardy clause as the refusal to admit evidence of the car hijacking as similar transaction evidence at defendant's trial for armed robbery was based on the lack of similarity between the car hijacking and the armed robbery incidents, not the lack of evidence of defendant's culpability for the car hijacking. *Syas v. State*, 273 Ga. App. 161, 614 S.E.2d 803 (1992).

Separate proof for traffic violations. — Where defendant could not have been convicted for aggravated assault and criminal damage to property under prior citations for traffic offenses requiring separate proof of facts, no double jeopardy attached. *Cates v. State*, 206 Ga. App. 694, 426 S.E.2d 576 (1992).

RICO prosecution based on same evidence as prior conspiracy and drug convictions. — No double jeopardy violation existed in an indictment charging the defendants with substantive and conspiracy violations of the federal Racketeer Influenced Corrupt Organizations Act (RICO) based on the use of the same proof as prior federal conspiracy and substantive drug convictions. *United States v. Boldin*, 772 F.2d 719 (11th Cir. 1985), modified, 779 F.2d 618 (11th Cir.), cert. denied, 475 U.S. 1098, 106 S. Ct. 1498, 89 L. Ed. 2d 899, cert. denied, 475 U.S. 1048, 106 S. Ct. 1269, 89 L. Ed. 2d 577, cert. denied, 475 U.S. 1110, 106 S. Ct. 1520, 89 L. Ed. 2d 917 (1986).

Separate instances of aggravated stalking. — The prosecution of the defendant in Fulton County for aggravated stalking was not barred by defendant's previous conviction in Cobb County for aggravated stalking since, although the offenses pertained to stalking of the same victim, each prosecution pertained to events that occurred on different days and in different places. *Daker v. State*, 248 Ga. App. 657, 548 S.E.2d 354 (2001), cert. denied, 535 U.S. 1085, 122 S. Ct. 1977, 152 L. Ed. 2d 1035 (2002).

Firearm charge and underlying felony. — Cumulative punishment for armed robbery and carrying and using a firearm in the commission of a felony does not subject a defendant to double jeopardy. *Jackson v. United States*, 976 F.2d 679 (11th Cir. 1992).

Defendant's conviction of offense of possession of a firearm by a convicted felon was not precluded by collateral estoppel where

he was acquitted of two other charges (aggravated assault and possession of a firearm during commission of a crime against a person) arising out of the same incident; the jury could have concluded that the defendant had the gun but did not assault or attempt to rob the victim with it. *Clark v. State*, 194 Ga. App. 280, 390 S.E.2d 425 (1990).

Financial transaction card theft not lesser included offense of financial transaction card fraud. — Financial transaction card theft, O.C.G.A. § 16-9-31, is not a lesser included offense of financial transaction card fraud, O.C.G.A. § 16-9-33, thus, the defendant's prior conviction for the former offense did not preclude prosecution for the latter. *Sword v. State*, 232 Ga. App. 497, 502 S.E.2d 334 (1998).

Defendant has burden of proving plea of former jeopardy. — In order to sustain a plea of former jeopardy, it is always incumbent upon the defendant to plead and prove that the transaction charged in the second indictment is the same as a matter of fact as that charged in the first indictment under which the defendant was put in jeopardy. *Waters v. State*, 112 Ga. App. 201, 144 S.E.2d 477 (1965).

What defendant must prove in support of double jeopardy plea. — In addition to pleading and proving that the transactions are the same as a matter of fact, it is also necessary in order to sustain a double jeopardy plea to plead and prove: (a) that the transaction charged in the second indictment is an offense that is identical in law with that charged in the first indictment, or else that under the actual terms of the first indictment proof of the second offense was made necessary as an essential ingredient of the offense as first charged; (b) that the transaction charged in the second indictment is an offense that represents either a major or minor grade of the same offense, of which the defendant might be convicted under an indictment for the major offense; or (c) if the transactions are the same as a matter of fact, even though the offenses be not identical or in effect identical as a matter of law, so as to come within the scope of the preceding items (a) or (b), the defendant may nevertheless, under the principles of res judicata, which may be included in a plea under the broader doctrine of former jeopardy.

Double Jeopardy (Cont'd)**4. Determination as to Whether Same Offenses are Involved (Cont'd)**

ardly, show that the defendant's acquittal on the first charge was necessarily controlled by the determination of some particular issue or issues of fact which would preclude the defendant's conviction of the second charge. *Waters v. State*, 112 Ga. App. 201, 144 S.E.2d 477 (1965).

If defendant establishes a prima facie claim the burden shifts to the government to prove by a preponderance of the evidence that the indictments involved in fact charge separate offenses. *United States v. Futch*, 637 F.2d 386 (5th Cir. 1981).

Operation of bar to multiple convictions where several crimes arising from one transaction are tried together. — The bar to multiple convictions usually arises where several crimes arising out of one criminal transaction are tried at the same time. In such cases the bar does not operate until after the verdicts. Under Georgia law it bars the conviction and therefore the punishment of all crimes which are as a matter of law or a matter of fact included in a major crime for which the defendant has been convicted. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977).

5. Imposition of Other Penalties for Same Act

No bar to imposition of civil and criminal penalties for same act. — The prohibition against putting any person twice in jeopardy of life or limb for the same offense applies only to twice subjecting an individual to criminal processes for the same offense against the same sovereign. There is no bar to the sovereign's imposing both civil and criminal penalties for the same act. *Alexander v. State*, 129 Ga. App. 395, 199 S.E.2d 918 (1973); *Johnson v. State*, 142 Ga. App. 124, 235 S.E.2d 550 (1977), aff'd, 240 Ga. 526, 242 S.E.2d 53, cert. denied, 439 U.S. 881, 99 S. Ct. 221, 58 L. Ed. 2d 194 (1978).

Revocation of business license. — Revocation of a business license to operate a health spa following the owner's plea of nolo contendere to a sexual offense was not double jeopardy. *Moser v. Richmond County Bd.*

of Comm'rs, 263 Ga. 63, 428 S.E.2d 71 (1993).

Suspension of a driver's license at an administrative hearing was not punishment, nor was the hearing a prosecution for the purposes of double jeopardy, thus, a subsequent criminal prosecution for driving under the influence was not barred. *Nolen v. State*, 218 Ga. App. 819, 463 S.E.2d 504 (1995), cert. denied, 518 U.S. 1018, 116 S. Ct. 2550, 135 L. Ed. 2d 1070 (1996); *McDaniel v. State*, 224 Ga. App. 5, 479 S.E.2d 779 (1996).

Payment of the fee required for reinstatement of a driver's license after it was suspended following an arrest for driving under the influence was not punishment and did not bar a subsequent prosecution for driving under the influence. *Thompson v. State*, 229 Ga. App. 526, 494 S.E.2d 306 (1997); *Morgan v. State*, 229 Ga. App. 861, 495 S.E.2d 138 (1998).

Ten-day suspension from school following defendant's arrest and indictment for armed robbery did not rise to the level of "punishment" for double jeopardy purposes. *Clark v. State*, 220 Ga. App. 251, 469 S.E.2d 250 (1996).

A civil forfeiture proceeding in a drug case was not a criminal prosecution for purposes of double jeopardy. *Murphy v. State*, 219 Ga. App. 474, 465 S.E.2d 497 (1995), aff'd, 267 Ga. 120, 475 S.E.2d 907 (1996).

A civil federal forfeiture action was neither punishment nor criminal for purposes of the double jeopardy clause. *Battista v. State*, 223 Ga. App. 369, 477 S.E.2d 665 (1996).

Criminal punishment and administrative punishment for same act. — Imposition of criminal punishment and administrative punishment for the same act does not constitute a violation of the double jeopardy prohibition. *Horne v. Hopper*, 238 Ga. 140, 231 S.E.2d 735 (1977).

A prisoner's convictions for certain criminal acts and prison administrative punishment for the same acts do not constitute double jeopardy. *Minton v. State*, 167 Ga. App. 114, 305 S.E.2d 812 (1983).

The constitutional prohibition against double jeopardy is not violated when a prisoner is subjected to executive department punishment for an act committed while a

prison inmate and is then prosecuted and convicted in a court of law for having committed a crime even though the crime and the act for which administrative punishment is assessed are one and the same. *Flowers v. State*, 166 Ga. App. 740, 306 S.E.2d 16 (1983).

Pretrial detentions. — Where defendant's pretrial detentions were not to punish defendant for two murders or the result of prosecutorial misconduct, the United States Constitution's fifth amendment double jeopardy clause did not bar the state's prosecution for the murders and related crimes. *Agee v. State*, 276 Ga. 536, 579 S.E.2d 730 (2003).

Termination of a police officer for threatening and attempting to choke the victim did bar prosecution of the officer for the same offenses. *Pennyman v. State*, 222 Ga. App. 779, 476 S.E.2d 71 (1996).

Separate conspiracy trial considering quantity of drugs sold. — Where the Northern District Court considered the quantities of drugs which were the object of the prosecution in the Southern District in determining the Northern District sentence for a conspiracy conviction, there was no double jeopardy violation for criminal conduct relating to those quantities of drugs because Congress may punish separately each step leading to the consummation of a transaction. *United States v. Eley*, 968 F.2d 1143 (11th Cir. 1992).

Consideration of murder in federal sentencing not a bar to state prosecution. — Double jeopardy did not bar the state from prosecuting defendant for murder even though the federal district court had considered the murder in its sentencing of defendant for bank robbery. *Nance v. State*, 266 Ga. 816, 471 S.E.2d 216 (1996), cert. denied, 519 U.S. 1043, 117 S. Ct. 615, 136 L. Ed. 2d 539 (1996).

Proceeding to revoke a probated sentence is not a criminal proceeding. *Johnson v. State*, 142 Ga. App. 124, 235 S.E.2d 550 (1977), aff'd, 240 Ga. 526, 242 S.E.2d 53, cert. denied, 439 U.S. 881, 99 S. Ct. 221, 58 L. Ed. 2d 194 (1978).

Discipline of a prisoner by prison authorities for violations of prison regulations and prosecution by civil authorities for the same acts does not violate the double jeopardy clause. *Gilchrist v. United States*, 427 F.2d 1132 (5th Cir. 1970).

When one is criminally convicted and sentenced for escape and is also subjected to administrative in-prison punishments for the same escape, constitutional double jeopardy protection is not violated. *Middlebrook v. Allen*, 234 Ga. 481, 216 S.E.2d 331 (1975).

6. Mistrial

State's right to mistrial. — Defendant's right to a fair trial is not paramount to the state's right to a fair trial; the trial court has the duty to ensure a fair trial to all parties in a case and has as much authority to grant a mistrial where injustice is caused to the state as where injustice is cause to the defendant. *Sinkfield v. State*, 217 Ga. App. 589, 458 S.E.2d 665 (1995).

Impaneled jury may not be discharged except for manifest necessity or ends of public justice. — Once the jury has been impaneled, the court may not discharge the jury from giving a verdict unless there is a case of manifest necessity for such an act, or the ends of public justice would otherwise be defeated. *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

Violation of court order did not provoke mistrial. — The requisite intent to provoke a mistrial, entitling the defendant to a dismissal on double jeopardy grounds, was absent where, in violating a court order to refrain from using the term "organized crime," the prosecutor referred to the government's witnesses only and there was no direct reference to the defendant, and where the defendant failed to object to the violation at the time it was made when the infraction could have been cured with proper instructions. *United States v. Dante*, 739 F.2d 547 (11th Cir.), cert. denied, 469 U.S. 1036, 105 S. Ct. 512, 83 L. Ed. 2d 402 (1984).

Reprosecution permissible where jury cannot fairly try the issues. — Reprosecution is permissible where, before declaring a mistrial, the court justifiably concludes that it is impossible for the jury, in considering the case, to act with the independence and freedom requisite to a fair trial of the issues. *United States v. Starling*, 571 F.2d 934 (5th Cir. 1978).

Strictest scrutiny is appropriate when the basis for a mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is

Double Jeopardy (Cont'd)**6. Mistrial (Cont'd)**

using the superior resources of the state to harass or achieve a tactical advantage over the accused. *Cobb v. State*, 246 Ga. 565, 272 S.E.2d 297 (1980).

Termination of trial in defendant's favor before guilt or innocence determined. — When a criminal defendant obtains a termination of the trial in the defendant's favor before any determination of factual guilt or innocence, a new trial is not barred by the double jeopardy clause. *State v. Williams*, 246 Ga. 788, 272 S.E.2d 725 (1980).

As a general rule, the genuine inability of a jury to agree on a verdict provides manifest necessity for discharge and a mistrial due to a deadlocked jury does not bar re prosecution. *United States v. Wright*, 622 F.2d 792 (5th Cir.), cert. denied, 449 U.S. 961, 101 S. Ct. 376, 66 L. Ed. 2d 229 (1980).

When a deadlocked jury was dismissed, the effect of the court's action was a mistrial, and a subsequent declaration of mistrial based on improper closing argument was a nullity; thus, the state was not barred from a retrial of defendant. *State v. Telenko*, 225 Ga. App. 724, 484 S.E.2d 725 (1997).

Failure of a jury to agree on a verdict of either acquittal or conviction does not bar retrial. *Cameron v. Caldwell*, 232 Ga. 611, 208 S.E.2d 441 (1974); *Hooks v. State*, 138 Ga. App. 539, 226 S.E.2d 765 (1976); *Kelly v. State*, 145 Ga. App. 780, 245 S.E.2d 20 (1978); *United States v. Starling*, 571 F.2d 934 (5th Cir. 1978); *Cherry v. Director, State Bd. of Cors.*, 613 F.2d 1262 (5th Cir. 1980), aff'd in part, rev'd in part on other grounds, 635 F.2d 414 (5th Cir.), cert. denied, 454 U.S. 840, 102 S. Ct. 150, 70 L. Ed. 2d 124 (1981).

Whether a trial for the same offense or one growing out of same act. — If the grant of a mistrial results from the inability of the jury to agree on a verdict that makes the discharge of the jury necessary and the completion of the trial impossible, a second trial for the same offense or for an offense growing out of the same acts is not barred and does not violate the guaranty against double jeopardy. *Van Scoik v. State*, 139 Ga. App. 293, 228 S.E.2d 229 (1976).

A second prosecution is not prohibited because of disqualification of a juror, mere

irregularity of procedure, or tactical necessity in wartime. *United States v. Starling*, 571 F.2d 934 (5th Cir. 1978).

Third trial, held after two mistrials caused by jury disagreement, does not constitute double jeopardy. *Orvis v. State*, 237 Ga. 6, 226 S.E.2d 570 (1976).

Jury request for mistrial due to lack of evidence. — Because, after deliberating for only a few minutes, the jury sent a note to the trial judge asking if it could declare a mistrial due to lack of evidence, but because the foreman stated a belief that the jury would eventually reach a decision, there was no manifest necessity for declaring a mistrial, and retrial was barred by the double jeopardy clause. *Cobb v. State*, 246 Ga. 565, 272 S.E.2d 297 (1980).

Trial court can retry a defendant following mistrial without violating double jeopardy protections. *Bell v. State*, 249 Ga. 644, 292 S.E.2d 402 (1982).

Trial court properly denied the defendant's plea in bar based on double jeopardy under U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, seeking to prevent a retrial of criminal charges against defendant after the motion for a mistrial under O.C.G.A. § 16-1-8(e)(1) was granted in the first trial upon the jury's advisement to the trial court judge that they were hopelessly deadlocked due to the refusal by two jurors to consider the direct evidence; the mistrial was properly declared and there was no improper conduct shown by the trial court or the state but rather, the defendant's counsel admitted that defendant hoped that another jury would be more sympathetic to the defendant upon a retrial, as the first jury was deadlocked 10-2 in favor of conviction. *Jackson v. State*, 282 Ga. App. 476, 638 S.E.2d 865 (2006).

Retrial of a criminal defendant after a mistrial caused by the inability of the jury to reach a verdict does not constitute double jeopardy where there is manifest necessity for declaring the mistrial. *Glass v. State*, 250 Ga. 736, 300 S.E.2d 812 (1983); *Jackson v. State*, 257 Ga. 484, 361 S.E.2d 156 (1987).

A retrial after a mistrial had been declared because of the jury's inability to reach an unanimous decision, it being hopelessly deadlocked after deliberating for two days (more time than the actual trial), sending four notes to the court explaining its situa-

tion, and being recharged twice, did not deprive the defendant of the defendant's right to be protected against double jeopardy. *Walker v. Weldon*, 744 F.2d 775 (11th Cir. 1984).

A trial terminated as a result of the jury's inability to reach a unanimous verdict. It is well known that retrial under these circumstances is not barred by the double jeopardy clause. *Williams v. State*, 258 Ga. 305, 369 S.E.2d 232, cert. denied, 488 U.S. 891, 109 S. Ct. 225, 102 L. Ed. 2d 215 (1988).

Mistrial during prosecution of multiple offenses. — Where the state seeks to prosecute a defendant for two offenses in a single prosecution, one of which is included in the other, and the defendant receives a mistrial on the greater offense, the remaining conviction of the lesser offense does not bar retrial of the greater offense. *Taylor v. State*, 238 Ga. App. 753, 520 S.E.2d 267 (1999).

Where a jury is hopelessly deadlocked, this constitutes manifest necessity for declaring a mistrial. *Glass v. State*, 250 Ga. 736, 300 S.E.2d 812 (1983); *Hurston v. State*, 206 Ga. App. 570, 426 S.E.2d 196 (1992).

Reprosecution generally not barred by mistrial sought or consented to by defendant. — The double jeopardy proscription of the federal and state Constitutions generally does not prevent reprosecution of a defendant where a mistrial occurs on the motion of, or with the consent of, the defendant. *Studyent v. State*, 153 Ga. App. 161, 264 S.E.2d 695 (1980).

Consent to mistrial. — Defendant was not prosecuted twice for the same offense where evidence introduced at habeas hearing did not contradict the court's recital that defendant consented to mistrial for lack of formal arraignment, and in fact defendant did not object to the mistrial, and either expressly or tacitly joined in co-defendant's motion for mistrial. *McCormick v. Gearinger*, 253 Ga. 531, 322 S.E.2d 716 (1984).

Where, after a jury was impaneled, defendant moved for severance and a mistrial, and the trial court granted the motion for severance and elected to go forward with the trial of the codefendant, but, instead of granting a mistrial, continued defendant's case, the grant of the continuance was equivalent to the grant of a mistrial, and defendant's plea of double jeopardy was properly rejected since defendant had sought and consented

to the severance. *Stone v. State*, 218 Ga. App. 350, 461 S.E.2d 548 (1995).

Defendant did not carry defendant's burden of showing that the state goaded defendant into moving for a mistrial when the state failed to provide the defense with one of two statements that the victim provided to police regarding the charges brought against defendant for child molestation and statutory rape, and, thus, the trial court did not err in denying defendant's plea of former jeopardy under either the state or federal constitution after the trial court granted defendant's motion for a mistrial. *Beach v. State*, 260 Ga. App. 399, 579 S.E.2d 808 (2003).

Delay in reducing mistrial order to writing. — Where the first trial ended with the grant of defendant's motion for mistrial and the order declaring the mistrial was not reduced to writing and entered on the minutes of the court until after the second trial, and where the court's written order merely perfected the record in this regard and the delay in no way affected defendant's rights, no double jeopardy defense is established. *Swafford v. State*, 161 Ga. App. 139, 291 S.E.2d 3 (1982).

Erroneous ruling invoked by defendant. — Because the prosecution's failure to present to the jury sufficient evidence to support a conviction resulted from an erroneous ruling of the trial court, which ruling was invoked by the defendant, the defendant waived the right to obtain a judgment of acquittal due to evidentiary insufficiency. Consequently, a new trial was not barred by the double jeopardy clause. *Hunter v. State*, 257 Ga. 571, 361 S.E.2d 787 (1987).

Prosecutor allowed inadmissible matters into evidence through negligence, and did not intend to "goad" defendant into seeking a mistrial; thus, defendant's retrial on the same charges after a mistrial was declared was not barred by double jeopardy. *Collis v. State*, 252 Ga. App. 659, 556 S.E.2d 221 (2001).

Prosecutorial overreaching is gross negligence or intentional misconduct, causing aggravated circumstances to develop which seriously prejudice a defendant causing him to reasonably conclude that a continuation of the tainted proceeding would result in a conviction. *United States v. Wright*, 622 F.2d 792 (5th Cir.), cert. denied, 449 U.S. 961, 101 S. Ct. 376, 66 L. Ed. 2d 229 (1980).

Double Jeopardy (Cont'd)**6. Mistrial (Cont'd)**

Retrial barred where defendant forced to move for mistrial because of prosecutorial overreaching. — Reprosecution is barred by the double jeopardy clause when prosecutorial overreaching forces a defendant to the choice of giving up the substantial right that the defendant has to the trial before the present jury, or moving for a mistrial and giving the government a second chance before another jury with any additional advantage accrued by matter learned in the first trial. *Studyvent v. State*, 153 Ga. App. 161, 264 S.E.2d 695 (1980).

What constitutes "prosecutorial overreaching". — "Prosecutorial overreaching" occurs and bars retrials where bad faith conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. *Studyvent v. State*, 153 Ga. App. 161, 264 S.E.2d 695 (1980).

To find prosecutorial overreaching, the government must have, through gross negligence or intentional misconduct, caused aggravated circumstances to develop which seriously prejudiced a defendant causing the defendant to reasonably conclude that a continuation of the tainted proceeding would result in a conviction. *United States v. Bizzard*, 493 F. Supp. 1084 (S.D. Ga. 1980), *aff'd*, 674 F.2d 1382 (11th Cir.), *cert. denied*, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

Where the trial court and the district attorney are totally at fault in the contempt finding which resulted in a mistrial it is unfair to allow the state to take advantage of such an abuse by again putting defendant in jeopardy. *Chatham v. State*, 247 Ga. 95, 274 S.E.2d 473 (1981).

Judicial or prosecutorial misconduct. — In determining if a retrial is barred by double jeopardy after a mistrial is granted because of prosecutorial or judicial misconduct, the issue is whether there has been a judicial or prosecutorial intent to harass the defendant and deprive the defendant of a fair decision by the jury before whom the defendant is being tried. *Benford v. State*, 164 Ga. App. 733, 298 S.E.2d 39 (1982).

In the context of a granted motion for mistrial, governmental misconduct will support a plea in bar based on double jeopardy if the prosecutor or trial judge intended to goad the defendant into moving for a mistrial. In the context of a reversal or grant of a motion for new trial, on the other hand, double jeopardy may bar a retrial where the prosecutor intended to prevent an acquittal that the prosecutor, or the trial judge accused of misconduct, believed at the time was likely to occur in the absence of the judge's misconduct. *Paul v. State*, 266 Ga. App. 126, 596 S.E.2d 670 (2004).

Prosecutorial misconduct will bar retrial pursuant to the double jeopardy clause only if there is an intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause. *Fugitt v. Lemacks*, 833 F.2d 251 (11th Cir. 1987).

Trial court did not err in granting a plea of double jeopardy after a motion for mistrial had been granted, where, in granting the plea, the court orally ruled that the prosecutor had "a deliberate intent to goad [defense counsel] into a mistrial, ... and that it was prosecutorial misconduct." *Beck v. State*, 261 Ga. 826, 412 S.E.2d 530 (1992).

The applicable standard is the intent of the prosecutor in the misconduct, and such intent is a fact question for the court to resolve. *Reed v. State*, 222 Ga. App. 376, 474 S.E.2d 264 (1996).

Prosecutorial misconduct before and after trial. — Because all but one of the incidents of alleged prosecutorial misconduct occurred either before or after trial, because the one trial incident did not result in a mistrial, and because the evidence did not show that any alleged incident of harassment was intended to subvert the protections afforded by the double jeopardy clause, the defendant's claim that a retrial was barred had no merit. *Fugitt v. State*, 253 Ga. 311, 319 S.E.2d 829 (1984), *cert. denied*, 479 U.S. 1070, 107 S. Ct. 963, 93 L. Ed. 2d 1011 (1987).

Prosecutor's failure to follow the instruction of the trial court to avoid questions concerning a witness' credibility did not bar retrial, where the prosecutor's mistakes were made in good faith and there was no intention to provoke mistrial. *State v. Oliver*, 188 Ga. App. 47, 372 S.E.2d 256 (1988).

Prosecutorial misconduct amounting to

harassment or overreaching, even if sufficient to justify a grant of mistrial, is nevertheless insufficient to bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause. *State v. Oliver*, 188 Ga. App. 47, 372 S.E.2d 256 (1988).

Defendant not “goaded” into moving for mistrial. — District attorney’s improper quoting of prior court cases was not intended to “goad” defendant into moving for a mistrial and therefore did not bar the state from retrying the case after it had been remanded to the trial court for retrial on sentencing. *Hardy v. State*, 258 Ga. 523, 371 S.E.2d 849 (1988), cert. denied, 489 U.S. 1040, 109 S. Ct. 1174, 103 L. Ed. 2d 237 (1989).

Where a mistrial was granted at the behest of the defendant, a retrial was not barred; the state had not intended to goad the defendant into moving for a mistrial by inadvertent testimony of its private investigator. *Mobley v. State*, 262 Ga. 808, 426 S.E.2d 150 (1993), cert. denied, 510 U.S. 870, 114 S. Ct. 198, 126 L. Ed. 2d 156 (1993); *Weems v. State*, 269 Ga. 577, 501 S.E.2d 806 (1998).

Repeated misconduct by defense counsel, resulting in the jury’s exposure to extensive assertions that were irrelevant, immaterial, highly prejudicial, and wholly lacking in evidentiary support, made it impossible for an impartial verdict to be reached; therefore, the trial court did not abuse its discretion in declaring a mistrial based on manifest necessity, and retrial of defendant was not barred. *Jackson v. State*, 226 Ga. App. 256, 485 S.E.2d 832 (1997).

Mistrial caused by defense’s improper question. — A mistrial was declared when defense counsel asked the defendant whether, in the context of the investigation of the present charges, the defendant had “ever taken a polygraph examination” and the defendant responded, “No, not for the State of Georgia.” In violation of the rules of evidence and contrary to the true state of facts, the question and answer intimated that, although the state had not undertaken to conduct its own test, there did exist a private polygraph test, the results of which were exculpatory. Therefore, the trial court did not abuse its sound discretion by granting the state’s motion for a mistrial and in denying the defendant’s plea of former jeopardy.

Phelps v. State, 187 Ga. App. 236, 369 S.E.2d 506 (1988).

In a trial of multiple counts where defense sought to impeach a complaining witness with character evidence of a specific act, a mistrial was proper only for the counts prejudiced by such improper evidence. *Venson v. Georgia*, 74 F.3d 1140 (11th Cir. 1996).

In a prosecution for malice murder, the trial court did not abuse its discretion in declaring a mistrial when defense counsel injected the prejudicial issue of the victim’s violent acts without having first made a prima facie showing of justification, and the state could try defendant again. *Laster v. State*, 268 Ga. 172, 486 S.E.2d 153 (1997).

No manifest necessity for mistrial where no evidentiary infraction. — In a prosecution for speeding and driving under the influence, the defendant did not engage in an intentional evidentiary infraction or knowingly violate any instruction of the trial court not to divulge an alcosensor reading in the defendant’s testimony sufficient to establish manifest necessity for a mistrial and avoid double jeopardy on retrial. *Dotson v. State*, 213 Ga. App. 7, 443 S.E.2d 650 (1994).

Error on part of prosecution in failing to produce document cannot be classified as prosecutorial misconduct barring retrial, unless the prosecutor’s action was intended to subvert the protections afforded by the double jeopardy clause. *Williams v. State*, 258 Ga. 305, 369 S.E.2d 232, cert. denied, 488 U.S. 891, 109 S. Ct. 225, 102 L. Ed. 2d 215 (1988).

Questions based on past sexual behavior. — In a rape prosecution, it was proper for the trial judge to declare a mistrial, on the judge’s own motion following the cross-examination of the alleged victim, which culminated in a question by defense counsel concerning the past sexual behavior of the witness, a violation of the shield law (O.C.G.A. § 24-2-3) that was “highly improper” and prejudicial. The declaration of mistrial did not bar a second trial of the defendant for the alleged offense. *Abdi v. Georgia*, 744 F.2d 1500 (11th Cir. 1984), cert. denied, 471 U.S. 1006, 105 S. Ct. 1871, 85 L. Ed. 2d 164 (1985).

Defendant’s introduction of evidence that was prohibited by the rape shield statute gave the court grounds to find manifest necessity for a mistrial; therefore, state and

Double Jeopardy (Cont'd)**6. Mistrial (Cont'd)**

federal double jeopardy provisions did not bar reprosecution. *Banks v. State*, 230 Ga. App. 258, 495 S.E.2d 877 (1998).

New trial after former mistakenly ended in mistrial. — Trial court erred in denying a rape defendant's plea of double jeopardy after a mistrial had been granted on the mistaken ground that the defense line of questioning of the victim had violated the Rape Shield Law. *George v. State*, 257 Ga. 176, 356 S.E.2d 882 (1987).

Absent prosecutorial or judicial overreaching, defendant's motion for mistrial ordinarily removes bar to reprosecution. — Where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. *United States v. Romano*, 482 F.2d 1183 (5th Cir. 1973), cert. denied, 414 U.S. 1129, 94 S. Ct. 866, 38 L. Ed. 2d 753 (1974); *Studyvent v. State*, 153 Ga. App. 161, 264 S.E.2d 695 (1980); *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980); *Cherry v. Director, State Bd. of Cors.*, 635 F.2d 414 (5th Cir.), cert. denied, 454 U.S. 840, 102 S. Ct. 150, 70 L. Ed. 2d 124 (1981).

Mistrial granted at behest of defendant. — Where a mistrial is granted at the behest of the defendant, a retrial is not barred by principles of double jeopardy unless the governmental conduct in question (from whomever derived) is intended to "goad" the defendant into moving for a mistrial. *Ellerbee v. State*, 215 Ga. App. 312, 450 S.E.2d 443 (1994).

Where a mistrial is granted at defendant's request, reprosecution is barred only if the mistrial resulted from grossly negligent or intentional misconduct by judge or prosecutor, conduct which was undertaken to harass the accused by successive prosecution or to gain the prosecution a better opportunity at conviction. *United States v. Kennedy*, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865, 98 S. Ct. 199, 54 L. Ed. 2d 140 (1977); *United States v. Luttrell*, 609 F.2d 1190 (5th Cir. 1980); *Chatham v. State*, 247 Ga. 95, 274 S.E.2d 473 (1981).

Mere negligence on the part of the government is not sufficient to preclude a sec-

ond trial. *United States v. Luttrell*, 609 F.2d 1190 (5th Cir. 1980).

Double jeopardy clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where bad faith conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. *United States v. Wright*, 622 F.2d 792 (5th Cir.), cert. denied, 449 U.S. 961, 101 S. Ct. 376, 66 L. Ed. 2d 229 (1980); *United States v. Bizzard*, 493 F. Supp. 1084 (S.D. Ga. 1980), aff'd, 674 F.2d 1382 (11th Cir.), cert. denied, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

Defendant's refusal to agree to continuance deemed motion for mistrial. — If a defendant will not agree to a continuance of some reasonable and finite length, and a mistrial is declared, the defendant has essentially forced the mistrial, and the defendant's actions should be declared akin to a motion for a mistrial. Accordingly, further proceedings against the defendant are not barred by the double jeopardy clause. *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

Reprosecution after mistrial without accused's consent stringently limited. — The protections offered by the double jeopardy ban include a stringent limitation on the government's right to reprosecute after a mistrial is declared without the consent of the accused. *United States v. Starling*, 571 F.2d 934 (5th Cir. 1978).

When free and fair trial cannot be had. — When it appears that a free and fair trial cannot be had, the trial ought to be stopped, even over objection of the accused, and the Constitution will not prevent another and better trial. *Sanford v. Robbins*, 115 F.2d 435 (5th Cir. 1940), cert. denied, 312 U.S. 697, 61 S. Ct. 737, 85 L. Ed. 1132 (1941).

Trial court's finding of manifest necessity requiring a mistrial was proper, and double jeopardy did not bar a retrial, where, during a break in deliberations, a juror made a comment in the presence of other jurors about making money from defendant's family. *Perez v. State*, 266 Ga. App. 82, 596 S.E.2d 191, cert. denied, 543 U.S. 957, 125 S. Ct.

410, 160 L. Ed. 2d 319 (2004).

Judge's inability to disregard inadmissible evidence. — In a bench trial, the judge's inability to disregard evidence the judge ruled inadmissible constituted a manifest necessity for a mistrial and the defendant's double jeopardy rights would not be violated by a retrial to a jury. *Bailey v. State*, 219 Ga. App. 258, 465 S.E.2d 284 (1995).

If, for reasons deemed compelling by the trial judge, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over the defendant's objections, and the defendant may be retried consistently with U.S. Const., amend. 5. *United States v. Wayman*, 510 F.2d 1020 (5th Cir.), cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975).

Retrial not barred where defendant successfully attacks conviction for lack of sufficient evidence. — The jeopardy provision does not prohibit a second trial on the same charge where the defendant has been successful in the motion for a new trial in having the conviction set aside for want of sufficient evidence. *Staggers v. State*, 120 Ga. App. 875, 172 S.E.2d 462 (1969).

Retrial barred where prosecution unprepared and mistrial granted over defendant's objection. — If the prosecutor begins the case without sufficient evidence to convict and the court grants a mistrial over defendant's objection, the defendant's plea of former jeopardy should be sustained should the state attempt to call the case again. *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

Defendant's objection to mistrial must be timely. — Where defendant objects to declaration of mistrial, but court order states that the mistrial was granted upon agreement of counsel for the defendant and counsel for the state, defendant's remedy is to file a motion to correct it, before the judge who issued it, at the same term of court, and while the matter is still fresh in the judge's mind. *Minter v. State*, 122 Ga. App. 695, 178 S.E.2d 335 (1970).

Failure to consider less severe alternatives to mistrial. — While not determinative, the failure of a trial judge to consider adequately less severe alternatives to a mistrial shows an inadequate concern for the severe consequences of ordering a mistrial without the

accused's consent. *Cherry v. Director, State Bd. of Cors.*, 613 F.2d 1262 (5th Cir. 1980), aff'd in part, rev'd in part on other grounds, 635 F.2d 414 (5th Cir.), cert. denied, 454 U.S. 840, 102 S. Ct. 150, 70 L. Ed. 2d 124 (1981).

Unavailability of key corroborating witness. — Retrial after a mistrial was not barred by the double jeopardy prohibition, where there was "manifest necessity" for the declaration of a mistrial because of the unavailability of a key witness who could corroborate an accomplice's inculpatory testimony. *Spencer v. State*, 192 Ga. App. 822, 386 S.E.2d 705 (1989).

Retrial possible if jury deadlocked. — Because defendant was acquitted of a charge of malice murder and the jury was deadlocked as to other offenses before them, retrial on the lesser included unindicted offense of voluntary manslaughter was not barred, provided the jury did not know about the murder charge. *State v. Archie*, 230 Ga. App. 253, 495 S.E.2d 581 (1998).

Failure of solicitor to pay state bar dues. — Even if the solicitor failed to pay the solicitor's state bar dues, this fact did not show intentional misconduct or instigative intention on the solicitor's part, and, therefore, the double jeopardy clause did not bar the retrial of the defendant after the granting of a mistrial when it was discovered that the solicitor was not in good standing. *Spears v. State*, 234 Ga. App. 498, 506 S.E.2d 446 (1998).

Consent to mistrial. — Although defense counsel had an opportunity to raise an objection after the court announced its intention to excuse the jurors and before the jurors were returned to the courtroom, counsel failed to do so; therefore, the trial court was authorized to find that defendant, through counsel, impliedly consented to the grant of a mistrial and defendant's plea of double jeopardy made during trial was properly denied. *Howell v. State*, 266 Ga. App. 480, 597 S.E.2d 546 (2004).

Declaration of mistrial because of juror's false statements. — Where, after requesting and considering alternatives to aborting a trial, the trial judge in good faith declares a mistrial because false statements of a juror might prevent a fair trial, the trial judge has not abused sound judicial discretion. In such a case, the double jeopardy clause does not

Double Jeopardy (Cont'd)**6. Mistrial (Cont'd)**

bar retrial of a state criminal defendant. *Jones v. Anderson*, 404 F. Supp. 182 (S.D. Ga. 1974), *aff'd*, 522 F.2d 181 (5th Cir. 1975).

Mistrial resulting from removal of a juror who misadvised the trial court as to the juror's qualifications upon voir dire, thereby depriving the jury of the statutory minimum number, constituted a mistrial as a result of "manifest necessity," therefore, retrial following the mistrial was not barred by a plea of double jeopardy. *Bishop v. State*, 179 Ga. App. 606, 347 S.E.2d 350 (1986).

Option of replacing juror does not eliminate grounds for declaring mistrial. — The option of selecting a replacement juror pursuant to O.C.G.A. § 15-12-167 does not eliminate manifest necessity or the need for the protection of the ends of public justice as a basis for the declaration of a mistrial at a defendant's first trial. Nor is the trial court required by the double jeopardy clause to utilize an available alternative so that failure to do so constitutes an abuse of discretion. *Jones v. Anderson*, 404 F. Supp. 182 (S.D. Ga. 1974), *aff'd*, 522 F.2d 181 (5th Cir. 1975).

Juror bias created a manifest necessity to declare a mistrial. *Wilson v. State*, 217 Ga. App. 544, 458 S.E.2d 486 (1995).

7. Effect of Appeal

Distinction between reversal for trial error and for insufficiency of the evidence. — Reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. It implies nothing with respect to the guilt or innocence of the defendant. It is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect. *Hall v. State*, 244 Ga. 86, 259 S.E.2d 41 (1979).

Where a conviction is reversed for trial error, retrial does not violate the double jeopardy clause. *Hall v. State*, 244 Ga. 86, 259 S.E.2d 41 (1979); *United States v. Bizzard*, 615 F.2d 1080 (5th Cir. 1980), *cert. denied*, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

Retrial barred by finding of not guilty or that evidence did not support verdict. — A defendant can be tried a second time for an

offense when the defendant's prior conviction for that same offense had been set aside on appeal unless the accused was adjudged not guilty or there was a finding that the evidence did not support the verdict. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976), *cert. denied*, 433 U.S. 911, 97 S. Ct. 2980, 53 L. Ed. 2d 1096 (1977); *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981); *State v. Williams*, 246 Ga. 788, 272 S.E.2d 725 (1980).

To obtain double jeopardy protection, challenge must be reviewable before second trial. — If a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the clause, the defendant's double jeopardy challenge to an indictment must be reviewable before that subsequent exposure occurs. *United States v. Dunbar*, 591 F.2d 1190 (5th Cir. 1979), *aff'd*, 611 F.2d 985 (5th Cir.), *cert. denied*, 447 U.S. 926, 100 S. Ct. 3022, 65 L. Ed. 2d 1120 (1980).

Because the double jeopardy clause is a guarantee against being twice put to trial for the same offense, the rights conferred thereunder would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. *United States v. Dunbar*, 611 F.2d 985 (5th Cir.), *aff'd*, 614 F.2d 39 (5th Cir.), *cert. denied*, 447 U.S. 926, 100 S. Ct. 3022, 65 L. Ed. 2d 1120 (1980).

Filing notice of appeal prevents retrial pending review. — Timely filing of a notice of appeal strips the trial court of its jurisdiction to try the case on the merits pending the outcome of the prior jeopardy appeal. *United States v. Dunbar*, 591 F.2d 1190 (5th Cir. 1979), *aff'd*, 611 F.2d 985 (5th Cir.), *cert. denied*, 447 U.S. 926, 100 S. Ct. 3022, 65 L. Ed. 2d 1120 (1980).

No bar to reprosecution where new trial sought and obtained. — U.S. Const., amend. 5's double jeopardy provision does not apply to a subsequent prosecution after a defendant has sought and obtained a new trial. *Staggers v. Stynchcombe*, 319 F. Supp. 1305 (N.D. Ga. 1970), *aff'd*, 436 F.2d 585 (5th Cir. 1971).

No bar to reprosecution where defendant succeeds in having conviction set aside. — The constitutional guarantee against double jeopardy imposes no limitations whatever

upon the power to retry a defendant who has succeeded in getting the first conviction set aside. *Staggers v. Stynchcombe*, 319 F. Supp. 1305 (N.D. Ga. 1970), *aff'd*, 436 F.2d 585 (5th Cir. 1971).

Retrial not barred by successful appeal. — Because the defendant was tried and convicted and was granted a new trial on appeal, the grant of the new trial is not an acquittal of the defendant, and to try the defendant again does not violate the double jeopardy provision of the United States Constitution. *Staggers v. State*, 225 Ga. 581, 170 S.E.2d 430 (1969); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978); *United States v. Starling*, 571 F.2d 934 (5th Cir. 1978); *Cherry v. Director, State Bd. of Cors.*, 613 F.2d 1262 (5th Cir. 1980), *aff'd in part, rev'd in part on other grounds*, 635 F.2d 414 (5th Cir.), *cert. denied*, 454 U.S. 840, 102 S. Ct. 150, 70 L. Ed. 2d 124 (1981).

Adjudication of delinquency was reversed as the state presented no evidence of venue and the juvenile court did not take judicial notice that the location of an aggravated assault described at a hearing was in Sumter County; the county in which the offense was committed was not established and the evidence was insufficient to support the conviction, but retrial was not barred by the double jeopardy clause so long as venue was properly established at retrial. *In the Interest of T.W.*, 280 Ga. App. 693, 634 S.E.2d 854 (2006).

Retrial not barred by successful collateral attack. — When a conviction is overturned on collateral attack, the double jeopardy clause does not bar retrial for the charges of which the successful appellant or petitioner had been found guilty. *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).

Reversal of sentence on appeal and new trial as to punishment is not double jeopardy. — If the jury, at the first trial, finds defendant guilty of the offense of murder, with such conviction for murder being affirmed on appeal, but with the sentence for that offense reversed and a new trial ordered as to punishment, the defendant is not twice put in jeopardy of being convicted for the same offense, since the conviction for murder is affirmed on appeal. Defendant's pun-

ishment was the only thing that remained to be decided by the jury upon the defendant's retrial. *Redd v. State*, 242 Ga. 876, 252 S.E.2d 383, *cert. denied*, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979).

Government is barred from appealing an acquittal. — U.S. Const., amend. 5's double jeopardy prohibition bars the government from appealing an acquittal in a criminal prosecution. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970).

But can appeal a judgment of acquittal entered after a verdict of guilt. *United States v. Clemones*, 577 F.2d 1247 (5th Cir. 1978), *modified*, 582 F.2d 1373 (5th Cir. 1978), *cert. denied*, 445 U.S. 927, 100 S. Ct. 1313, 63 L. Ed. 2d 759 (1980).

Review of court of appeals decision in favor of defendant in criminal case. — The Supreme Court has jurisdiction to review by certiorari any decision by the court of appeals in the defendant's favor in a criminal case, and a defendant's constitutional right against double jeopardy is not implicated when the state seeks discretionary review of an adverse decision by the court of appeals in a criminal case. *State v. Tyson*, 273 Ga. 690, 544 S.E.2d 444 (2001).

Failure to assert claim on interlocutory appeal. — The double jeopardy claim is not lost for failure to assert it on an interlocutory appeal. *United States v. Bizzard*, 674 F.2d 1382 (11th Cir.), *cert. denied*, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

Where a double jeopardy claim is found by the district court to be frivolous, the filing of a notice of appeal divests the district court of jurisdiction to try the case. *United States v. Bizzard*, 674 F.2d 1382 (11th Cir.), *cert. denied*, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

Waiver of right to appeal. — A defendant is entitled to appellate review of a double jeopardy claim prior to trial, but such right to appeal before trial can be waived. *United States v. Bizzard*, 674 F.2d 1382 (11th Cir.), *cert. denied*, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

Where a defendant notices an appeal of a double jeopardy claim, suspends the trial, then dismisses the appeal, the right to appeal before trial is waived. *United States v. Bizzard*, 674 F.2d 1382 (11th Cir.), *cert. denied*, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 286 (1982).

Double Jeopardy (Cont'd)
7. Effect of Appeal (Cont'd)

Reversal for insufficiency of evidence, but not for error, bars retrial. — Once a reviewing court reverses a conviction solely for insufficiency of the evidence to sustain the verdict of guilty, double jeopardy bars retrial; however, where a defendant obtains a reversal based upon “trial error,” double jeopardy does not bar retrial. *Osborne v. State*, 166 Ga. App. 439, 304 S.E.2d 416 (1983).

Grant of new trial based on insufficiency of evidence. — Where defendant’s motion for new trial was granted on the basis of insufficiency of evidence, the trial court erred in denying defendant’s plea in bar as to the defendant’s further prosecution. *Priest v. State*, 265 Ga. 399, 456 S.E.2d 503 (1995).

Retrial not barred where reversal for erroneous admission of evidence. — Where the testimony of a lab technician was not inadmissible because it was incompetent, but because the defense had not been furnished a copy of the laboratory report as required by former O.C.G.A. § 17-7-211, it was not excluded automatically on retrial. Thus, where the original conviction was reversed due to the trial error in the admission of evidence, rather than insufficiency of the evidence, a retrial was not barred by the double jeopardy provisions of the Georgia and United States Constitutions. *Osborne v. State*, 166 Ga. App. 439, 304 S.E.2d 416 (1983).

Retrial barred by successful appeal including finding that evidence did not authorize verdict. — The reversal of the defendants’ convictions for felony murder based upon armed robbery due to insufficient evidence not only raised a procedural double jeopardy bar for that particular crime but also raised a procedural double jeopardy bar for the lesser-included offense of criminal attempt to commit armed robbery. *Prater v. State*, 273 Ga. 477, 541 S.E.2d 351 (2001).

Retrial not barred by judicial or prosecutorial misconduct at initial trial. — Even if misconduct of the trial court and prosecutor required the defendant to represent self at the initial trial without benefit of counsel, a retrial was not barred since there was no evidence that retrial was an intended consequence of the actions of the court and

prosecutor. *Keith v. State*, 222 Ga. App. 360, 474 S.E.2d 256 (1996).

8. Resentencing

Neither double jeopardy nor equal protection provisions bar more severe sentence upon reconviction. — The guarantee against double jeopardy does not restrict the length of sentence which may be imposed upon reconviction, and the imposition of a more severe sentence upon retrial does not violate the equal protection clause of the U.S. Const., amend. 14. *Chaffin v. State*, 227 Ga. 327, 180 S.E.2d 741 (1971); *Rozier v. State*, 126 Ga. App. 336, 190 S.E.2d 627 (1972); *Stuckey v. Stynchcombe*, 614 F.2d 75 (5th Cir. 1980).

Sentence modifications. — Double jeopardy concerns are not implicated in sentence modifications as long as the overall period of imprisonment is reduced. *United States v. Jackson*, 923 F.2d 1494 (11th Cir. 1991).

Juvenile defendant’s voluntary manslaughter sentence was vacated, and resentencing was ordered, when the trial court erred by increasing the same after defendant had already begun serving it, because the original sentence was final at the time it was imposed, and defendant had no reason to believe otherwise; hence, the trial court’s increased sentence constituted double jeopardy and could not stand. *Williams v. State*, 273 Ga. App. 42, 614 S.E.2d 146 (2005).

Imposition of more severe penalty following successful appeal. — System that allows the imposition of a more severe penalty following a successful appeal is not per se constitutionally infirm. The focus is on the potential for vindictiveness to determine whether a particular procedure violates due process. *Dan J. Sheehan Co. v. Occupational Safety & Health Review Comm’n*, 520 F.2d 1036 (5th Cir. 1975), cert. denied, 424 U.S. 965, 96 S. Ct. 1458, 47 L. Ed. 2d 731 (1976).

Vindictiveness against a defendant for successfully attacking the defendant’s first conviction must play no part in resentencing after retrial. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), see 23 Emory L.J. 879, *United States v. McDuffie*, 542 F.2d 236 (5th Cir. 1976); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978); *Thompson v.*

State, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Rendition of a higher sentence by a jury upon retrial does not violate the double jeopardy clause nor the due process clause so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), for comment, see 23 Emory L. J. 879(1974).

Defendant must show that jury acted in spirit of vindictiveness. — An increase in a defendant's sentence by a jury, on retrial of the case, is not unconstitutional unless the defendant can demonstrate that the increase was prompted by a spirit of vindictiveness, since the jury ordinarily will not know of the previous trial or sentence. *Chaffin v. Stynchcombe*, 455 F.2d 640 (5th Cir. 1972), *aff'd*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), for comment, see 23 Emory L. J. 879 (1974).

Judge must affirmatively state reasons for more severe sentence upon retrial. — To ensure the absence of vindictiveness and to assure defendants that they will not be penalized for asserting their rights on appeal, whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for so doing must affirmatively appear. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973); *United States v. McDuffie*, 542 F.2d 236 (5th Cir. 1976); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978); *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Reasons given for more severe sentence should in fact support the imposition of the harsher penalty. *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

More severe sentence must be based upon objective information concerning identifiable conduct of the defendant occurring after the original sentencing proceeding. *United States v. McDuffie*, 542 F.2d 236 (5th Cir. 1976); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).

Factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy

of the increased sentence may be fully reviewed on appeal. *United States v. McDuffie*, 542 F.2d 236 (5th Cir. 1976).

Submitting an additional aggravating circumstance to the jury for its consideration at a resentencing trial does not violate double jeopardy protection. *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979), vacated in part on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Resentencing to correct an illegal sentence is not double jeopardy, even if the prisoner has already served part of the prisoner's term. *Stuckey v. Stynchcombe*, 614 F.2d 75 (5th Cir. 1980).

Where the original sentence was invalid, vacation of that sentence and imposition of another sentence did not constitute double jeopardy. *Crews v. State*, 170 Ga. App. 104, 316 S.E.2d 549 (1984).

Prisoner entitled to credit for time served. — The guarantee against double jeopardy is violated when punishment already exacted for an offense is not fully credited in imposing a new sentence after retrial for the same offense. *Chaffin v. State*, 227 Ga. 327, 180 S.E.2d 741 (1971).

Court may not reinstate original, vacated sentence where lesser punishment received upon resentencing. — Where a defendant who was convicted for murder and sentenced to life imprisonment is granted a new trial and subsequently pleaded guilty to voluntary manslaughter and is sentenced to ten years imprisonment, the trial court is without authority to vacate the motion for new trial and ten year sentence and reinstate the sentence of life imprisonment. *Brown v. Moody*, 243 Ga. 473, 254 S.E.2d 853 (1979).

The imposition of a new sentence to be served consecutively to a sentence on a prior conviction, in place of a vacated sentence that was to be served concurrently with the sentence on that prior conviction, may constitute an impermissible harsher punishment. *Thomas v. State*, 150 Ga. App. 341, 258 S.E.2d 28 (1979).

Different aggravating circumstance to support death sentence. — Where a first death sentence is vacated, the double jeopardy clause does not prevent the state from relying on an aggravating circumstance to support a death sentence at a second sentencing hearing not relied on at the first such hearing. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir.

Double Jeopardy (Cont'd)**8. Resentencing (Cont'd)**

1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

Death penalty may be sought on retrial. — A reversal of a conviction in which the death penalty was imposed does not preclude imposing the death penalty upon a retrial unless the sentencer or reviewing court has found that the evidence is insufficient to support the death penalty. *Crawford v. State*, 256 Ga. 57, 344 S.E.2d 215, cert. denied, 479 U.S. 989, 107 S. Ct. 583, 93 L. Ed. 2d 585 (1986).

State was not prohibited from seeking anew the death penalty after reversal of a murder conviction, where, although the jury had improperly specified "kidnapping" as the aggravating circumstance in imposing the death penalty, there had been no finding that the evidence was insufficient to support the death penalty. *Crawford v. State*, 256 Ga. 57, 344 S.E.2d 215, cert. denied, 479 U.S. 989, 107 S. Ct. 583, 93 L. Ed. 2d 585 (1986).

Death penalty barred upon retrial after jury imposed life sentence. — If convicting jury in a murder trial sentences the defendant to life imprisonment, this constitutes an acquittal of the charge that the evidence supports a finding of a statutory aggravating circumstance, and in any retrial the double-jeopardy clause prohibits the defendant's being given the death sentence. *Hill v. State*, 250 Ga. 821, 301 S.E.2d 269 (1983).

Initial judgment that evidence insufficient to support death sentence bars imposing death penalty on retrial. — The federal district court's initial judgment holding that there was insufficient evidence to support a death sentence, i.e., insufficient evidence to prove the alleged statutory aggravating factors beyond a reasonable doubt, as required by O.C.G.A. § 17-10-30(c), which decision was left undisturbed by the federal appellate court, which reversed the district's court's denial of the writ of habeas corpus with respect to the guilt phase of the trial, barred the state under the double jeopardy clause from attempting to impose the death penalty on the defendant in the defendant's retrial. *Young v. Kemp*, 760 F.2d 1097 (11th Cir. 1985), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

Only one aggravating factor was presented

to and considered by the jury which imposed the death sentence in the defendant's first trial for murder. Since the ground failed, on appeal, for constitutional insufficiency of the evidence, the state could not, should it choose to try the defendant again, seek to reimpose the death penalty. *Godfrey v. Francis*, 613 F. Supp. 747 (N.D. Ga. 1985), aff'd, 836 F.2d 1557 (11th Cir.), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Overturning death sentence on legal grounds. — If a defendant overturns a death sentence on legal grounds, the death penalty may be sought on resentencing, and the state may offer proof of statutory aggravating circumstances not offered at the first trial. *Zant v. Redd*, 249 Ga. 211, 290 S.E.2d 36 (1982), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398 (1983).

If a defendant overturns a death sentence on technical grounds, the sentence is nullified and the state and the defense start anew. Consequently, on resentencing, the state may again seek the death penalty and may offer any evidence on aggravating circumstances in support thereof. Likewise, the defendant is entitled to bring the jury any mitigating circumstances available to him, including those not known or utilized at the first sentencing trial. *Zant v. Redd*, 249 Ga. 211, 290 S.E.2d 36 (1982), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398 (1983).

Rule that state cannot seek death penalty on resentencing after original sentencing jury has imposed a life sentence does not apply where jury has imposed death penalty and death penalty is vacated on legal grounds as opposed to grounds that the evidence is insufficient to support the verdict. *Patrick v. State*, 249 Ga. 708, 293 S.E.2d 329, cert. denied, 459 U.S. 1089, 103 S. Ct. 575, 74 L. Ed. 2d 936 (1982).

Reimposition of death sentence based on another aggravating circumstance. — The double jeopardy clause was not violated at the defendant's resentencing trial because the judge permitted the state to introduce evidence pertaining to the defendant's alleged rape of the victim, where the jury in the first sentencing trial returned a death sentence upon a finding of "torture." The first jury may have taken the alleged rape into account, as sexual abuse constitutes

"torture" under Georgia law for the purpose of a death sentence aggravating circumstance. *Green v. Zant*, 738 F.2d 1529 (11th Cir.), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984).

Amending of orally pronounced sentence permitted if not vindictive. — Court is authorized to amend its oral pronouncement to change sentence from 12 months on probation to 12 months in jail, where there is no suggestion of vindictiveness against defendant for having exercised any legal right, but rather it is only trial court's effort to make punishment fit crime of which jury had found defendant to be guilty. *Curry v. State*, 248 Ga. 183, 281 S.E.2d 604 (1981).

Although an oral sentence is not a binding judgment of the court, once a person has entered upon the execution of the sentence, the court is without power to change it by increasing the punishment. However, when there is an error or irregularity in failing to inform the defendant of conditions under which the sentence to confinement was imposed, the court may correct the error by recalling the defendant and sentencing the defendant as provided by law. *Henderson v. State*, 162 Ga. App. 320, 292 S.E.2d 77 (1982).

Where the record shows, without dispute, that the amended sentence is identical to the intended original sentence and the amended sentence is corrected to the oral pronouncement of the trial court and to the defendant's original understanding of the sentence, this is merely a correction to make the sentence speak the truth. *Henderson v. State*, 162 Ga. App. 320, 292 S.E.2d 77 (1982).

Once a person has entered upon the execution of the person's sentence, the court is without power to change it by increasing the punishment. *Brown v. Moody*, 243 Ga. 473, 254 S.E.2d 853 (1979); *Hudson v. State*, 248 Ga. 397, 283 S.E.2d 271 (1981).

Sentence which has been reduced to writing and signed by judge may not be increased after defendant has begun to serve that sentence. *Curry v. State*, 248 Ga. 183, 281 S.E.2d 604 (1981).

Unless a statute explicitly provides for sentence modification, or the defendant knowingly engages in deception, a sentence may not be altered in a manner prejudicial to the defendant after the defendant has

started serving the sentence. *United States v. Jones*, 722 F.2d 632 (11th Cir. 1983).

Oral sentence may not be increased after execution commences. — Although it is true that an oral sentence is not a binding judgment of the court, the law is also clear that once a person has entered upon the execution of the sentence, the court is without power to change it by increasing the punishment. This is considered a violation of the prohibition under U.S. Const., amend. 5 against double punishment or jeopardy. *Inman v. State*, 124 Ga. App. 190, 183 S.E.2d 413 (1971); *Hinton v. State*, 127 Ga. App. 853, 195 S.E.2d 472 (1973); *Jones v. State*, 155 Ga. App. 382, 271 S.E.2d 30 (1980); *Harp v. State*, 228 Ga. App. 473, 491 S.E.2d 923 (1997).

Oral declaration as to what sentence shall be is not the sentence of the court; the sentence signed by the judge is. However, oral declaration of sentence may not be increased after defendant has begun to serve it. *Curry v. State*, 248 Ga. 183, 281 S.E.2d 604 (1981).

Where defendant is jailed over weekend pursuant to oral sentence, increase in sentence barred. — Where a defendant is in fact incarcerated immediately upon oral announcement of misdemeanor sentence on a Friday and is held in jail over the weekend, the court is without power to increase the sentence the following Monday. *Jones v. State*, 155 Ga. App. 382, 271 S.E.2d 30 (1980).

Self-Incrimination

1. In General

Self-incrimination clause creates zone of privacy. — This amendment, in its self-incrimination clause, enables the citizen to create a zone of privacy that the government may not force the citizen to surrender to the citizen's detriment. *Smith v. Price*, 446 F. Supp. 828 (M.D. Ga. 1977), rev'd on other grounds, 616 F.2d 1371 (5th Cir. 1980).

Privilege applies to interrogations. — The constitutional privileges against self-incrimination are applicable to post-arrest, pretrial police interrogation. *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976); *Clark v. State*, 237 Ga. 901, 230 S.E.2d 277 (1976).

Applicability of the privilege to the trial itself. *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976).

Self-Incrimination (Cont'd)**1. In General (Cont'd)**

Protections of U.S. Const., amend. 5 apply fully to state proceedings through U.S. Const., amend. 14. *Tennessee, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

When fifth amendment protections may be invoked. — Protections of U.S. Const., amend. 5 may be invoked in civil as well as criminal actions. *Tennessee, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

The insured's danger of incrimination was sufficient to support the insured's refusal to answer the insured's liability insurer's questions about the insured's actions giving rise to the claim against the insured, because those actions had led to criminal convictions, and a possibility existed that the insured's pending motion for a new trial in the criminal case could have been granted. *Anderson v. Southern Guar. Ins. Co.*, 235 Ga. App. 306, 508 S.E.2d 726 (1998).

In defendant's trial for forgery and racketeering for selling fake badges for a golf tournament to a ticket agency, the trial court did not abuse its discretion in denying defendant's motion for mistrial when the state attempted to question defendant's spouse after the spouse invoked the fifth amendment while on the witness stand because, despite defendant's argument that defendant's spouse's use of the fifth amendment could have been interpreted as evidence against the defendant and thus violated defendant's own right against self incrimination, the spouse's use of the fifth amendment related to the spouse's own concerns about self incrimination, not to defendant's, and the court instructed defendant that defendant could request a charge on the scope of the fifth amendment right against self incrimination but the record did not indicate that defendant requested such a charge. *Davis v. State*, 264 Ga. App. 128, 589 S.E.2d 700 (2003).

Privilege against self-incrimination cannot be asserted in advance of the questions actually propounded in the examination or hearing. *Spivey v. State*, 200 Ga. App. 284, 407 S.E.2d 425, cert. denied, 200 Ga. App. 897, 407 S.E.2d 425 (1991).

Privilege against self-incrimination may not be overridden by the right of confrontation under U.S. Const., amend. 6. *United*

States v. Brown, 634 F.2d 819 (5th Cir. 1981).

Right to resist inquiry not as extensive under first amendment. — Undeniably, U.S. Const., amend. 1, in some circumstances protects an individual from being compelled to disclose the individual's associational relationships. However, the protections of U.S. Const., amend. 1, unlike a proper claim of the privilege against self-incrimination under U.S. Const., amend. 5, do not afford a witness the right to resist inquiry in all circumstances. *Braden v. United States*, 272 F.2d 653 (5th Cir. 1959), aff'd, 365 U.S. 431, 81 S. Ct. 584, 5 L. Ed. 2d 653 (1961).

State courts and federal constitutional right against self-incrimination. — State courts do not have the power to expand the federal constitutional right against self-incrimination beyond the limits given it by federal authorities. *Page v. Page*, 235 Ga. 131, 218 S.E.2d 859 (1975).

Amendment applies to all evidence, oral or real, not just testimony. — While the language of U.S. Const., amend. 5 has long been construed to be limited to testimony, the language of Ga. Const. 1976, Art. I, Sec. I, Para. XIII (Ga. Const. 1983, Art. I, Sec. I, Para. XVI) has been construed to limit the state from forcing the individual to present evidence, oral or real. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Constitutional right against self-incrimination is incorporated in O.C.G.A. § 24-9-20. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), sentence vacated, *Eppinger v. State*, 198 Ga. App. 889, 403 S.E.2d 829 (1991), cert. denied, 198 Ga. App. 897, 403 S.E.2d 829 (1991).

O.C.G.A. § 24-9-20 is governed by the same standards as its constitutional counterpart, U.S. Const., amend. 5. *Jordan v. State*, 239 Ga. 526, 238 S.E.2d 69 (1977).

Where privilege expressly predicated on U.S. Const., amend. 5, state constitutional and statutory provisions immaterial. — Where refusal to answer questions is expressly and exclusively predicated on the self-incrimination clause of U.S. Const., amend. 5, the parallel Georgia constitutional and statutory provisions, Ga. Const. 1976, Art. I, Sec. I, Para. XIII (Ga. Const. 1983, Art. I, Sec. I, Para. XVI) and O.C.G.A. § 24-9-27, and interpretations of them, are not material. *Master v. Savannah Sur.*

Assoc., 148 Ga. App. 678, 252 S.E.2d 186 (1979).

Essential predicate for a claim under U.S. Const., amend. 5 is a finding that an accused has been compelled to incriminate oneself. *McAllister v. Brown*, 555 F.2d 1277 (5th Cir. 1977).

Determination as to whether statement would be incriminatory. — The protection of U.S. Const., amend. 5 and O.C.G.A. § 24-9-27 can only be invoked when there is a substantial and real danger of incrimination. The mere say-so of the witness does not establish this. Defendant must also show that the defendant has reasonable cause to apprehend danger of incrimination from the answer, and the court must first determine whether there is a proper basis for invoking the privilege. *Prince & Paul v. Don Mitchell's WLAQ, Inc.*, 127 Ga. App. 502, 194 S.E.2d 269 (1972).

Extensive questioning concerning financial affairs as incrimination. — Extensive questioning concerning financial affairs might tend to incriminate a person as a matter of law. In the particular situation of financial affairs, only the defendant or witness can weigh the effect. *Busby v. Citizens Bank*, 131 Ga. App. 738, 206 S.E.2d 640 (1974).

It is not error to permit the defendant to determine whether answers would incriminate the defendant. — If a court can not say that answers to questions concerning a defendant's financial resources and dealings might not tend to incriminate the defendant in any matter, under either state or federal law, a trial judge does not err in allowing the defendant to determine whether answers to the interrogatories might tend to incriminate the defendant. *Mallin v. Mallin*, 227 Ga. 833, 183 S.E.2d 377 (1971).

Person is not entitled to Miranda warnings as a matter of right, even though that person is a suspect, unless that person had been taken into custody or has been deprived of freedom of action in another significant way. Although the focus of the investigation may be on the defendant, the defendant must also be in a custodial situation for *Miranda* to apply. *Ford v. State*, 205 Ga. App. 12, 421 S.E.2d 294 (1992).

Where the accused was neither in custody nor so restrained as to equate to a formal arrest, any statements made to the investigat-

ing officer were made under noncustodial circumstances and *Miranda* warnings were not required. *Tolliver v. State*, 273 Ga. 785, 546 S.E.2d 525 (2001).

Miranda warnings not required if movement restrained by defendant's injury not police. — Defendant was not in "custody" for *Miranda* purposes when questioned by police because although defendant's movement was restrained, it was because of defendant's own injury and not by any police conduct. *Meadows v. State*, 264 Ga. App. 160, 590 S.E.2d 173 (2003).

Assertion of privilege with particular questions protected. — Defendant in SEC violation case had repeatedly invoked the defendant's fifth amendment privilege against self-incrimination, but not in a blanket manner, in pre-indictment discovery requests. Although a defendant may not assert the privilege on matters which would not tend to incriminate defendant, it was likely that any testimony or response sought in investigating allegations of civil allegations of fraud would provide or would lead to providing relevant incriminating information for a criminal securities fraud case; furthermore, the act of producing documents whose contents might not be privileged would likely be sufficiently testimonial and incriminating in nature to trigger the fifth amendment privilege. Therefore, the defendant's response to particular questions by invoking the privilege was protected. *SEC v. Zimmerman*, 854 F. Supp. 896 (N.D. Ga. 1993).

Privilege need not be expressly invoked where plain from context. — If it is plain from the context of the questioning in general that the plaintiff is invoking the privilege under U.S. Const., amend. 5 against self incrimination it is not necessary to invoke the privilege in express terms. *Temple v. Temple*, 228 Ga. 73, 184 S.E.2d 183 (1971).

Assertion of privilege must be clear. — Law enforcement officers must immediately cease questioning a defendant who has clearly asserted a right to have counsel present during custodial interrogation; but if the defendant makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, cessation of the questioning is not required. Since a reasonable officer

Self-Incrimination (Cont'd)**1. In General (Cont'd)**

would not necessarily have understood defendant's reference to an attorney to be a clear request for counsel, the officer was not required to cease the questioning. *Fitz v. State*, 275 Ga. 349, 566 S.E.2d 668 (2002).

Exclusion is remedy for violation of U.S. Const., amend. 5. — Under *Miranda*, a criminal defendant's remedy for a violation of the defendant's rights under U.S. Const., amend. 5 is the exclusion from trial of any evidence obtained from the defendant during the defendant's illegal detention. *Sheffield v. State*, 235 Ga. 507, 220 S.E.2d 265 (1975).

Effect of civil action while criminal charges as to same conduct pending. — Being forced to go to trial in a civil case while criminal charges arising out of the same conduct are pending does not violate U.S. Const., amend. 5 by forcing the defendant to choose between preserving the defendant's privilege against self-incrimination and losing the civil action. *United States v. White*, 589 F.2d 1283 (5th Cir. 1979).

If there is no indication that invocation of U.S. Const., amend. 5 would result in an adverse judgment, nor any indication that the defendant's silence would compel a verdict for the plaintiff, compelling the defendant to go to trial in a civil suit before the defendant's trial on a related criminal charge did not violate the defendant's privilege under U.S. Const., amend. 5. *United States v. White*, 589 F.2d 1283 (5th Cir. 1979).

In a case in which the defendant moved the court to stay further proceedings in a civil action by the comptroller of the currency pending the outcome of possible criminal proceedings against the defendant in a pending criminal investigation, it was held that although the choice between testifying or invoking U.S. Const., amend. 5 may be difficult, it does not create a basis for a stay. *Comptroller of Currency v. Lance*, 632 F. Supp. 437 (N.D. Ga. 1986).

Generally, there is no unconstitutional infringement of the fifth amendment privilege by forcing an individual to risk disadvantage in a civil case by refusing to provide material facts for fear of self-incrimination in a pending criminal case, but there is an

exception to this rule in instances where an individual who is a defendant in pending civil and criminal cases is forced to choose between forfeiting the privilege against self-incrimination or losing the civil case by automatic summary judgment; the exception does not apply if assertion of the privilege merely results in loss of the defendant's most effective defense rather than an adverse summary judgment. *Anderson v. Southern Guar. Ins. Co.*, 235 Ga. App. 306, 508 S.E.2d 726 (1998).

Forfeiture proceedings. — Defendant failed to show how requiring the defendant to conform to the pleading requirements of O.C.G.A. § 16-13-49(o)(3), relating to civil forfeiture proceedings against persons arrested for controlled substances violations, violated defendant's fifth amendment right against self-incrimination. *Jett v. State*, 230 Ga. App. 655, 498 S.E.2d 274 (1998).

Defendant was not compelled to be a witness against self in violation of defendant's fifth amendment rights when the trial court permitted admission in defendant's criminal case of answers defendant gave in pleadings in a related civil forfeiture proceeding that defendant owned certain items of property seized at defendant's residence, including illegal drugs, as defendant could have sought a stay of the forfeiture proceeding by asserting defendant's fifth amendment rights under the forfeiture statute, but chose not to do so. *Clemons v. State*, 257 Ga. App. 96, 574 S.E.2d 535 (2002).

Trial court could infer admissions from defendant's invocation of defendant's fifth amendment right against self-incrimination in a civil forfeiture proceeding. *Sanders v. State*, 259 Ga. App. 422, 577 S.E.2d 94 (2003).

Consent to search. — Although a consent to search was requested and obtained after the defendant had invoked the defendant's right to remain silent, the defendant's rights under the fifth amendment privilege against self-incrimination were not violated by use of the consent and by introduction of the evidence obtained as a result of the ensuing search, since the fifth amendment protects only against compelled incriminating evidence of a testimonial nature and not against compelled production of physical evidence. *United States v. Hidalgo*, 7 F.3d 1566 (11th Cir. 1993).

Privilege retained despite guilty plea. — Defendant who entered a guilty plea retained the privilege against self-incrimination prior to sentencing. *United States v. Kuku*, 129 F.3d 1435 (11th Cir. 1997), cert. denied, 524 U.S. 909, 118 S. Ct. 2071, 141 L. Ed. 2d 147 (1998).

Right against self-incrimination is personal. — A witness cannot be compelled to answer any question the answer to which would tend to incriminate the witness, or would constitute a necessary link in the chain of testimony sufficient to convict the witness of a criminal offense. But the privilege is personal to the witness, and cannot be claimed for the witness by a party to the action. *Johnson v. State*, 112 Ga. App. 597, 145 S.E.2d 636 (1965).

Defendant in a civil action lacks standing to challenge the admission of testimony given in a previous criminal action on the ground that such action violated the witness' fifth amendment rights or the immunity agreement between the witness and the state, since the privilege against self-incrimination is that of the person under examination as a witness and is intended for the witness' protection only. *Kesler v. Veal*, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

Right may not be vicariously asserted. — Some constitutional rights are personal and may not be vicariously asserted, among these is the right against self-incrimination. *Hall v. United States*, 413 F.2d 45 (5th Cir. 1969).

Right against incrimination is personal right. — Party's successors cannot invoke the original party's right under U.S. Const., amend. 5 against incrimination. The privilege is purely personal. *United States v. Ayers*, 615 F.2d 658 (5th Cir. 1980).

Defendant may not invoke the defendant's privilege on behalf of a witness. — The privilege against self-incrimination is that of the person under examination as a witness and is intended for the witness' protection only. The defendant on trial has no standing to raise this issue on behalf of the witness, even where the witness is an accomplice. *Lively v. State*, 237 Ga. 35, 226 S.E.2d 581 (1976).

Privilege as applicable to juveniles. — A child is entitled to the same constitutional privilege against self-incrimination as is available to adults. *Freeman v. Wilcox*, 119 Ga. App. 325, 167 S.E.2d 163 (1969), for comment, see 22 Mercer L. Rev. 597 (1971).

Constitutional privilege against self-incrimination is as applicable to juveniles as it is with respect to adults. *K.E.S. v. State*, 134 Ga. App. 843, 216 S.E.2d 670 (1975).

Privilege as applicable to corporations. — Under U.S. Const., amend. 5, a corporation cannot avail itself of the privilege against self-incrimination. *Classic Art Corp. v. State*, 245 Ga. 448, 265 S.E.2d 577 (1980); *In re Agan*, 498 F. Supp. 493 (N.D. Ga. 1980).

Corporate officer may be compelled to identify and authenticate corporate records produced pursuant to a valid subpoena duces tecum even though this involves compelling oral testimony, where the officer is compelled to state nothing more than the belief that the papers are those described in the subpoena, since such testimony is only ancillary to the primary act compelled — that of producing the documents. *In re Agan*, 498 F. Supp. 493 (N.D. Ga. 1980).

Corporate officer may be compelled to give name and address. — In context of compliance by corporate officer with requests for documents designated in subpoena duces tecum, absent unusual circumstances, testifying before grand jury as to the officer's name and address merely provides identification information ancillary to production of the documents called for in the subpoena and is not within the scope of U.S. Const., amend. 5's privilege against self-incrimination. *In re Agan*, 498 F. Supp. 493 (N.D. Ga. 1980).

Corporate officers may be compelled to produce corporate records even though they may be personally incriminating, since corporations can only speak through their officers. *In re Agan*, 498 F. Supp. 493 (N.D. Ga. 1980).

Even though a corporate officer is the sole shareholder or alter ego of the corporation, the officer may be compelled to produce corporate records that may incriminate the officer. *In re Agan*, 498 F. Supp. 493 (N.D. Ga. 1980).

Generally, corporate books and records cannot be insulated from reasonable demands by governmental authorities by a claim of personal privilege and same only applies to the private property of the person claiming the privilege; thus, a corporate officer may not withhold testimony or documents on the ground that the corporation

Self-Incrimination (Cont'd)**1. In General** (Cont'd)

would be incriminated, nor may the custodian of corporate books or records withhold them on the ground that the custodian personally might be incriminated by their production. *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981).

An individual may not claim the fifth amendment privilege against compulsory self-incrimination to withhold documents of a collective entity held in a representative capacity and an order of a district court finding that individual in contempt of court for refusing to produce the records of a corporation in compliance with a grand jury subpoena duces tecum will be affirmed. *In re Grand Jury Subpoena Duces Tecum*, 795 F.2d 904 (11th Cir. 1986).

A corporate representative or agent cannot claim a fifth amendment privilege against producing corporate documents, whether or not they were prepared by the representative or agent, regardless of the incriminating nature of the information they contain. *In re Grand Jury Subpoena*, 635 F. Supp. 569 (N.D. Ga. 1986).

Custodian of corporate or association books, by accepting custodianship, voluntarily assumes a duty that overrides the custodian's claim of privilege with respect to the production of records themselves, but does not waive the custodian's constitutional privilege as to oral testimony; therefore, a corporate officer who is the custodian of the records may not resist the production of corporate books in response to subpoena even though such books may tend to incriminate the custodian as an individual. *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981).

Custodian of records not required to disclose whereabouts of records. — The custodian of corporate records must produce the records if the custodian has them and the custodian may also be required to identify them; but the custodian may not be required to do more in answering questions as to their whereabouts such as to disclose the whereabouts of the records or who has possession of them. *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981).

Witness in a state court can claim the privilege against self-incrimination as to mat-

ters which might tend to incriminate him under either state or federal law. *Mallin v. Mallin*, 227 Ga. 833, 183 S.E.2d 377 (1971).

Persons other than criminal defendants cannot stymie questioning totally, but must take the stand when called and decide after each question whether to invoke the privilege or not. *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

Nondefendant witness cannot refuse to testify. — Therefore, such a witness cannot be said to have waived the witness' privilege under U.S. Const., amend. 5 against self-incrimination by testifying. *United States v. Dooley*, 587 F.2d 201 (5th Cir.), cert. denied, 440 U.S. 949, 99 S. Ct. 1430, 59 L. Ed. 2d 639 (1979).

Applicability to potential defendants. — A potential defendant may be subpoenaed to appear before a grand jury and subsequently indicted without violating the self-incrimination proscription of the fifth amendment, if the potential defendant testifies voluntarily. *Blackwell v. United States*, 405 F.2d 625 (5th Cir.), cert. denied, 395 U.S. 962, 89 S. Ct. 2104, 23 L. Ed. 2d 747 (1969).

Disciplinary hearing while incarcerated in a state correctional institution is a custodial hearing which requires an appropriate warning of the right against self-incrimination before any statements made are admissible against the speaker in a subsequent criminal proceeding for those same criminal acts (in the absence of waiver). *Grant v. State*, 154 Ga. App. 758, 270 S.E.2d 42 (1980).

Attorney under investigation by State Bar of Georgia may invoke privilege against self-incrimination. — An attorney whose professional activities are under investigation by the disciplinary authorities of the State Bar of Georgia is entitled to the protection of the constitutional safeguards of the federal and state Constitutions against self-incrimination. *Wilson v. State Bar*, 225 Ga. 343, 168 S.E.2d 584, cert. denied, 396 U.S. 957, 90 S. Ct. 429, 24 L. Ed. 2d 421 (1969).

Attorney improperly found in contempt where requisite determinations about questions not made. — Attorney who delivered an anonymous campaign contribution on behalf of a client in violation of O.C.G.A. § 21-5-30(e) was improperly held in contempt for failing to disclose the client's

name to the State Ethics Commission; the attorney invoked the self-incrimination privilege, and the trial court found the attorney in contempt without first determining whether the commission's proposed questions might have been incriminating. *Begner v. State Ethics Comm'n*, 250 Ga. App. 327, 552 S.E.2d 431 (2001).

Self-incrimination a complete defense where compliance with statute would violate that privilege. — When compliance with a federal statute entails a very substantial risk of self-incrimination, a plea of the privilege against self-incrimination provides a complete defense to a prosecution based on failure to comply with that statute. *United States v. Davis*, 330 F. Supp. 899 (N.D. Ga. 1971).

Firearm registration statute not unconstitutional where prosecutorial use of information is prohibited. — A statute requiring the registration of firearms does not violate the privilege against self-incrimination where the statute prohibits the direct or indirect use of any information obtained from firearm registration in a criminal prosecution of a violation occurring prior to or concurrently with the registration. *United States v. Bright*, 471 F.2d 723 (5th Cir.), cert. denied, 412 U.S. 921, 93 S. Ct. 2742, 37 L. Ed. 2d 148 (1973).

Prosecution under National Firearms Act. — The timely assertion of the privilege under U.S. Const., amend. 5 by the transferee of an unregistered firearm is no longer a defense to a criminal prosecution under the National Firearms Act, 26 U.S.C. § 5801 et seq., since the transferee of a firearm who attempts to comply with the Act no longer faces the risk of self-incrimination, the transferee does not need immunity, whether "use" or "transactional". *United States v. Smith*, 341 F. Supp. 687 (N.D. Ga. 1972).

Prosecution under Federal Marihuana Tax Act. — The assertion of the privilege under U.S. Const., amend. 5 is a complete defense to a prosecution based on non-compliance with the Federal Marihuana Tax Act, 26 U.S.C. § 4741 et seq. *United States v. Davis*, 330 F. Supp. 899 (N.D. Ga. 1971).

Prosecution under federal tax wagering statutes. — This amendment's privilege against self-incrimination provides a complete defense to prosecution under the federal wagering tax statutes. *Lawson v. United*

States, 397 F. Supp. 370 (N.D. Ga. 1975).

Information concerning the nature of one's business may be privileged under U.S. Const., amend. 5. In re *Agan*, 498 F. Supp. 493 (N.D. Ga. 1980).

How privilege asserted as to business records. — Rights under U.S. Const., amend. 5 in business records should be asserted by refusal to deliver the records rather than by subsequently revoking that delivery and demanding their return, for when a person has voluntarily submitted records in response to a summons, it is only reasonable to assume that the government would conclude its examination and copy such records prior to return, even after a demand, and that it should have a reasonable time to do so. *Kelley v. Godbout*, 379 F. Supp. 532 (N.D. Ga. 1974).

Application of privilege to federal tax returns. — See *United States v. Vance*, 730 F.2d 736 (11th Cir. 1984).

In a prosecution for willful failure to file income tax returns, by refusing to allow the defendant to submit any evidence to the jury of good faith as to the defendant's assertion on the defendant's tax forms of the privilege against self-incrimination, without first making a prima facie showing to the court, the trial court impermissibly invaded the province of the jury. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984).

Production of records under IRS summons. — A taxpayer failed to show that any potential incrimination would have occurred as the result of the enforcement of a summons by the IRS requiring the taxpayer to testify and to produce certain designated records; therefore, U.S. Const., amend. 5 did not bar the production of the requested records. *United States v. Reis*, 765 F.2d 1094 (11th Cir. 1985).

An IRS summons to a bank requiring the production of certain records relating to an individual taxpayer did not violate the taxpayer's privilege against self-incrimination, since U.S. Const., amend. 5 does not protect against the production of records belonging to third parties and the records were not being sought pursuant to a justice department criminal prosecution. *United States v. Saunders*, 621 F. Supp. 745 (N.D. Ga. 1985).

Domestic reporting requirements of the federal Bank Secrecy Act, which requires certain financial institutions to file currency

Self-Incrimination (Cont'd)**1. In General (Cont'd)**

transaction reports, were not unconstitutional as applied to defendants charged with a money laundering scheme, as these requirements are not directed at any inherently suspect group, nor is there a direct nexus between the required disclosure and any potential criminal activity. *United States v. Sanchez Vazquez*, 585 F. Supp. 990 (N.D. Ga. 1984).

Debtor bears burden to establish privilege in fieri facias interrogatories. — Where interrogatories in fieri facias do not constitute or evidence extensive questioning as to the judgment debtor's financial affairs which would tend, as a matter of law, to incriminate the debtor, work a forfeiture of the debtor's estate, or bring disgrace or infamy upon the debtor or the debtor's family, but are clearly within the ambit of O.C.G.A. § 9-11-69, the burden is on the debtor to state the general reason for the debtor's refusal to answer and to specifically establish that a real danger of incrimination exists with respect to each question. *Petty v. Chrysler Credit Corp.*, 169 Ga. App. 418, 312 S.E.2d 874 (1984).

Voluntary waiver of privilege by property settlement agreement. — Privilege against self-incrimination can be voluntarily waived by a property settlement agreement as to future income tax returns and financial information covering future financial events unknown at the time of entering into the contract. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

If waiver necessarily follows settlement agreement, express waiver not required. — If a person represented by counsel enters into a property settlement agreement that has the necessary effect of waiving a constitutional right, express notice of or reference to such waiver is not required. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

Evidence of flight and escape. — Evidence of flight, including defendant's failure to show up at time of trial, and evidence that accused attempted to escape during trial is admissible as tending to establish guilt of an accused and is not violative of defendant's right against self-incrimination. *Carruth v. State*, 155 Ga. App. 666, 272 S.E.2d 531 (1980).

Noncustodial electronic surveillance. — Electronic surveillance of a suspect who is

not in custody does not violate right under U.S. Const., amend. 5 not to be compelled in any criminal case to be a witness against oneself. *Granes v. State*, 232 Ga. 193, 206 S.E.2d 26 (1974).

Electronic interceptions of the defendant speaking to self in the defendant's cell in the penitentiary did not violate the defendant's fifth amendment rights against self-incrimination and the defendant's due process rights. *United States v. Moody*, 977 F.2d 1425 (11th Cir. 1992), cert. denied, 507 U.S. 1052, 113 S. Ct. 1948, 123 L. Ed. 2d 653 (1993).

Illegal search and arrest. — If a search and arrest are illegal, then admissions made during the illegal detention are tainted and therefore inadmissible. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Validity of defendant's testimony after admission of illegally seized evidence. — In the absence of a contrary showing by the state, a defendant's testimony in a case after the admission into evidence of illegally seized evidence is unconstitutionally impelled by that erroneous admission. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Psychiatric evaluation. — No violation of the privilege against self-incrimination occurred where the accused was compelled to undergo a psychiatric evaluation to be used by the state after the accused made it clear the accused was going to raise the defense of insanity and requested that the state pay for the accused to be examined by a psychiatrist. *Godfrey v. Francis*, 613 F. Supp. 747 (N.D. Ga. 1985), aff'd, 836 F.2d 1557 (11th Cir.), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Defendant's suppression motion was properly denied as to the defendant's psychiatric examination by a state's expert as the defendant's counsel knew of the time, place, scope, and nature of the examination, but chose not to attend; the examination did not violate the defendant's fifth or sixth amendment rights. *Durham v. State*, 281 Ga. 208, 636 S.E.2d 513 (2006).

Admissibility of testimony given at suppression hearing under fourth amendment. — When a defendant testifies in support of a motion to suppress evidence pursuant to U.S. Const., amend. 4, the defendant's testimony may not thereafter be admitted against the defendant's at trial on the issue of guilt, unless the defendant makes no

objection. *Culpepper v. State*, 132 Ga. App. 733, 209 S.E.2d 18 (1974).

Statement properly admitted. — The trial court did not err in admitting the written statement of the defendant into evidence, because the defendant voluntarily went to the police station and told an officer that the defendant wanted to talk about the charges against the defendant. After the officer advised the defendant of the defendant's rights, the defendant indicated that the defendant understood the defendant's rights by signing a waiver of rights form. *McDaniel v. State*, 204 Ga. App. 753, 420 S.E.2d 636 (1992).

Trial court did not err in admitting defendant's statement that if the police would let defendant walk away, defendant would identify a major drug dealer, as there was no evidence that defendant was coerced or threatened by the police, or that defendant did not understand defendant's Miranda rights; thus, the trial court was authorized to find that the statement was freely and voluntarily given. *Johnson v. State*, 267 Ga. App. 549, 600 S.E.2d 667 (2004).

Trial court properly denied suppression of statements that defendant made to police officers while defendant was getting treated in the hospital for injuries sustained after committing criminal acts with a co-defendant in two home invasions, as the first statement that defendant gave to a police officer occurred when defendant was not in custody and the officer was unaware that defendant was involved in any criminal incidents; when the second officer questioned defendant, defendant was already handcuffed to the hospital gurney, such that defendant should have been given Miranda warnings, but as the statement given to that officer was repetitive of the one given to the first officer, the error was deemed harmless. *Moyer v. State*, 275 Ga. App. 366, 620 S.E.2d 837 (2005).

Defendant's motion to suppress two statements the defendant made to the police were properly denied as the defendant was not in custody when the defendant made the statements; the defendant's motion to suppress a third statement was properly denied as the defendant was read the defendant's Miranda rights before the defendant made the statement. *Durham v. State*, 281 Ga. 208, 636 S.E.2d 513 (2006).

Admission of testimony in support of motion to suppress would chill right against self-incrimination. — It is error for a trial court to admit in evidence on the issue of guilt incriminating statements given by a defendant in support of an unsuccessful pretrial motion to suppress; such a practice would require a defendant to surrender the defendant's U.S. Const., amend. 4 right against unreasonable search and seizure in order to maintain the defendant's right under U.S. Const., amend. 5 to remain silent. *Sharp v. United States*, 410 F.2d 969 (5th Cir. 1969).

Sanction for use of privilege against self-incrimination to avoid discovery. — Federal court interpretations of the privilege against self-incrimination have generally allowed dismissal of a plaintiff's action as a sanction against the plaintiff who is avoiding discovery via the self-incrimination privilege. *Master v. Savannah Sur. Assocs.*, 148 Ga. App. 678, 252 S.E.2d 186 (1979).

Imposition of maximum sentence for failure to answer questions about unrelated offenses. — A trial judge's imposition of the maximum sentence possible upon a defendant as a result of the defendant's failure to answer the judge's questions concerning an unrelated offense imposes an unconstitutional condition on the defendant's privilege against self-incrimination and violates U.S. Const., amend. 5. *Bertrand v. United States*, 467 F.2d 901 (5th Cir. 1972).

Jury instructions regarding defendant's failure to testify. — It is proper for the court to give a charge on the defendant's failure to testify without a request and it is not reversible error to fail to give the charge if the defendant does not request it. *Stapleton v. State*, 235 Ga. 513, 220 S.E.2d 269 (1975).

In the absence of a timely written request, the trial court does not err in failing to charge the jury that the defendant has a constitutional right not to testify and that no inference could be made as a result of the defendant's failure to testify on the defendant's own behalf. *Stephens v. State*, 157 Ga. App. 414, 278 S.E.2d 70 (1981).

Jury instructions regarding presumption of truthfulness as to witness testimony. — Instructing the jury that "witnesses are presumed to speak the truth unless they are impeached in some manner as provided by law" does not violate the fifth amendment

Self-Incrimination (Cont'd)**1. In General (Cont'd)**

privilege against self-incrimination. *Head v. State*, 191 Ga. App. 262, 381 S.E.2d 519, cert. denied, 191 Ga. App. 922, 381 S.E.2d 519 (1989).

Jury instruction regarding inference of guilt from possession of stolen property. — An instruction stating that guilt of the defendant can be inferred from possession of recently stolen property unaccounted for by the defendant cannot properly be construed as a comment on the defendant's failure to testify. *Horton v. State*, 228 Ga. 690, 187 S.E.2d 677 (1972).

Party asserting privilege must respond to each question asked in discovery. — If a party asserts the privilege against self-incrimination concerning matters sought to be discovered, that party must respond to each question asked, asserting the privilege to those questions that party deems necessary. *Axson v. National Sur. Corp.*, 254 Ga. 248, 327 S.E.2d 732 (1985).

Invocation of privilege by foreign nationals. — A French citizen, who sued American citizens for fraud in connection with the sale of Georgia land to the French citizen, could invoke the fifth amendment privilege against self-incrimination on the ground that the answers to certain questions posed on deposition might incriminate the French citizen of violations under the criminal law of France. *Yves Farms, Inc. v. Rickett*, 659 F. Supp. 932 (M.D. Ga. 1987).

Testimony concerning alien detainee's criminal behavior in another country not privileged. — The privilege against self-incrimination simply protects any disclosures that the witness may reasonably apprehend could be used in a criminal prosecution or that could lead to other evidence that might be so used, and testimony concerning an alien detainee's criminal behavior in the alien's country is not privileged, since such acts could not form the basis for any criminal prosecution in the United States. *Fernandez-Roque v. Smith*, 567 F. Supp. 1115 (N.D. Ga. 1983), rev'd on other grounds, 734 F.2d 576 (11th Cir. 1984).

Statements attributable to a coconspirator who refuses to testify are properly admitted as declarations of the other coconspirator during the course of the conspiracy. *Owens*

v. State, 251 Ga. 313, 305 S.E.2d 102 (1983).

Right of a witness in a criminal case to invoke the fifth amendment is not unqualified. *Jones v. State*, 162 Ga. App. 502, 291 S.E.2d 103 (1982).

Grand jury witness' refusal to answer questions on fifth amendment grounds did not warrant contempt sanctions because there was no court order that the witness answer the questions before the grand jury, nor was the witness in anywise granted immunity. *Baker v. State*, 162 Ga. App. 606, 292 S.E.2d 451 (1982).

Law firm complying with grand jury subpoenas and directing it to produce records reflecting, inter alia, its clients' financial status, business activities, payment of taxes, and involvement in litigation, did not implicate its clients in any compelled testimonial self-incrimination. In re *Grand Jury Subpoena Duces Tecum*, 754 F.2d 918 (11th Cir. 1985).

Gun obtained by police after the police denied the defendant's request for an attorney in an interview in which the defendant told the police the murder was committed by the defendant using the defendant's parent's gun was the fruit of a voluntary statement and was not subject to the exclusionary rule. *Taylor v. State*, 274 Ga. 269, 553 S.E.2d 598 (2001).

Statements during traffic stops. — A motorist detained pursuant to a traffic stop is not taken into custody for the purpose of the Miranda warning. *Hudgins v. State*, 176 Ga. App. 719, 337 S.E.2d 378 (1985).

Refusal to undergo alcohol screening test. — Because the defendant in a prosecution for driving under the influence was not in custody, there was no requirement that a request that the defendant undergo an alcohol screening test be preceded by Miranda warnings, and evidence of the defendant's refusal to undergo the test was not inadmissible as violative of the defendant's constitutional right to remain silent. *Keenan v. State*, 263 Ga. 569, 436 S.E.2d 475 (1993); *Bravo v. State*, 249 Ga. App. 433, 548 S.E.2d 129 (2001).

Noncustodial defendant and field sobriety tests. — The alphabet test and the physical dexterity tests for determining sobriety are not inadmissible under the fifth amendment of the United States Constitution because they were not evidence of a testimonial or

communicative nature. *Lankford v. State*, 204 Ga. App. 405, 419 S.E.2d 498 (1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127 (1993); *State v. Sumlin*, 224 Ga. App. 205, 480 S.E.2d 260 (1997).

Upon seeing the car in distress in a through-lane of traffic, police officer was authorized to approach the car and make inquiry and, when the defendant admitted to have been drinking and driving, the officer was authorized to conduct the field sobriety tests without giving Miranda warnings. *Coates v. State*, 216 Ga. App. 93, 453 S.E.2d 35 (1994).

Field sobriety tests are not inadmissible under the fifth amendment because they are not evidence of a testimonial or communicative character. *Coates v. State*, 216 Ga. App. 93, 453 S.E.2d 35 (1994).

Where defendant was not placed under arrest during an investigatory stop, Miranda warnings were not required to be given before field sobriety tests were conducted. *State v. Kirbabas*, 232 Ga. App. 474, 502 S.E.2d 314 (1998).

Defendant whose license was taken and who was placed temporarily in a patrol car for the defendant's own safety was not in custody and, therefore, evidence of the defendant's statements was admissible, as was evidence of the defendant's refusals to submit to alco-sensor and HGN tests and of the defendant's failure of other tests administered before the defendant's arrest. *Turner v. State*, 233 Ga. App. 413, 504 S.E.2d 229 (1998).

Driver could not assert right against self-incrimination to suppress results of field sobriety test, since the driver was not a person "charged in a criminal proceeding" at the time the test was given, the driver was not in police custody at that time, and no force or threat of penalty was used against the driver. *Montgomery v. State*, 174 Ga. App. 95, 329 S.E.2d 166 (1985).

Breath tests. — The choice under O.C.G.A. §§ 40-5-55 and 40-6-392, either to agree or refuse to take a blood-alcohol test, is not protected by the privilege against self-incrimination. Neither is the form signed by the defendant, agreeing to take a breath test. A police officer is not required to inform defendant of the defendant's Miranda rights. *State v. Mack*, 207 Ga. App. 287, 427 S.E.2d 615 (1993).

Fact that defendant was not advised of defendant's Miranda rights before field sobriety tests were conducted did not violate the fifth amendment; such tests were not evidence of a testimonial or communicative nature and therefore, they did not constitute "statements" subject to the fifth amendment protections embodied in Miranda. *Disharoon v. State*, 263 Ga. App. 787, 589 S.E.2d 339 (2003).

Because the defendant was informed of the Miranda rights in a timely manner and the procedure employed to gain defendant's consent was fair and reasonable, the trial court erred in suppressing the results of the state-administered breath test. *State v. Allen*, 272 Ga. App. 169, 612 S.E.2d 11 (2005).

Striking of testimony. — When the defendant asserted a possessory interest in a suitcase, the ownership of the suitcase was not a collateral matter and was a proper subject of cross-examination but, once the defendant claimed the privilege against self-incrimination, it was proper to strike the testimony concerning the case. *Rasnake v. State*, 164 Ga. App. 765, 298 S.E.2d 42 (1982), cert. denied, 462 U.S. 1132, 103 S. Ct. 3114, 77 L. Ed. 2d 1368 (1983).

Where nonimmunized witnesses are involved, such witnesses are allowed to consult with their attorneys during the course of the questioning to determine whether or not they should invoke their privilege based on U.S. Const., amend. 5 against self-incrimination. *In re Earnest*, 90 F.R.D. 698 (M.D. Ga. 1981).

Admission of confession not harmless in sentencing phase. — Admission of a mentally retarded murder defendant's confession of guilt was harmless error at the defendant's trial but not at the defendant's sentencing, where the confession may have played some part in the jury's decision to sentence the defendant to death rather than to life imprisonment. *Smith v. Kemp*, 664 F. Supp. 500 (M.D. Ga. 1987), appeal dismissed, 849 F.2d 481 (11th Cir. 1988), aff'd, 887 F.2d 1407 (11th Cir. 1989).

Testimony of codefendant. — Because a codefendant was informed of the codefendant's constitutional rights under the fifth amendment and was willing to testify, but was prevented from testifying by the trial court, this was harmful error requiring reversal of a finding of delinquency. *In re*

Self-Incrimination (Cont'd)**1. In General (Cont'd)**

J.L.B., 184 Ga. App. 243, 361 S.E.2d 236 (1987).

Exculpatory statement followed by inculpatory statement. — Even if defendant's initial statement to police was erroneously admitted, the error was harmless because the statement given was exculpatory rather than incriminating, and it was followed by a statement which was much stronger and tended to be inculpatory, thereby, if valid, vitiating any possible damage accruing from the admission of the first statement. *Caplinger v. State*, 185 Ga. App. 476, 364 S.E.2d 610 (1988).

Statement held not inculpatory. — It was unnecessary to determine whether there was a *Miranda* defect, because the defendant's statement was not inculpatory, since all it could stand for is that the defendant knew the location of a rifle, which was not inconsistent with the defendant's defense of "defense of self and home", so that any error in admitting the defendant's statement was harmless. *Delay v. State*, 258 Ga. 229, 367 S.E.2d 806, cert. denied, 488 U.S. 850, 109 S. Ct. 132, 102 L. Ed. 2d 105 (1988).

Contractual obligation of insured to submit to examination under oath. — The fifth amendment privilege against self-incrimination did not excuse an insured from fulfilling the insured's contractual obligation under a homeowner's insurance policy to submit to an examination under oath as a condition precedent to suit. *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944 (11th Cir.), cert. denied, 498 U.S. 899, 111 S. Ct. 255, 112 L. Ed. 2d 213 (1990).

Trial court's instruction on flight of the accused was neither burden shifting nor violative of defendant's right to remain silent. *Sweet v. State*, 196 Ga. App. 451, 396 S.E.2d 82 (1990).

Rights noted in record. — Trial defense counsel's request that trial court lay defendant's rights on the record precluded defendant from seeking a mistrial after the request was granted. *Brundage v. State*, 208 Ga. App. 58, 430 S.E.2d 173 (1993).

Prosecution may not use claim of privilege against defendant. — Trial court did not abuse its discretion in denying defendant's motion for a mistrial due to a fire investiga-

tor's comments on defendant's exercise of defendant's right to remain silent as the motion was initially made before any such testimony was given, and, while in the second instance the investigator did improperly comment on the exercise of defendant's right, the trial court properly gave the jurors a curative instruction and specifically asked them whether they could disregard the testimony. *George v. State*, 263 Ga. App. 541, 588 S.E.2d 312 (2003).

Waiver of fifth amendment privilege. — Because the testimony of a cameraman established that a videotape was a fair and accurate portrayal of defendant's arrest, and there was no chain of custody requirement for the admission of videotapes, defendant's custodial statements to police in Florida were properly admitted at defendant's trial in Georgia; it was not necessary for a valid waiver of the fifth amendment privilege that defendant knew and understood every consequence of the waiver. *Smith v. State*, 279 Ga. 48, 610 S.E.2d 26 (2005).

2. Interrogations

Relationship to sixth amendment. — Admission of defendant's statement to a police officer concerning an attempted burglary was proper under the fifth amendment as defendant had only invoked defendant's right to counsel under the sixth amendment in connection with unrelated charges in Fulton County; defendant never invoked defendant's fifth amendment right for counsel to be present during questioning in connection with the attempted burglary in Henry County. *Smith v. State*, 273 Ga. App. 107, 614 S.E.2d 219 (2005).

What constitutes "interrogation". — The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. *Murray v. State*, 155 Ga. App. 816, 273 S.E.2d 219 (1980); *United States v. Bennett*, 626 F.2d 1309 (5th Cir. 1980), cert. denied, 449 U.S. 1092, 101 S. Ct. 888, 66 L. Ed. 2d 821 (1981).

Defendant's suppression motion was prop-

erly denied as to the statements given to the police before the defendant was given the defendant's Miranda warnings as, although the defendant was in custody as the defendant was approached at gunpoint, handcuffed, and placed on the ground while guarded by three police officers even before the defendant was advised that he was under arrest, the defendant was not subjected to interrogation as the officers asked the defendant's father, not the defendant, about the missing truck, and their questions to the father were not reasonably likely to elicit any response from the defendant. *Waters v. State*, 281 Ga. 119, 636 S.E.2d 538 (2006).

What constitutes "custodial interrogation". — By custodial interrogation is meant the questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of freedom of action in any significant way. *Chester v. State*, 157 Ga. App. 191, 276 S.E.2d 684 (1981).

The custodial interrogation that requires investigating officers to advise the person interrogated of constitutional rights to counsel and against self-incrimination is that interrogation that occurs after the investigation has focused on an accused. *Boutwell v. State*, 256 Ga. 63, 344 S.E.2d 222 (1986).

Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue for purposes of giving constitutionally required custodial warnings, for some suspects are free to come and go until the police decide to make an arrest. *McAllister v. State*, 270 Ga. 224, 507 S.E.2d 448 (1998).

Defendant's statement was not made in a custodial interrogation for Miranda purposes even though a police officer falsely represented to defendant that whether defendant would be arrested depended upon what defendant said in defendant's statement; the officer had obtained an arrest warrant before defendant made defendant's statement, but never communicated to defendant the officer's intent to place defendant under arrest. *Richardson v. State*, 265 Ga. App. 711, 595 S.E.2d 565 (2004).

Custodial and noncustodial interrogation distinguished. — The distinction between custodial and noncustodial interrogation involves probable cause to arrest, subjective intent of the police, subjective belief of the

defendant, and focus of the investigation. *Shy v. State*, 234 Ga. 816, 218 S.E.2d 599 (1975).

One who is under investigative detention or is the subject of a general on-the-scene investigation is not in "custody" within the meaning of Miranda. *Bailey v. State*, 153 Ga. App. 178, 264 S.E.2d 710 (1980).

Custodial interrogation not found. — Defendant was not subjected to improper custodial interrogation where the officer read to defendant the implied consent warnings for suspects over 21, and placed defendant in the back of the officer's patrol car, during an impound search of defendant's car, the officer found an identification card that showed that defendant was under 21, the officer asked defendant the defendant's age, and learned that defendant was under 21, the officer read defendant the implied consent notice for suspects under 21, and the question was not designed to incriminate defendant, as the officer was arresting defendant for driving under the influence (less safe driver), and defendant's age was not an element of the offense. *Evans v. State*, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

Detective's inquiry into whether co-defendant was okay, made while they were in the bathroom, did not constitute interrogation under Miranda. *Smith v. State*, 269 Ga. App. 133, 603 S.E.2d 445 (2004).

Routine booking questions. — Asking the defendant in custody how the defendant injured the defendant's arm did not fall under the exception to Miranda for "routine booking questions." *Franks v. State*, 268 Ga. 238, 486 S.E.2d 594 (1997).

Circumstance of arrest. — Trial court did not err in admitting redacted videotape of two custodial interrogations into evidence, as statements on the tape about uncharged burglaries was admissible as a circumstance of defendant's arrest and statements about defendant's criminal record were voluntarily given. *Oliver v. State*, 276 Ga. 665, 581 S.E.2d 538 (2003).

Miranda played no part in the admissibility of field sobriety test results, notwithstanding the definition of arrest contained in O.C.G.A. § 17-4-1, as defendant was not under arrest for constitutional purposes where defendant failed to show any restraints comparable to those associated with formal arrest, defendant's statement that

Self-Incrimination (Cont'd)**2. Interrogations (Cont'd)**

defendant knew the officer was going to “take her in” demonstrated defendant’s apprehension, not the fact of an arrest, defendant was not informed that defendant’s detention would not be temporary, and defendant’s performance on the field sobriety tests did not support a claim that defendant was exposed to custodial interrogation at the scene. *Evans v. State*, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

Statement responding to administrative inquiry. — When, after defendant was arrested, defendant was asked about defendant’s employment, in the course of completing biographical information about defendant, defendant’s response, before defendant was warned of defendant’s Miranda rights, was admissible, because, while the question was not asked as part of a formal booking, it was part of an administrative processing which was not intended to elicit an incriminating response. *English v. State*, 260 Ga. App. 620, 580 S.E.2d 351 (2003).

Determination of custodial restraint. — There are several criteria for determining when custodial restraint is present: the subjective intent of the police; the subjective belief of the defendant; whether probable cause for arrest existed at the time of the interrogation; and whether the defendant was the focus of the investigation. These criteria are, of course, intended to facilitate rather than replace case-by-case analysis. *Alderman v. Austin*, 498 F. Supp. 1134 (S.D. Ga. 1980), *aff’d in part, rev’d in part* on other grounds, 663 F.2d 558 (5th Cir. 1981), on rehearing, 695 F.2d 124 (5th Cir. 1983).

Purpose of Miranda warnings is prophylactic in that they serve to ensure that an in-custody statement is still voluntary and not compelled by circumstances; certainly, then, the failure to communicate an officer’s true intent with regard to taking a suspect into custody will not control the need for Miranda warnings, since the compulsive aspect of custody is not present so as to impact on the voluntary nature of the statement. *Richardson v. State*, 265 Ga. App. 711, 595 S.E.2d 565 (2004).

Interview in home. — Interview by a Child Protective Services Investigator and a detective from the sheriff’s department at defen-

dant’s home was not a custodial situation such as would invoke the Miranda protections. *Carroll v. State*, 208 Ga. App. 316, 430 S.E.2d 649 (1993).

Single threshold inquiry of an officer as to what is happening is not an impermissible interrogation. *Shy v. State*, 234 Ga. 816, 218 S.E.2d 599 (1975).

While recognizing that Miranda warnings are not limited to station-house interrogations as long as there is some significant deprivation of an individual’s freedom of action, a police officer may make a threshold inquiry to ascertain if there were any current danger to the officer or to others present at the scene. So long as the interrogation is not aimed at obtaining information to establish a suspect’s guilt but is instead aimed at determining the nature of the situation upon the arrival of the officer on the scene, some initial inquiry may, under the circumstances, be permissible before Miranda warnings are given. *Aldridge v. State*, 247 Ga. 142, 274 S.E.2d 525 (1981).

Upon arrival at scene of suspected crime, and without first administering Miranda warnings, police officers may make initial inquiry solely for purpose of ascertaining whether or not there currently is any danger to them or to other persons who are present at the scene. Such questioning must not be “aimed at obtaining information to establish a suspect’s guilt.” *State v. Overby*, 249 Ga. 341, 290 S.E.2d 464 (1982).

Test for determining custody at traffic stop. — The test for determining whether a person is in custody at a traffic stop is if a reasonable person in the suspect’s position would have thought the detention would not be temporary; police officers at the scene of a traffic stop may conduct a general on-the-scene investigation, which may even require that persons be temporarily detained, without such being classified as custodial interrogation. *Carroll v. State*, 203 Ga. App. 22, 416 S.E.2d 354 (1992).

Noncustodial, voluntary statement made during on-the-scene investigation. — A noncustodial, voluntary statement by the defendant to an officer simply making an on-the-scene investigation to find out what has happened, when the officer has no suspects, is always admissible against the maker without the defendant’s having been advised of the rights against self-incrimination. *Davis*

v. State, 135 Ga. App. 584, 218 S.E.2d 297 (1975); *Brown v. State*, 140 Ga. App. 160, 230 S.E.2d 128 (1976), cert. denied, 434 U.S. 819, 98 S. Ct. 58, 54 L. Ed. 2d 75 (1977).

On-the-scene questioning permissible absent counsel if not prolonged. — Investigation by police officers at the scene on their arrival, and the defendant's statements to them, not being tainted by the overtones of coercion incident to prolonged illegal detention, are not objectionable because defendant did not at that time have counsel. *Dukes v. State*, 109 Ga. App. 825, 137 S.E.2d 532 (1964).

On-the-scene inquiries in custodial institutions. — Same principles governing initial on-the-scene inquiries when crime scene is "on the streets" apply also when scene of crime is "behind bars" in a penal institution, jail or other custodial institution. *State v. Overby*, 249 Ga. 341, 290 S.E.2d 464 (1982).

Roadside questioning at routine stop not custodial situation. — When a violator is placed in custody or under arrest at a traffic stop the protection of Miranda arises; however, roadside questioning at a routine stop does not constitute such a custodial situation. *Lebrun v. State*, 255 Ga. 406, 339 S.E.2d 227 (1986); *Brown v. State*, 223 Ga. App. 364, 477 S.E.2d 623 (1996).

Miranda required in routine traffic incident investigation. — If a defendant is under arrest, a Miranda warning must be given regardless of whether the questioning occurs in the context of a routine investigation of a traffic incident. *State v. O'Donnell*, 225 Ga. App. 502, 484 S.E.2d 313 (1997).

Defendant not in custody prior to officers' decision to arrest. — The trial court's determination that the defendant was not in custody prior to the time of the officers' decision to arrest the defendant was not clearly erroneous and would not be disturbed on appeal because there was no evidence that the officer indicated to the defendant in any manner that the defendant was not free to leave or that the stop would be anything other than temporary. *Carroll v. State*, 203 Ga. App. 22, 416 S.E.2d 354 (1992).

Request that witnesses not leave. — Because, although all the witnesses had been requested not to leave while the sheriff was attempting to secure the crime scene, no one had been placed under arrest, and no

one had been given any Miranda warnings, the defendant was not in custody nor was the defendant otherwise deprived of freedom of action in any significant way. Thus, the trial court did not err in allowing the defendant's response to a person from the sheriff's office into evidence. *Parker v. State*, 256 Ga. 363, 349 S.E.2d 379 (1986).

Supposed "victim" of robbery was not "in custody" until suspicion began to focus on the "victim" shortly after the "victim" implicated self with contradictory statements, at which time Miranda rights were given. *United States v. Roark*, 753 F.2d 991 (11th Cir. 1985).

Suspect in custody was required to be warned of rights prior to interrogation even though the interrogation involved an offense other than that for which the suspect was in custody. *State v. Rogers*, 173 Ga. App. 653, 327 S.E.2d 782 (1985).

Illegal detention as not excluding confession. — Even assuming that a juvenile suspect was illegally detained by juvenile authorities, the suspect's confession was admissible because proper safeguards (Miranda warnings, presence of parent) were present and because there was no evidence of intimidation or of purposeful and flagrant misconduct on the part of the juvenile authorities. *Houser v. State*, 173 Ga. App. 378, 326 S.E.2d 513 (1985).

Statements not made in context of "custodial interrogation". — None of the statements made by the defendant to the police officers who searched the defendant's apartment were made in the context of a "custodial interrogation," in that the officers did not have probable cause nor the subjective intent to arrest the defendant, and there was no evidence that the defendant believed the defendant to be in custody or that the defendant did not feel free to leave rather than answer the questions the defendant was asked. Therefore, the statements were not required to be suppressed. *United States v. Burke*, 613 F. Supp. 576 (N.D. Ga. 1985), rev'd on other grounds, 784 F.2d 1090 (11th Cir.), cert. denied, 476 U.S. 1174, 106 S. Ct. 2901, 90 L. Ed. 2d 987 (1986).

Where the defendant, who was not in custody at the time, volunteered an explanation as to why the defendant possessed a weapon without authority, no Miranda warning was necessary and the evidence was

Self-Incrimination (Cont'd)**2. Interrogations (Cont'd)**

sufficient to show that the defendant shot self in a government building with a weapon that the defendant took from police custody, in violation of O.C.G.A. §§ 16-8-2 and 16-7-24(a); therefore, the trial court's findings were not clearly erroneous. *McClendon v. State*, 264 Ga. App. 174, 590 S.E.2d 189 (2003).

Confession after break in custody upheld.

— Where there was a 21-month break in custody between the initial interrogation of the defendant, at which time the defendant expressed the defendant's desire to speak only through counsel, and the final interrogation, at which time the defendant confessed, there was no violation of the defendant's fifth and fourteenth amendment rights. *State v. Bymes*, 258 Ga. 813, 375 S.E.2d 41 (1989).

Because of the absence or dissipation of coercion once a suspect is released from custody, subsequent confessions obtained from even police initiated interrogation are admissible without violating the suspect's fifth amendment rights if there has been an intervening break in custody. *Wilson v. State*, 264 Ga. 287, 444 S.E.2d 306, cert. denied, 513 U.S. 988, 115 S. Ct. 486, 130 L. Ed. 2d 398 (1994).

Suspect need not be advised of right to stop questioning. — For a statement to be voluntary, arresting authorities are not required to advise the suspect that the suspect may stop the questioning at any time. *Thomas v. State*, 158 Ga. App. 668, 281 S.E.2d 646 (1981).

Inquiries for purpose of protecting officer and others. — A police officer in the course of investigating unusual behavior can make reasonable inquiries to dispel the officer's reasonable fears for the officer's safety and that of others. *Shy v. State*, 234 Ga. 816, 218 S.E.2d 599 (1975).

Miranda warnings contemplate an interrogation after the suspect is in custody and do not apply where investigation has not focused on suspect and where no incriminating statements have been made. *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308, cert. denied, 428 U.S. 910, 96 S. Ct. 3224, 49 L. Ed. 2d 1219 (1976).

Investigation focused upon noncustodial defendant. — If the focus of investigation is

upon the defendant, but the defendant is not in custody, the defendant's volunteered response is admissible in evidence. *Chester v. State*, 157 Ga. App. 191, 276 S.E.2d 684 (1981).

Deliberate delay of arrest to elicit information. — Where agents somewhat prolong a booking procedure, asking for more information than is strictly necessary, and deliberately create a relaxed atmosphere in the hope that defendant might let something slip, this is not such an overbearing custodial interrogation as to deprive the defendant of free choice in making a statement. *Jenkins v. State*, 123 Ga. App. 822, 182 S.E.2d 542 (1971).

Police may not delay arrest of a suspect as a subterfuge to coerce the suspect into incriminating self. *Shy v. State*, 234 Ga. 816, 218 S.E.2d 599 (1975).

Error in giving warnings harmless when statement not in evidence. — Where no statement obtained while in custody is offered into evidence, any error in the timely giving of Miranda rights is harmless. *Sheffield v. State*, 235 Ga. 507, 220 S.E.2d 265 (1975).

Warning of right to withdraw waiver not required. — Miranda does not require officers to advise the individual that the individual may withdraw the waiver of constitutional rights at any time during the interrogation. *Katzensky v. State*, 228 Ga. 6, 183 S.E.2d 749 (1971).

Miranda warnings in no way inform a person of the person's rights under U.S. Const., amend. 4, including the person's right to be released from unlawful custody following an arrest without a warrant or without probable cause. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Statement may be inadmissible under U.S. Const., amend. 4, even if voluntary under U.S. Const., amend. 5. — Even though proper Miranda warnings may have been given prior to a defendant's incriminatory statement and even though the statement may have been voluntary for purposes of U.S. Const., amend. 5, the statement is nonetheless inadmissible under the U.S. Const., amend. 4, if it is the product of an illegal seizure. *Dupree v. State*, 247 Ga. 470, 277 S.E.2d 18 (1981).

There is no per se rule that Miranda warnings in and of themselves suffice to cure

a fourth amendment violation involved in obtaining inculpatory statements during custodial interrogation following a formal arrest on less than probable cause. In order to use such statements, the prosecution must show not only that the statements meet fifth amendment requirements (voluntariness), but also that the causal connection between the statements and the illegal arrest is sufficiently attenuated so as to purge the primary taint of the illegal arrest in light of the distinct policies and interests of the fourth amendment. *Robinson v. State*, 166 Ga. App. 741, 305 S.E.2d 381 (1983).

Warnings need not be repeated in subsequent interrogation. — In subsequent interrogations of a defendant, it is not necessary that the full Miranda warning be given again. Rather, it is sufficient if the first complete warning thereafter is reinforced by the authorities prior to each subsequent interrogation by reminding the defendant that the defendant previously was advised of the defendant's rights. *Anglin v. State*, 244 Ga. 1, 257 S.E.2d 513 (1979); *Bragg v. State*, 162 Ga. App. 264, 291 S.E.2d 112 (1982).

Because the defendant gave three statements on the day in question and the investigating officer fully informed the defendant of the defendant's Miranda rights (including the right to have an attorney appointed if the defendant so desired) prior to the giving of the first statement, in view of the continuing nature of the interrogation of the defendant (and the relatively short time span between the giving of the first Miranda warnings and the third statement), it was not necessary for the investigating officer to inform the defendant again that an attorney would be appointed to represent the defendant if the defendant was indigent and the defendant so desired. *Akers v. State*, 179 Ga. App. 529, 346 S.E.2d 861 (1986).

Warnings need not be repeated where questioning constitutes merely continued interrogation. — If a defendant is advised of the defendant's constitutional right prior to the defendant's first in-custody statement, further warning is not required prior to the taking of a second in-custody statement some seven hours later, if such questioning constitutes merely continued interrogation. *Watson v. State*, 227 Ga. 698, 182 S.E.2d 446 (1971).

Trial court did not clearly err in admitting

defendant's custodial statement in redacted form because the court, after hearing the conflicting testimony, including testimony about defendant's intoxication, and after seeing the signed waiver of rights by defendant determined that defendant was properly advised of defendant's constitutional rights and that defendant's custodial statement met the criteria for admission. *Wallace v. State*, 267 Ga. App. 801, 600 S.E.2d 808 (2004).

Miranda is applicable to custodial interrogation and does not require that a defendant be given any warning at trial. *Schiselman v. Trust Co. Bank*, 246 Ga. 274, 271 S.E.2d 183 (1980).

Defendant's custodial statement was admissible as the defendant's statement was voluntarily given where an officer recited the defendant's Miranda rights to the defendant by memory one day and upon returning to the jail the next day to obtain the defendant's fingerprints, the defendant voluntarily began talking to the officer about the three woman whom the defendant was accused of raping and the officer then repeated from memory the defendant's Miranda rights, the defendant signed a waiver of the defendant's Miranda rights, and the defendant then gave a custodial statement. *Collins v. State*, 267 Ga. App. 784, 600 S.E.2d 802 (2004).

Knowing and voluntary statements made after receiving warnings are admissible. — If a defendant was properly advised and made aware of Miranda rights, the facts that thereafter while in custody the defendant knowingly and voluntarily elected to talk is no cause for complaint. *Williams v. State*, 155 Ga. App. 513, 271 S.E.2d 657 (1980).

Where defendant wishes to remain silent, interrogation must cease. — Once Miranda warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that the individual wishes to remain silent, the interrogation must cease. *United States v. Morris*, 491 F. Supp. 226 (S.D. Ga. 1980).

Whether accused in custody is question of fact. — Miranda safeguards are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. Whether or not the accused was in custody or under interro-

Self-Incrimination (Cont'd)**2. Interrogations** (Cont'd)

gation is a question of fact to be resolved by the trial court. *Brenneman v. State*, 200 Ga. App. 111, 407 S.E.2d 93 (1991).

Facts supported admission of statement.

— *Miranda* warnings were not required for the admission of defendant's statement to a police sergeant as: (1) defendant was not under arrest at the time of the interview; (2) defendant was not prevented from leaving the interview; (3) defendant was not promised anything in return for a statement, nor threatened into making the statement; and (4) the sergeant acknowledged telling defense counsel that the sergeant was trying to gather enough evidence to put defendant in jail, but this did not make the statement inadmissible. *Thomas v. State*, 262 Ga. App. 492, 589 S.E.2d 243 (2003).

Interrogation must cease when an individual unequivocally asks for an attorney. *Murray v. State*, 155 Ga. App. 816, 273 S.E.2d 219 (1980); *United States v. Webb*, 633 F.2d 1140 (5th Cir. 1981); *Blige v. State*, 203 Ga. App. 151, 416 S.E.2d 160 (1992).

An accused in custody, having expressed the desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to the accused, unless the accused initiates further communication, exchanges, or conversations with the police. *Cervi v. Kemp*, 855 F.2d 702 (11th Cir. 1988), cert. denied, 489 U.S. 1033, 109 S. Ct. 1172, 103 L. Ed. 2d 230 (1989); *Allen v. State*, 259 Ga. 63, 377 S.E.2d 150 (1989); *Nobles v. State*, 191 Ga. App. 594, 382 S.E.2d 637 (1989), cert. denied, 191 Ga. App. 923, 382 S.E.2d 637 (1989); *Cansler v. State*, 261 Ga. 693, 409 S.E.2d 504 (1991).

Defendant's statement to a police officer — "I'll talk to you after I've talked to my lawyer" — was a clear and unequivocal assertion of the defendant's right to counsel, requiring that all interrogation should immediately have ceased. *Allen v. State*, 259 Ga. 63, 377 S.E.2d 150 (1989).

Individual has the right to cease talking and to request the presence of an attorney at any time during interrogation. *Katzensky v. State*, 228 Ga. 6, 183 S.E.2d 749 (1971).

Defendant's demand for counsel does not bar voluntary statements if the defendant

spontaneously incriminates self after questioning has ceased. *United States v. Webb*, 633 F.2d 1140 (5th Cir. 1981).

Request for counsel required. — Without an oral or written request the accused does not invoke a right to the presence of an attorney during custodial interrogation. *Johnson v. State*, 251 Ga. 62, 303 S.E.2d 7 (1983).

Defendant's statement to officers after the defendant was read the defendant's rights to "go ahead and run the lawyers" did not constitute an unambiguous or unequivocal request for counsel. *Mincey v. Head*, 206 F.3d 1106 (11th Cir. 2000), cert. denied, 532 U.S. 926, 121 S. Ct. 1369, 149 L. Ed. 2d 297 (2001).

Although a refusal to sign a waiver of rights form may indicate that the suspect is invoking the right to counsel, it is not conclusive proof that the suspect has invoked the right. *Mincey v. Head*, 206 F.3d 1106 (11th Cir. 2000), cert. denied, 532 U.S. 926, 121 S. Ct. 1369, 149 L. Ed. 2d 297 (2001).

Defendant's right to speak with an attorney was not violated and defendant's custodial interrogation was admissible into evidence because defendant's comments during the interrogation indicated an intention on defendant's part to speak with a lawyer in the future and did not constitute a clear request for counsel; accordingly, the officer who was questioning defendant was not required to cease questioning defendant. *Wallace v. State*, 267 Ga. App. 801, 600 S.E.2d 808 (2004).

Refusal to sign waiver of counsel is not request for counsel. — Accused's refusal to sign a waiver of counsel form was not in effect an assertion of the accused's right to the presence of an attorney and a significant event sufficient to invoke *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Johnson v. State*, 251 Ga. 62, 303 S.E.2d 7 (1983).

Effect of request for attorney on interrogation. — A fifth amendment right to counsel, like the sixth amendment right to counsel, may be waived by the accused; in either case, once a defendant requests an attorney, all police initiated interrogation is prohibited, and any waiver of the defendant's right to counsel for that police initiated interrogation is invalid, but the defendant may initiate further communications with the

police. *Housel v. State*, 257 Ga. 115, 355 S.E.2d 651 (1987), cert. denied, 487 U.S. 1240, 108 S. Ct. 2915, 101 L. Ed. 2d 946 (1988).

Because the defendant asked for an attorney after the defendant's Miranda rights were read and the questioning was continued with no break in the interrogation of the defendant as a "suspect" and the questioning of the defendant as a "witness," the defendant's statement was involuntary and could not be used at trial to impeach the defendant. *Linares v. State*, 266 Ga. 812, 471 S.E.2d 208 (1996), cert. denied, 519 U.S. 997, 117 S. Ct. 491, 136 L. Ed. 2d 384 (1996).

Equivocal request for counsel. — Because the defendant's desires were expressed in an equivocal fashion, police officers' efforts at clarification showed that the defendant did not intend to invoke the fifth amendment right to counsel by virtue of the defendant's equivocal request, and the trial court did not err by admitting the defendant's statement into evidence. *Bryant v. State*, 186 Ga. App. 142, 366 S.E.2d 810 (1988).

Question not rising to level of equivocal request for counsel. — Although the defendant asked a detective if the detective thought the defendant needed a lawyer, the defendant's question did not rise to the level of an equivocal request for counsel. *Byrd v. State*, 261 Ga. 202, 403 S.E.2d 38 (1991).

Defendant's comment concerning whether the defendant should ask for an attorney, made while the defendant was in the process of waiving the defendant's Miranda rights, was not an equivocal request for counsel. *Jackson v. State*, 222 Ga. App. 843, 476 S.E.2d 615 (1996).

Request for attorney does not bar admission of subsequent statements. — If a defendant is arrested, advised of the defendant's rights, makes an incriminating statement, is arraigned, at which time the defendant asks for an attorney, is later advised of the defendant's rights again, and then makes another incriminating statement, the admission of the defendant's second statement does not violate the defendant's fifth and fourteenth amendment rights. The defendant, under these circumstances, has only indicated the defendant desires counsel in the sixth amendment sense, not that the defendant will deal with the police only through a lawyer. *Collins v. Francis*, 728 F.2d 1322 (11th

Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984).

Police may legitimately inquire whether a suspect has changed the suspect's mind about speaking to them with or without an attorney. *Johnson v. State*, 251 Ga. 62, 303 S.E.2d 7 (1983).

Failure to cease questioning after phone call. — Defendant's Miranda rights were not violated when investigating officers failed to cease their questioning after the defendant made a telephone call to the defendant's brother from the jail, during which the defendant requested that the defendant's brother obtain an attorney for the defendant. *Payne v. State*, 249 Ga. 354, 291 S.E.2d 226 (1982).

Entry of attorney into proceedings after defendant has waived rights. — Where the defendant was adequately advised of the defendant's rights and signed a written waiver prior to commencing a lengthy taped statement, in the course of which the interrogators were advised that an attorney secured by the defendant's parent had arrived and wanted to talk to the defendant, interrogators did not deny the defendant's rights by failing to advise the defendant of the attorney's presence. *Blanks v. State*, 254 Ga. 420, 330 S.E.2d 575 (1985), cert. denied, 475 U.S. 1090, 106 S. Ct. 1479, 89 L. Ed. 2d 733 (1986).

Prohibition against interrogation applies when sixth amendment right to counsel asserted. — The bright-line rule that prohibits police-initiated interrogations after a defendant has asserted the defendant's fifth amendment right to counsel also applies when a defendant has asserted the defendant's sixth amendment right to counsel at an arraignment or similar proceeding. *Collins v. Zant*, 892 F.2d 1502 (11th Cir.), cert. denied, 449 U.S. 1103, 101 S. Ct. 990, 66 L. Ed. 2d 829 (1981).

Interrogation for other crimes. — After being given the Miranda warnings, the person under arrest may be interrogated about the commission of crimes other than the one for which the person has been arrested. *Cantrell v. State*, 237 Ga. 851, 230 S.E.2d 287 (1976).

Spontaneous admission made after invoking right to silence is admissible. — An admission made by a suspect in custody, after the suspect has invoked the privilege of

Self-Incrimination (Cont'd)**2. Interrogations (Cont'd)**

silence, is voluntary within the meaning of *Miranda*, if it is made spontaneously, not in response to any question, during legitimate police questioning unrelated to the crime (booking procedure). *Jenkins v. State*, 123 Ga. App. 822, 182 S.E.2d 542 (1971).

Spontaneous statement admissible. — If a statement is made by the defendant after the defendant is informed of the victim's death and is not as a result of any questioning, but is in the nature of a spontaneous statement, it is admissible. *Eidson v. State*, 167 Ga. App. 184, 305 S.E.2d 787 (1983).

An incriminating statement made by the defendant after the defendant was arrested and shown the defendant's indictment was a spontaneous exclamation not prompted by any question and was properly admitted into evidence. *United States v. Suggs*, 755 F.2d 1538 (11th Cir. 1985).

Statement defendant made to the police when defendant was arrested about a gun replica that the defendant owned, where the defendant was accused of raping women at gunpoint, was admissible because the arresting officers did not use the functional equivalent of questioning to elicit an incriminating response from the defendant, and the spontaneous statement by the defendant was not impermissibly tainted by an officer's earlier question. *Collins v. State*, 267 Ga. App. 784, 600 S.E.2d 802 (2004).

It was not error for the trial court to refuse to suppress the defendant's inculpatory statements made while being transported by officers from Maryland to Georgia; the evidence supported the trial court's findings that the inculpatory statements at issue, which had been made after the defendant was advised of the *Miranda* rights, were not the result of interrogation or questioning but were spontaneously uttered by the defendant. *Stokes v. State*, 281 Ga. 825, 642 S.E.2d 82 (2007).

Spontaneous conversation overheard. — Where a conversation was spontaneous and not in response to any interrogation or prodding by the person transporting defendants to the hospital, who overheard the conversation, there was no *Miranda* violation. *Eady v. State*, 182 Ga. App. 293, 355 S.E.2d 778 (1987).

Spontaneous, precustodial statements to investigating officers. — The finding that the defendant's statements were voluntary was authorized by testimony that the defendant made spontaneous, voluntary, precustodial statements to the two investigating officers at the scene of the crime, without any questioning, threats, or promises on their part; that these statements were interrupted by their giving the defendant the *Miranda* warnings, after which the defendant continued the statement; that the defendant had indicated that the defendant understood the *Miranda* warnings, but did not request an attorney; and that the defendant had made later, consistent custodial statements after having been advised again of the *Miranda* rights. *Sanders v. State*, 257 Ga. 239, 357 S.E.2d 66 (1987).

Defendant initiated conversation admissible. — Because the defendant initiated and asked for a meeting with a law enforcement officer at a restaurant, the defendant was not in custody under the *Miranda* rule and the statement the defendant made at the meeting was admissible. *Hardin v. State*, 269 Ga. 1, 494 S.E.2d 647 (1998).

Defendant's voluntary exclamation of "You got me" is not inadmissible because of a failure to give warnings required by the *Escobedo* and *Miranda* cases. *Caito v. State*, 130 Ga. App. 831, 204 S.E.2d 765 (1974); *Kerthers v. State*, 169 Ga. App. 832, 315 S.E.2d 46 (1984).

Defendant could not raise an objection to the admission of defendant's spontaneous statement to police officers executing a search warrant that "you've got me" for the first time on appeal absent plain error. There was no plain error in admitting the statement as: (1) defendant was being detained under O.C.G.A. § 17-5-28, and was not under arrest; (2) defendant was not being interrogated, making *Miranda* warnings not required; (3) defense counsel cross-examined the officers on the statement; (4) the statement was admissible as a spontaneous statement; and (5) the statement was admissible under O.C.G.A. § 24-3-3 as a part of the *res gestae*. *Zackery v. State*, 262 Ga. App. 646, 586 S.E.2d 346 (2003).

Statements induced by trick are admissible if voluntary. — Statements of an incriminatory character by one accused of crime

are admissible in evidence, if freely and voluntarily made, though made to an officer while in custody and induced by some trick, artifice, or deception. *Jacobs v. State*, 133 Ga. App. 812, 212 S.E.2d 468 (1975).

Leading questions permissible. — A mature individual of normal intelligence, after being fully advised of the individual's constitutional rights and consenting to be interviewed without counsel, may, during short periods of questioning when not otherwise imposed upon, be asked leading questions. *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975).

Burden of proof as to statements made in unlawful custody. — Each case is to be judged individually on its facts, and the burden is on the prosecution to show the admissibility of statements made by the defendant while in unlawful custody. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

If defendant interrogated from time of illegal arrest until the defendant confesses, confession inadmissible. — If the causal connection between an illegal arrest and a confession is not broken by any intervening events, but a suspect is interrogated from the time of the defendant's arrival until the defendant confesses a short time later, the trial court errs by admitting the confession into evidence, and a conviction based solely on the confession cannot stand. *Robinson v. State*, 166 Ga. App. 741, 305 S.E.2d 381 (1983).

Waiver of rights at police station after arrest at home. — Defendant's statements made to the police were not the product of an illegal arrest and, therefore, inadmissible, because the arresting officer, with an arrest warrant in the officer's pocket, went to the defendant's house and convinced the defendant to go to the police station for further questioning, and when they arrived at the police station, the defendant was immediately advised of the defendant's rights and arrested, signed a written waiver of rights, and gave two statements to the police. There was no merit to the contention that the defendant should have been informed the defendant was being arrested while at home and before going to the police station. *Phillips v. State*, 258 Ga. 228, 368 S.E.2d 91 (1988).

Statements made to parties which are not law enforcement officers or agents of the

state do not require Miranda warnings or trigger an accused's right to counsel. *Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685, *cert. denied*, 459 U.S. 981, 103 S. Ct. 317, 74 L. Ed. 2d 293 (1982).

That FBI was aware that the witness was visiting defendant and that they paid the witness' travel expenses for these visits, without more, did not make such witness an agent for the government, and, therefore, warnings were inapplicable to statements made by defendant to the witness, and defendant had no right to have counsel present during such visits. *Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982).

Miranda warnings are not a prerequisite to the admission of statements made by a defendant to persons other than law enforcement officers or their agents. *Bethea v. State*, 251 Ga. 328, 304 S.E.2d 713 (1983).

"Affirmative misrepresentation" not shown. — Where a GBI agent told the defendant that the agent wanted to talk to the defendant about the theft of a truck and only later, after the defendant began talking, told the defendant that the agent knew the owner of the truck was dead, the agent's conduct did not amount to the kind of "affirmative misrepresentation" that would invalidate a suspect's waiver of the fifth amendment privilege. *Christenson v. State*, 261 Ga. 80, 402 S.E.2d 41 (1991), *cert. denied*, 502 U.S. 855, 112 S. Ct. 166, 116 L. Ed. 2d 130 (1991).

Questioning by nonuniformed city clerk. — After the defendant walked into the city clerk's office looking for someone to surrender to after shooting two people, the defendant could not have believed reasonably that an unarmed, nonuniformed city clerk was a law enforcement officer, or that the defendant was in the clerk's custody, and Miranda did not apply to statements elicited by the clerk. *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48, *cert. denied*, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Deputy's presence at social worker's interview of defendant. — The presence of a uniformed sheriff's deputy during the interview of defendant by a caseworker of the Department of Family and Children Services did not require the conclusion that defendant was in custody. *Banther v. State*, 182 Ga. App. 333, 355 S.E.2d 709 (1987).

Questioning of prison inmate regarding suspected crime is custodial. — Questioning

Self-Incrimination (Cont'd)**2. Interrogations (Cont'd)**

an inmate, whether by peace officers or prison officials, where the thrust and purpose of the interrogation relates to a suspected crime for which criminal prosecution might ensue, is a custodial hearing, and requires a Miranda warning, in order to render any statements made therein admissible in a subsequent hearing. *Grant v. State*, 154 Ga. App. 758, 270 S.E.2d 42 (1980).

Statements made absent counsel not per se inadmissible. — It is not the law of this state that when a prisoner is known by police to be represented by counsel, anything the prisoner says to police in absence of counsel is per se inadmissible, whether “voluntary” or not. *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975).

Statement to prison warden without prior warnings is inadmissible. — A statement made to a warden concerning the location of a car known to have been stolen, which statement had the practical effect of a full confession, is inadmissible as a product of custodial interrogation without the prior warnings required under *Miranda*. *Biddy v. State*, 127 Ga. App. 212, 193 S.E.2d 31 (1972).

Statement in response to warden’s suggestion that sentence might be lighter. — Evidence is inadmissible if a warden fails to give *Miranda* warnings and suggests that the defendant might receive a lighter sentence if the defendant reveals to the officer the location of a car the defendant had stolen and used in escaping. *Biddy v. State*, 127 Ga. App. 212, 193 S.E.2d 31 (1972).

Burden on prosecution to show procedural safeguards used in custodial interrogation. — The prosecution may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *United States v. Bennett*, 626 F.2d 1309 (5th Cir. 1980), cert. denied, 449 U.S. 1092, 101 S. Ct. 888, 66 L. Ed. 2d 821 (1981); *Chester v. State*, 157 Ga. App. 191, 276 S.E.2d 684 (1981).

If interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant

knowingly and intelligently waived the privilege against self-incrimination and the right to retain or appoint counsel. *Colbert v. State*, 124 Ga. App. 283, 183 S.E.2d 476 (1971).

Requesting explanation of presence pursuant to loitering statute not abrogation of right. — The offering of an opportunity in § 16-11-36 for someone suspected of loitering and prowling to explain their presence and conduct does not abrogate the right against self-incrimination. *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984).

Response to police officer’s answer to the defendant’s own question. — Because a statement, while “custodial,” was not initiated by police officers, but rather, it was the defendant’s response to an officer’s answer to the defendant’s own question, there was no error in admitting the statement. *Delay v. State*, 258 Ga. 229, 367 S.E.2d 806, cert. denied, 488 U.S. 850, 109 S. Ct. 132, 102 L. Ed. 2d 105 (1988).

Letter voluntarily written by prisoner not product of “custodial interrogation”. — A letter voluntarily written by a prisoner to a stranger to the proceedings which comes to the attention of the state through its power to maintain discipline in its detention facilities and not at the request of or by subterfuge of the state (i.e., not a custodial statement) is not the product of “custodial interrogation” and, thus, is a part of the work product of the state not subject to compelled discovery except to the extent that such a letter may be exculpatory and subject to disclosure under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Franklin v. State*, 166 Ga. App. 375, 304 S.E.2d 501 (1983).

Application of exclusionary rule. — The exclusionary rule does not apply to evidence derived from a voluntary but *Miranda*-tainted statement. *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092, 103 S. Ct. 580, 74 L. Ed. 2d 940 (1982), but see, *Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996).

Error without injury beyond reasonable doubt. — In view of the compelling weight of the evidence against the defendant, if it was error to admit the incriminating statements made in response to interrogation carried on after the defendant had said the defendant would not answer questions, it was error without injury beyond reasonable

doubt. *United States v. Clavis*, 956 F.2d 1079 (11th Cir.), cert. denied, 504 U.S. 990, 112 S. Ct. 2979, 119 L. Ed. 2d 597, modified on other grounds, 977 F.2d 538 (11th Cir. 1992), cert. denied, 507 U.S. 998, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993).

Error harmless. — Although the trial court erred in allowing the state to introduce defendant's custodial statement to police, the error was harmless because the record established beyond a reasonable doubt that it did not contribute to the guilty verdict where the eyewitness testimony was overwhelming evidence of defendant's guilt of the crimes of which the defendant was convicted. *Gardner v. State*, 261 Ga. App. 10, 582 S.E.2d 7 (2003).

3. Waiver and Voluntariness Generally

Volunteered statements of any kind are not barred by U.S. Const., amend. 5. *Carnes v. State*, 115 Ga. App. 387, 154 S.E.2d 781, cert. denied, 389 U.S. 928, 88 S. Ct. 287, 19 L. Ed. 2d 279 (1967).

Admissibility of volunteered statements. — Any statement given freely and voluntarily without any compelling influences is admissible in evidence. *Carnes v. State*, 115 Ga. App. 387, 154 S.E.2d 781, cert. denied, 389 U.S. 928, 88 S. Ct. 287, 19 L. Ed. 2d 279 (1967).

In a child molestation case, because the evidence of record showed that the officers immediately ceased their interrogation of the defendant when the defendant requested counsel and that it was the defendant who thereafter initiated further communication between them, the trial court was authorized to conclude both that the statements were made freely and voluntarily and that they were not elicited in violation of the defendant's right to counsel. *Tatum v. State*, 203 Ga. App. 892, 418 S.E.2d 152 (1992).

Statements made prior to triggering of Miranda rights. — It did not appear as a matter of law from the evidence that Miranda rights were triggered by a detective's mere asking of the defendant's name, address and other preliminaries for booking purposes, where the defendant was being transported from the defendant's attorney's office, and where the defendant had surrendered into custody, to jail. *Syfrett v. State*, 210 Ga. App. 185, 435 S.E.2d 470 (1993).

Miranda warnings are not a prerequisite to the admission of evidence concerning voluntary statements not made in response to any form of custodial interrogation. *Smith v. State*, 264 Ga. 857, 452 S.E.2d 494 (1995).

No Miranda warnings were required before defendant made a statement, where it was made voluntarily, and was not made in response to police interrogation or while in police custody. *Stevenson v. State*, 264 Ga. 892, 453 S.E.2d 18 (1995).

If defendant initiates communications with the police, the defendant has waived the defendant's Miranda rights. *Ward v. State*, 262 Ga. 293, 417 S.E.2d 130 (1992), cert. denied, 506 U.S. 1084, 113 S. Ct. 1061, 122 L. Ed. 2d 366 (1993).

In a case in which the defendant, who had been stopped by a police officer, left the vehicle and approached a police officer in an unsteady manner, smelling of alcohol, the defendant's volunteered response to the officer's inquiry concerning the defendant's consumption of alcohol did not provoke the right of a custodial interrogation requiring Miranda procedural safeguards. *Tibbs v. State*, 207 Ga. App. 273, 427 S.E.2d 603 (1993).

Defendant's admission to ownership of a hat found at a robbery scene was properly admitted because the trial court found that defendant voluntarily initiated a discussion with a detective about the hat and that defendant waived the right to counsel before making a statement. *Lawson v. State*, 275 Ga. App. 334, 620 S.E.2d 600 (2005).

Statements made by the defendant in a second custodial interrogation were properly admitted because the investigator honored the defendant's original invocation of the right to remain silent by immediately stopping the interview and exiting the room; furthermore, in the four days between interviews, the defendant was not subjected to repeated efforts to wear down the defendant's resistance and make the defendant change the defendant's mind about invoking the right to remain silent, and because Miranda warnings were repeated before the second interview, and the defendant understood those rights. *Griffin v. State*, 280 Ga. 683, 631 S.E.2d 671 (2006).

Government must keep plea bargains and promises of immunity. — To protect the voluntariness of a waiver of rights under U.S.

Self-Incrimination (Cont'd)**3. Waiver and Voluntariness****Generally (Cont'd)**

Const., amend. 5, where a plea, confession, or admission is based on a promise of a plea bargain or immunity, the government must keep its promise. *United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979).

That statement is voluntary does not preclude exclusion under fourth amendment.

— Though statements by the defendant may be possibly voluntary under U.S. Const., amend. 5, it does not necessarily mean they were voluntary under U.S. Const., amend. 4, since they might be tainted by an illegal arrest and detention. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, requires not merely that the statement meet U.S. Const., amend. 5's standard of voluntariness but that it be sufficiently an act of free will to purge the primary taint. Consideration of a statement's admissibility must be made in light of the distinct policies and interests of U.S. Const., amend. 4. *Hill v. State*, 140 Ga. App. 121, 230 S.E.2d 336 (1976).

Even though proper Miranda warnings may have been given prior to a defendant's making an incriminatory statement, and even though the statement may have been voluntary for purposes of U.S. Const., amend. 5, the statement is nonetheless inadmissible under the fourth amendment if it is the product of an illegal seizure. *Green v. State*, 168 Ga. App. 558, 309 S.E.2d 687 (1983).

Trial court does not err in admitting the defendant's confession obtained pursuant to the defendant's consent if there is nothing in the record to indicate that the confession was coerced or involuntary, and the fact that the defendant may have been illegally detained at the time the defendant made the defendant's statement does not render it inadmissible. *Thompson v. State*, 157 Ga. App. 600, 278 S.E.2d 62, aff'd, 248 Ga. 343, 285 S.E.2d 685 (1981).

All evidence is not "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. The intervention of a clear act of free will on the part of the defendant can purge the evidence of its stigma. *United States v.*

Strickland, 493 F.2d 182 (5th Cir.), cert. dismissed, 419 U.S. 801, 95 S. Ct. 9, 42 L. Ed. 2d 32 (1974).

Waiver of privilege. — The third provision of U.S. Const., amend. 5, "nor shall [any person] be compelled in any Criminal Case to be a witness against himself," may be waived. *Barkman v. Sanford*, 162 F.2d 592 (5th Cir.), cert. denied, 332 U.S. 816, 68 S. Ct. 155, 92 L. Ed. 393 (1947).

The rights guaranteed under U.S. Const., amend. 5 and U.S. Const., amend. 6 are personal; if the defendant has chosen to waive the defendant's rights, and there has been no misconduct on the part of the investigating officers, the trial court does not err in admitting the defendant's statements. *Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983).

Because a witness in a civil proceeding refused to answer questions on grounds other than the witness' fifth amendment rights and was held in contempt by the trial court, the witness could not, following unsuccessful appeal of the contempt order, assert the privilege against self-incrimination as a ground for refusing to answer the questions because the witness had waived this privilege by failing to invoke it at the first opportunity. *Cohran v. Carlin*, 165 Ga. App. 141, 299 S.E.2d 738 (1982).

Defendant voluntarily waived the right to an attorney by initiating the interview at which the defendant's confession was obtained, following a prior request for counsel. *Snipes v. State*, 188 Ga. App. 366, 373 S.E.2d 48 (1988).

Allowing a codefendant to give testimony regarding the substance of the defendant's prior testimony at a probation revocation hearing, after the defendant elected not to take the stand at trial, did not violate the defendant's privilege against self-incrimination, since the defendant waived the privilege by testifying voluntarily on the defendant's behalf at the prior hearing. *Bobbitt v. State*, 215 Ga. App. 131, 449 S.E.2d 674 (1994).

Because there was evidence that could have authorized the exclusion of the defendant's statement based on lack of a knowing and understanding waiver of the defendant's Miranda rights, and because the trial court failed to make specific findings on the issue,

a remand was necessary for the entry of findings on this issue. *Livingston v. State*, 267 Ga. App. 875, 600 S.E.2d 817 (2004).

By merely asking if an attorney was present, the defendant did not make an unambiguous request for counsel during a custodial interrogation; because a detective testified that the detective interviewed the defendant for only 35 to 40 minutes immediately after the defendant's arrest and that the defendant was able to understand the detective and respond appropriately to questions, and because the trial court heard the audiotape of the interview, the trial court did not err in finding that the defendant knowingly and voluntarily waived the right to counsel, and admission of the statement was not improper. *Simon v. State*, 279 Ga. App. 844, 632 S.E.2d 723 (2006).

Waiver must be knowing and voluntary. — A waiver of the fifth amendment right to counsel must be freely and voluntarily given, and must be knowingly and intelligently made. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990).

Habeas court's finding that a petitioner's guilty pleas were validly entered was reversed as the waiver forms signed by the petitioner and reviewed with the petitioner by the petitioner's attorneys addressed only the right to be tried by a jury; the waiver forms did not advise the petitioner that the petitioner was waiving the petitioner's right against self-incrimination and the petitioner's confrontation right. *Beckworth v. State*, 281 Ga. 41, 635 S.E.2d 769 (2006).

Intoxication affecting voluntariness of waiver of Miranda rights. — Defendant's claim that defendant's waiver of Miranda rights was involuntary because defendant was intoxicated was rejected; an officer testified that defendant did not appear to be intoxicated, that defendant seemed to understand the officer's questions, and that defendant's answers were responsive to the officer's questions, and the trial court was entitled to believe this testimony. *Smith v. State*, 269 Ga. App. 17, 602 S.E.2d 921 (2004).

Voluntariness of waiver depends on totality of circumstances. — Whether, after the Miranda warnings are given, the waiver of those rights was free and voluntary depends upon the totality of the circumstances. *Miller*

v. State, 155 Ga. App. 587, 271 S.E.2d 719 (1980).

Defendant making statement after signing waiver. — Because the defendant, without any questioning by the detective, admitted committing the burglary at the residence where the defendant had been apprehended, seconds after having initialled a waiver form, the confession was admissible. *Blige v. State*, 203 Ga. App. 151, 416 S.E.2d 160 (1992).

The defendant's custodial statement was not secured in violation of the right to remain silent, because the defendant initially asserted the right to remain silent, and the evidence supported the finding that the interrogator ceased interrogation once the defendant invoked the right to remain silent and that, minutes later, the defendant waived this right by spontaneously and voluntarily initiating the conversation during which the defendant made the statement. *Farley v. State*, 234 Ga. App. 742, 507 S.E.2d 504 (1998).

Although defendant disputed many of the facts offered by a police detective and a federal agent regarding whether defendant was given Miranda warnings prior to defendant's statements to the detective and the agent and whether defendant's statements were made without bribery and coercion, the trial judge was the arbiter of the credibility of the witnesses at defendant's *Jackson v. Denno* hearing and ample testimony supported the trial court's conclusion that the statements were voluntarily given where the testimony of the detective and the federal agent indicated that the two custodial interviews each lasted about an hour, defendant was read Miranda warnings and executed a written waiver of rights form before giving each statement, and defendant was never threatened or promised any hope of benefit in exchange for the statements; since the trial court's factual and credibility findings were not clearly erroneous, its decision to admit the statements was upheld on appeal. *Phanamixay v. State*, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

In deciding the admissibility of a statement during a Jackson-Denno hearing, the trial court must consider the totality of the circumstances and must determine the admissibility of the statement under the preponderance of the evidence standard.

Self-Incrimination (Cont'd)**3. Waiver and Voluntariness****Generally (Cont'd)**

Fowler v. State, 246 Ga. 256, 271 S.E.2d 168 (1980).

Trial court is required to make findings as to voluntariness in determining the admissibility of a statement given to a second police officer after the first officer had advised the defendant of the defendant's rights. *Jordan v. State*, 207 Ga. App. 710, 429 S.E.2d 97 (1993).

Privilege against self-incrimination can be waived in praesenti. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

Waiver of right to remain silent. — By making statements knowingly and voluntarily after being advised of constitutional rights, a party waives the right to remain silent. *Pendergrass v. State*, 245 Ga. 626, 266 S.E.2d 225 (1980).

Once *Miranda* warnings are given and a person in custody gives a statement to police without invoking the right to remain silent and without requesting an attorney, that person has in effect waived that person's rights. *Barrs v. State*, 202 Ga. App. 520, 414 S.E.2d 733 (1992).

Ineffective invocation of right to remain silent. — Defendant's statement that the defendant "was reluctant to answer any question" did not constitute an equivocal invocation to right to remain silent since it was made before the defendant was in actual police custody. *Manchester v. State*, 226 Ga. App. 653, 487 S.E.2d 449 (1997).

Defendant signed away the defendant's rights. — Any statements by the defendant after waiver documents were read to and executed by the defendant were knowingly and voluntarily given, as were the waivers of *Miranda* rights that preceded such statements. *Rachell v. State*, 210 Ga. App. 106, 435 S.E.2d 480 (1993).

Failure to sign waiver form. — Defendant's refusal to sign a *Miranda* waiver form was not an invocation of the right to remain silent or to counsel. *Hunter v. State*, 273 Ga. App. 52, 614 S.E.2d 179 (2005).

Waiver not established by response to further interrogation. — If an accused has invoked the right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by show-

ing only that the accused responded to further police-initiated custodial interrogation even if the accused has been advised of the accused's rights. *Cervi v. Kemp*, 855 F.2d 702 (11th Cir. 1988), cert. denied, 489 U.S. 1033, 109 S. Ct. 1172, 103 L. Ed. 2d 230 (1989).

Refusal to sign written waiver does not automatically invoke the accused's right to silence; whether a failure to sign a written waiver constitutes such an invocation depends upon the existing circumstances. *Johnson v. State*, 186 Ga. App. 801, 368 S.E.2d 562 (1988).

Waiver followed by subsequent assertion of right to counsel. — Defendant's assertion of the right to counsel rendered inadmissible any statement subsequently given by the defendant in violation of the defendant's rights, but did not have the effect of rendering inadmissible any previous statement which the defendant had already made pursuant to a valid waiver of the defendant's constitutional rights. *Peebles v. State*, 196 Ga. App. 176, 395 S.E.2d 640 (1990).

Defendant knowingly and intelligently waived the fifth amendment privilege, because, although the defendant had a dependent personality disorder, the defendant was not completely without the will to refuse the requests of others, even when under medication, and the defendant understood at least some of the consequences of the defendant's acts. *United States v. Gaddy*, 894 F.2d 1307 (11th Cir. 1990).

Because defendant received *Miranda* warnings, waived them and then gave a statement to police, the fact that defendant was taking pain medication at the time did not negate the voluntary waiver of defendant's rights under *Miranda*, and as the findings on that issue by the trial court were not clearly erroneous, the denial of suppression of that statement was not disturbed. *Moyer v. State*, 275 Ga. App. 366, 620 S.E.2d 837 (2005).

Waiver of privilege by juveniles. — Confessions and incriminating statements given outside the presence of the juvenile's parents will not be automatically excluded, because age alone is not determinative of whether a person can waive the person's rights. Instead, the question of waiver must be analyzed by a consideration of several factors. These are (1) age of the accused; (2)

education of the accused; (3) knowledge of the accused as to both the substance of the charge ... and the nature of the accused's rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogation; (7) length of interrogations; (8) whether vel non the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extrajudicial statement at a later date. *Riley v. State*, 237 Ga. 124, 226 S.E.2d 922 (1976).

The admissibility of a juvenile's statement turns on whether the juvenile knowingly and voluntarily waived the juvenile's constitutional rights, and the state has a heavy burden in showing that a juvenile did so. Whether a juvenile has made a knowing and voluntary waiver of the juvenile's rights depends on the totality of the circumstances, with consideration given to nine specific factors. *Smith v. State*, 263 Ga. 363, 434 S.E.2d 465 (1993).

A thirteen-year old defendant knowingly and intelligently waived the defendant's constitutional rights and made the defendant's statements freely and voluntarily where the trial court found that the defendant was fully informed of the defendant's rights and gave every indication, even under the defendant's own testimony, that the defendant understood those rights and understood the charges against the defendant; that the defendant showed throughout a willingness to speak with the police officers; that the defendant's statements were made in a non-coercive setting in the presence of one or both of the two adults with whom the defendant lived; and that no promise of benefit had been made to the defendant. *Henry v. State*, 264 Ga. 861, 452 S.E.2d 505 (1995).

There are factual situations in which the privilege under U.S. Const., amend. 5 may be waived. *Tyler v. United States*, 404 F.2d 409 (5th Cir. 1968), cert. denied, 394 U.S. 917, 89 S. Ct. 1187, 22 L. Ed. 2d 450 (1969).

Defendant's statement to the officer that the defendant would talk but would not sign anything, proved not only waiver of the right to remain silent but of the assistance of an

attorney as well. *Graves v. State*, 180 Ga. App. 446, 349 S.E.2d 519 (1986).

Subsequent written acknowledgment. — Although the defendant had refused to sign a written acknowledgment that the defendant had been informed of the right to remain silent and right to representation, the defendant's subsequent acknowledgment in writing two hours later that the defendant had been informed of these rights supported the trial court's findings that the defendant's statement was freely and voluntarily given. *Pierce v. State*, 209 Ga. App. 366, 433 S.E.2d 641 (1993).

Waiver invalid notwithstanding earlier brief consultation with attorney. — Defendant's waiver of the right to counsel, made at a police-initiated interrogation after the defendant had invoked the defendant's right to counsel, was invalid, notwithstanding the fact that the defendant had earlier been allowed to consult with an attorney briefly on the afternoon of the defendant's interrogation. *Roper v. State*, 258 Ga. 847, 375 S.E.2d 600, cert. denied, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989).

Voluntary inculpatory statements need not be suppressed. — If the defendant is admonished with *Miranda* warnings after the right to counsel attaches, and then voluntarily makes inculpatory statements, the statements need not be suppressed. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990).

While defendant claimed an officer had promised defendant leniency in exchange for defendant's statement, the officer denied this; therefore, the trial court's denial of defendant's motion to suppress defendant's custodial statements on the grounds they were not voluntary was not clearly erroneous. *Pennymon v. State*, 261 Ga. App. 450, 582 S.E.2d 582 (2003).

Defendant's motion to suppress the custodial statement the defendant gave to the police was properly denied as: (1) the *Miranda* warnings were first read aloud to the defendant and then the defendant was allowed to read and initial each right and to sign the waiver form; (2) the defendant's parent was present during the interrogation; (3) the defendant's statement to the police was not the result of threats or intimidation; and (4) the interrogation tactics used, including alleged screaming and chair-kicking,

Self-Incrimination (Cont'd)**3. Waiver and Voluntariness****Generally (Cont'd)**

were not more than were ordinarily employed. *Peterson v. State*, 280 Ga. 875, 635 S.E.2d 132 (2006).

Defendant's motion to suppress a videotaped statement was properly denied as the sixth amendment right to counsel was offense specific and counsel representing the defendant on unrelated charges did not have to be contacted prior to an interview about a murder; the defendant was advised of the defendant's fifth amendment right to counsel at the initiation of the questioning about the murder and executed a waiver of that right, and at a Jackson-Denno hearing, the defendant's inculpatory statement was found to have been made freely and voluntarily. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Courts not unaware of conflict in choosing between silence and explanation. — Whether or not a waiver of rights under U.S. Const., amend. 5 is voluntary does not mean that courts do not recognize that defendants cannot be free from conflicting concerns, and cannot weigh the relative advantages of silence and explanation. *United States v. White*, 589 F.2d 1283 (5th Cir. 1979).

Waiver of privilege by codefendant appearing as witness. — If an accomplice has been separately indicted and has testified at the accomplice's own trial, the accomplice waives the privilege against self-incrimination when appearing as a witness at the defendant accomplice's trial. *Lively v. State*, 237 Ga. 35, 226 S.E.2d 581 (1976).

Party may invoke privilege at second trial even if waived at first trial. — On a second trial a party may decline to give evidence which would tend to incriminate that party, notwithstanding the fact that at a previous trial of the case the party waived the party's privilege of remaining silent as to these matters. *Mallin v. Mallin*, 227 Ga. 833, 183 S.E.2d 377 (1971).

Admissibility at trial of defendant's testimony at bail hearing. — Absent objections grounded on the fifth amendment at the bail hearing, the decision of defense counsel to bring the extraneous issue of guilt or innocence into the bail proceeding did not preclude, on fifth amendment grounds, the

use at trial of incriminating testimony given at such hearing. *Cowards v. State*, 266 Ga. 191, 465 S.E.2d 677 (1996).

Burden of proof of waiver. — The burden rests upon the state to demonstrate clearly that the defendant knowingly and intelligently waived the privilege against self-incrimination. *Smith v. State*, 132 Ga. App. 491, 208 S.E.2d 351 (1974).

Statements overheard by arresting officers are not involuntary. — Evidence of statements made by the defendant in a conversation overheard by the arresting officers who had concealed themselves, as planned between them and the person with whom the defendant talked, does not amount to evidence given by the defendant involuntarily and without the advice of counsel, and is not coerced from the defendant in violation of the defendant's rights not to be compelled to be a witness against himself. *Blackwell v. State*, 113 Ga. App. 536, 148 S.E.2d 912 (1966).

Spontaneous statement while in custody before advisement of Miranda rights. — Trial court was not clearly erroneous in admitting the voluntary and spontaneous statements defendant made while riding in a police car after defendant's arrest before being advised of Miranda rights because the statements were not the result of an interrogation and an officer told defendant it would be in defendant's best interest to wait until getting to the police station before talking. *Gresham v. State*, 255 Ga. App. 625, 566 S.E.2d 380 (2002).

Voluntariness of relinquishing of evidence hidden in defendant's mouth. — Because the defendant had been stopped by officers, but was not under legal arrest, the defendant's action in opening the defendant's mouth when ordered to do so by officer, at which time officer removed from the defendant's mouth a chewing gum wrapper containing penciled entries for use in a numbers game, was voluntary and not the result of coercion so as to make the introduction of the wrapper, as a lottery ticket, inadmissible on the ground that it violated the constitutional inhibition against self-incrimination, as there was no explicit threat or show of force against the defendant. Nor can it be said, in the absence of coercion, that such evidence was inadmissible as violative of the

due process clause of U.S. Const., amend. 14. *Jones v. State*, 90 Ga. App. 761, 84 S.E.2d 124 (1954).

Failure to inform defendant of the privilege under U.S. Const., amend. 5 in the civil context does not make testimony given in the civil case involuntary. *United States v. White*, 589 F.2d 1283 (5th Cir. 1979).

Because the transcript of proceedings and trial counsel's affidavit did not show that defendant was advised that a guilty plea would waive the privilege against self-incrimination and the right to confrontation, the trial court erred in denying defendant's habeas corpus petition. *Green v. State*, 279 Ga. 687, 620 S.E.2d 788 (2005).

Uncounseled inculpatory testimony in a civil case given in ignorance of the privilege under U.S. Const., amend. 5 is not inadmissible in a subsequent criminal case. *United States v. White*, 589 F.2d 1283 (5th Cir. 1979).

Nonvoluntary statements. — Admission of a nonvoluntary statement although not a confession nor on its face incriminatory is a violation of due process. *Platt v. State*, 163 Ga. App. 776, 296 S.E.2d 113 (1982).

Hearing required only when fair question presented. — The requirement for a hearing on the issue of voluntariness of a statement applies only if the evidence presents a fair question as to its voluntariness. *Watson v. State*, 227 Ga. 698, 182 S.E.2d 446 (1971).

Statement admissible upon prima facie showing of voluntariness. — After the state made a prima facie showing of voluntariness, the court properly admitted the defendant's statement into evidence for the jury's consideration, and thereafter, the question of whether or not defendant's confession was freely and voluntarily given, without hope of benefit or fear of injury, became one of fact for determination by the jury. *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979).

Burden and standard of proof as to voluntariness. — The state must prove by a preponderance of the evidence considering the totality of the circumstances that a statement given by an accused was voluntary. *Lawrence v. State*, 235 Ga. 216, 219 S.E.2d 101 (1975).

There is no burden on state officials to prevent an accused from talking about the incident in question if the accused wishes to

do so. Simply stated, they must not interrogate but they need not refuse to listen. *Zubiadul v. State*, 193 Ga. App. 235, 387 S.E.2d 431 (1989).

Trial court's determinations on voluntariness of waiver must be accepted unless clearly erroneous. — If the trial court concludes that the accused had freely and voluntarily waived the rights to silence and an attorney and had chosen to give a statement, the appellate court must accept those factual determinations by the trial court unless those findings are shown to be clearly erroneous. *Lawrence v. State*, 235 Ga. 216, 219 S.E.2d 101 (1975); *Fowler v. State*, 246 Ga. 256, 271 S.E.2d 168 (1980).

If in a hearing conducted outside the presence of the jury the judge determines as trier of fact the issues of voluntariness, truthfulness and comprehension of a confession, the judge's findings will not be disturbed in the absence of obvious error; the question is not whether *Miranda* warnings have been repeated on every occasion when the defendant has been examined but whether the defendant understands the defendant's rights and acts in accordance with such understanding. *Duke v. State*, 158 Ga. App. 71, 279 S.E.2d 476 (1981).

No requirement that questions imposed under F.R.Cr.P. 11(c)(3) be asked. — While the Constitution requires that the record indicate the voluntariness of any waiver of the rights of jury trial, confrontation, and nonself-incrimination, it does not require that a district judge go beyond these constitutional minima to ask the specific questions that F.R.Cr.P. 11(c)(3), 18 U.S.C. App., imposes as a prophylactic procedure. *United States v. Caston*, 615 F.2d 1111 (5th Cir.), cert. denied, 449 U.S. 831, 101 S. Ct. 99, 66 L. Ed. 2d 36 (1980).

No error where admission without voluntariness hearing is harmless beyond reasonable doubt. — Where the case against the defendant is so overwhelming that any error in admitting an in-custody statement without first conducting a hearing out of the presence of the jury was harmless beyond a reasonable doubt, the admission of such statement in evidence without a hearing is not error. *Harris v. Stynchcombe*, 227 Ga. 763, 183 S.E.2d 205 (1971).

Absent proper objection and any evidence that defendant's in-custody statement is in-

Self-Incrimination (Cont'd)**3. Waiver and Voluntariness****Generally** (Cont'd)

voluntary, its admission in evidence without a voluntariness hearing is not error. *Harris v. Stynchcombe*, 227 Ga. 763, 183 S.E.2d 205 (1971); *Taylor v. State*, 143 Ga. App. 881, 240 S.E.2d 236 (1977).

Where objection concerns failure to give Miranda warnings, not voluntariness, admission without voluntariness hearing not error.

— If an objection to admission of a defendant's in-custody statement is on the ground of the alleged failure to apprise the defendant of the defendant's constitutional rights prior to taking the defendant's statement and does not reach the issue of the statement's voluntariness, the admission of such statement in evidence without a hearing as to its voluntariness is not error. *Watson v. State*, 227 Ga. 698, 182 S.E.2d 446 (1971).

Evidence from psychiatric interrogation in capital case. — The state may not use evidence from a psychiatric interrogation in a capital sentencing proceeding unless the defendant received proper *Miranda* warnings prior to the examinations. A defense request for competency and sanity evaluations does not permit the examining psychiatrist to testify on the issue of future dangerousness upon which the defendant never consented to being examined. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990).

Murder defendant's voluntary in-custody statements to the defendant's parent, made without the benefit of *Miranda* warnings, were admissible, because defendant spoke freely to the parent, apparently with full knowledge of the consequences of revealing where the victim's body had been left. *Buttersworth v. State*, 260 Ga. 795, 400 S.E.2d 908 (1991).

Psychiatric evidence. — When, in support of a claim of mental retardation or illness, a capital defendant presents expert psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant relied upon; the defendant has no fifth amendment privilege against the introduction of this psychiatric testimony by the prosecution for such a limited rebuttal purpose. *Stephens v. State*,

270 Ga. 354, 509 S.E.2d 605 (1998).

Statement to psychiatrist. — Where defense counsel arranged for the defendant's examination by a psychiatrist, the defendant's incriminating statement made to the psychiatrist was freely and voluntarily given; the defendant was given *Miranda* warning at the time of the arrest and it was not necessary to remind the defendant that the defendant need not answer any of the psychiatrist questions before the examination. *Hammock v. State*, 210 Ga. App. 513, 436 S.E.2d 571 (1993).

4. Voluntariness of Confessions

What constitutes a confession. — A confession is a voluntary statement made by a person charged with the commission of a crime, wherein the accused acknowledges to be guilty of the offense charged. Such a statement will not suffice as a confession where only limited facts are admitted from which the jury would not be authorized to infer guilt. *Jackson v. State*, 225 Ga. 553, 170 S.E.2d 281 (1969).

Statement which does not confess guilt, though incriminating in nature, is an admission only. As such, it is not direct evidence of guilt, but only circumstantial evidence tending to prove the offense when considered with other evidence and may be used to justify a conviction. *Thompson v. State*, 151 Ga. App. 128, 258 S.E.2d 776 (1979).

Presumptively valid statement. — Defendant's statement to the police was presumptively valid because before making the statement, defendant was advised of defendant's *Miranda* rights, defendant understood those rights, defendant executed a waiver of rights form, and defendant did not invoke the right to have an attorney present during defendant's interview. *Ray v. State*, 273 Ga. App. 656, 615 S.E.2d 812 (2005).

Writing not required. — No law or authority requires a confession or admission to be reduced to writing. *Hilliard v. State*, 128 Ga. App. 157, 195 S.E.2d 772 (1973).

Test of voluntariness. — The appropriate standard in judging voluntariness is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influences. *United States v. Morris*, 491 F. Supp. 226 (S.D. Ga. 1980).

When evidentiary hearing required. — There must be an evidentiary hearing to properly determine the voluntariness of a confession. *State v. Watson*, 143 Ga. App. 785, 240 S.E.2d 194 (1977), overruled on other grounds, *Strickman v. State*, 253 Ga. 287, 319 S.E.2d 864 (1984).

Both the defendant and the state are entitled to a resolution of voluntariness, which is resolved without receiving evidence or hearing testimony. *State v. Watson*, 143 Ga. App. 785, 240 S.E.2d 194 (1977), overruled on other grounds, *Strickman v. State*, 253 Ga. 287, 319 S.E.2d 864 (1984).

Accused is entitled to a hearing on voluntariness by a body other than the one trying guilt or innocence. *James v. State*, 223 Ga. 677, 157 S.E.2d 471 (1967); *Hilliard v. State*, 128 Ga. App. 157, 195 S.E.2d 772 (1973).

Voluntariness determination must be reliable and clear-cut, including the resolution of disputed facts upon which the voluntariness issue may depend. *United States v. James*, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917, 99 S. Ct. 2836, 61 L. Ed. 2d 283 (1979).

Requirements where evidence regarding voluntariness genuinely in dispute. — If the evidence concerning the voluntariness of a confession gives rise to a disputed issue on which the minds of reasonable persons might disagree, it is the duty of the trial judge to hold a preliminary hearing of evidence on the subject outside the presence of the jury at which both sides should be offered an opportunity to present evidence. It may then be offered for jury consideration after, and only after, a definite ruling by the trial judge that the judge finds the confession to have been voluntarily made. A mere ruling that the judge finds the issue in dispute and will let it go to the jury is not sufficient. *Cardell v. State*, 119 Ga. App. 848, 168 S.E.2d 889 (1969).

Proper analysis in determining the admissibility of a confession is threefold: first, whether the protective guidelines delineated in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1960), to secure the privilege under U.S. Const., amend. 5 against self-incrimination were scrupulously honored; second, whether defendant voluntarily, knowingly and intelligently waived the rights enumerated in the *Miranda* warnings,

and third, whether defendant's eventual confession was the result of a voluntary decision. *United States v. Morris*, 491 F. Supp. 226 (S.D. Ga. 1980).

One who suffers some mental or emotional impairment can give a valid confession. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

The fact that the defendant may have suffered from mental deficiency or that the defendant was illiterate did not render the defendant incapable of making a valid confession. *Coverson v. State*, 162 Ga. App. 497, 292 S.E.2d 196 (1982); *Frymyer v. State*, 179 Ga. App. 391, 346 S.E.2d 573 (1986).

Mere showing of mental disability insufficient for exclusion. — A mere showing that one who confessed to a crime may have suffered from some mental disability is not a sufficient basis upon which to exclude the statement. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

Admissions made by defendant after defendant had been read *Miranda* rights and had waived them did not violate U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVI, even if defendant was mentally ill as alleged; mental illness did not render a defendant incapable of making a voluntary statement. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, U.S. , 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Mental ability and unfamiliarity with the criminal process are factors that weigh heavily against the voluntariness of a confession. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972).

Statement not rendered involuntary by lack of intelligence. — The fact that there was evidence that a criminal defendant ranked in the lower three percent of population in range of intelligence did not render the defendant's voluntary statement invalid or involuntary. In determining this issue, the court must consider the totality of the circumstances and decide to the preponderance of the evidence. *Kerr v. State*, 194 Ga. App. 604, 391 S.E.2d 449 (1990).

Voluntariness of confessions in counsel's absence. — Considering the totality of the circumstances, a confession may be shown to be voluntary, even though made in the absence of counsel, after counsel has been

Self-Incrimination (Cont'd)**4. Voluntariness of Confessions (Cont'd)**

retained or appointed. *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975).

If defendant is aware of rights, and not under duress nor drugs or alcohol, confession is voluntary. — Because the evidence heard was sufficient to authorize the trial court to determine that the defendant was advised of the defendant's rights, that the defendant was not placed under any duress, that the defendant seemed to understand the defendant's rights, that the defendant was not under influence of drugs or alcohol and that the defendant seemed completely aware of what was going on around the defendant, the defendant's confession was voluntarily elicited and not in violation of U.S. Const., amend. 5 or U.S. Const., amend. 6. *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979).

Waiver must be voluntary and cannot be presumed from silence after warnings given.

— To be valid, a waiver of the privilege against self-incrimination must be made voluntarily, and may not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. *United States v. Daniel*, 441 F.2d 374 (5th Cir. 1971); *United States v. Morris*, 491 F. Supp. 226 (S.D. Ga. 1980).

Use of threats or promises to coerce a criminal defendant to make a statement is contrary to O.C.G.A. § 24-3-50 and to U.S. Const., amend. 5. *Young v. State*, 243 Ga. 546, 255 S.E.2d 20 (1979).

Although the detective used descriptive language regarding how blood would be taken from defendant's arm, because it was common knowledge how a hospital drew blood from a patient, the detective's language did not convey any threat of bodily harm, and the detective's warning that the detective would arrest defendant if the defendant's blood matched that found at the victim's apartment was not a threat of personal harm and did not render defendant's statements to the detective involuntary; thus, defendant's statements to the detective were voluntary. *Dyer v. State*, 278 Ga. 656, 604 S.E.2d 756 (2004), cert. denied, U.S. 126 S. Ct. 95, 163 L. Ed. 2d 111 (2005).

Employment of falsehood by a police officer, where calculated only to elicit the

truth, is not alone enough to render a confession inadmissible. *Jacobs v. State*, 133 Ga. App. 812, 212 S.E.2d 468 (1975).

False or deceptive statements by police do not render confession involuntary. — Confessions are not generally rendered inadmissible merely because they are obtained by fraud, deception, or trickery practiced upon the accused, provided the means employed are not calculated to procure an untrue statement and the confession is otherwise freely and voluntarily made. *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), aff'd, 523 F.2d 1053 (5th Cir. 1975).

In questioning a mature criminal suspect of normal intelligence, who has been fully advised of the suspect's constitutional rights, falsely advising the suspect that the murder weapon has been found is insufficient in and of itself to render the otherwise free and voluntary confession inadmissible. *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), aff'd, 523 F.2d 1053 (5th Cir. 1975).

The fact that state police falsely told the defendant, a mature individual of normal intelligence, during questioning of short duration that the defendant's associate had confessed, while relevant, was insufficient to make an otherwise voluntary confession inadmissible. *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), aff'd, 523 F.2d 1053 (5th Cir. 1975).

Reissuance of Miranda warning after lapse of time. — Confession given less than four hours after the issuance of Miranda warnings was not inadmissible because of failure to reissue the warnings since the record reflected that the warnings given were complete and defendant understood them. *Jarrell v. Balkcom*, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985).

Trial court did not err in admitting statements made by defendant to police, wherein the defendant admitted involvement in a robbery, as defendant was Mirandized prior to the time that the defendant admitted the participation, and during a second interview a few days later, defendant was again properly Mirandized prior to giving a written statement admitting the involvement in the crime; Miranda warnings were not required when the officers conducted an initial noncustodial interview of defendant and further, the defendant did not confess to the

crime at that time. *Spradley v. State*, 276 Ga. App. 842, 625 S.E.2d 106 (2005).

Defendant not in custody when statements made. — Although the defendant made two statements without having been given Miranda warnings, because the defendant voluntarily came to the police station for the first statement, and there was no indication that the defendant was under suspicion for the crime, that the defendant or the police believed that the defendant would be detained, or that the investigation had focused on the defendant, and, as to the second statement, the defendant's counsel did not suggest that the officer had probable cause to arrest the defendant, and the defendant did not testify that the defendant believed the defendant under restraint in leaving, there was no indication that the police had the intention of doing more than following up on the defendant's previous statements, and they freely released the defendant at the end of the questioning on the defendant's promise that the defendant would post a bond as a material witness, there was no error in failing to exclude the statements as the defendant was not in custody when they were made. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

The uncontroverted evidence in the case clearly authorized the trial court to conclude that defendant was not in custody at the time the defendant's statement was made to the police, because the officer stated that the officer did not threaten or coerce the defendant in any way, promise the defendant anything, or give the defendant any reason to believe that the defendant was not free to go at any time, and that the defendant appeared to be coherent and understand what was going on around the defendant. *Harrell v. State*, 204 Ga. App. 738, 420 S.E.2d 631 (1992).

Because a reasonable person in the defendant's shoes would not have believed that the defendant's freedom was curtailed in a significant way when the defendant was first approached by the arresting officer, told about a shooting incident, and asked if the defendant had a gun, there was no error in the admission of the gun into evidence, given that the compulsive atmosphere requiring Miranda warnings was not present. *Quinn v. State*, 209 Ga. App. 480, 433 S.E.2d 592 (1993).

Scope of initial investigation not exceeded. — An officer's inquiry did not exceed the scope of initial investigation and the defendant was properly notified of the defendant's constitutional rights where pursuant to receiving a search warrant, the officer went to the defendant's house and asked the defendant if the defendant had any cocaine in the house. When defendant admitted that the defendant did and produced the drug, the officer immediately advised the defendant of the defendant's rights, whereupon the defendant made more statements. *Ford v. State*, 205 Ga. App. 12, 421 S.E.2d 294 (1992).

Only in-custody statements by the accused give rise to the issues of voluntariness and the Miranda warnings. *Carroll v. State*, 203 Ga. App. 22, 416 S.E.2d 354 (1992).

Caseworker not law enforcement officer. — A Department of Family and Children Services caseworker was not responsible for advising the defendant of the defendant's Miranda rights because caseworker was not a law enforcement officer. *Rucker v. State*, 203 Ga. App. 358, 416 S.E.2d 871 (1992).

Interrogation by parent who is law enforcement officer. — The court would reject the contention that the questioning of a suspect by a parent who is a law enforcement officer is a per se custodial interrogation since such a holding would require the court to presume that law enforcement parents would place their parent-child relationship subordinate to their employer-employee relationship and that a law enforcement parent would automatically coerce a confession from his or her own child; such an issue must be resolved on a case-by-case basis, by viewing the totality of the circumstances, in order to determine if the law enforcement parent was acting as a parent or as an agent of the state when speaking with his or her arrested child. *Cook v. State*, 270 Ga. 820, 514 S.E.2d 657 (1999), cert. denied, 528 U.S. 974, 120 S. Ct. 419, 145 L. Ed. 2d 327 (1999).

The trial court did not err by finding that a law enforcement officer acted as a parent and not as an agent of the state when the officer met with the officer's child, the defendant, who was a suspect in a murder investigation, where: (1) the parent was not part of the investigative team on the murders; (2) the defendant asked to see the parent at the same time the defendant re-

Self-Incrimination (Cont'd)**4. Voluntariness of Confessions (Cont'd)**

quested an attorney; (3) the parent was not directed by any law enforcement agent connected with the defendant's case to speak to the defendant — the defendant made the request on the defendant's own initiative; (4) the parent's motive in speaking with the defendant was to urge the defendant to cooperate in the hope of getting a plea bargain; and (5) the interview involved hugging and crying by parent and child which is not typical of a police interrogation. *Cook v. State*, 270 Ga. 820, 514 S.E.2d 657 (1999), cert. denied, 528 U.S. 974, 120 S. Ct. 419, 145 L. Ed. 2d 327 (1999).

Intimidation or coercion. — Statement of police officer during course of questioning, that "I want you to tell us the truth," did not constitute such coercion or intimidation as to render confession involuntary. *Hester v. State*, 164 Ga. App. 871, 298 S.E.2d 292 (1982).

Confession made under false representation of confidentiality. — The trial court erroneously admitted the defendant's confession, made after being advised of *Miranda*, as such was made in response to an unqualified false representation to the defendant that it would be kept confidential between the interviewing detective and the defendant. *Spence v. State*, Ga. , S.E.2d , 2007 Ga. LEXIS 293 (Apr. 10, 2007).

Detective's statement to defendant that the detective could not initiate discussion of crimes. — A detective's warning to a defendant who had called the detective on several occasions to ask for information and assistance that the detective could not initiate any discussion with the defendant about any crimes could not have been reasonably calculated to elicit incriminating admissions of criminal activity. *Housel v. State*, 257 Ga. 115, 355 S.E.2d 651 (1987), cert. denied, 487 U.S. 1240, 108 S. Ct. 2915, 101 L. Ed. 2d 946 (1988).

Resumption of recording after stopping tape during interview. — Although it would be better practice to keep the tape recorder running at all times during the interview with a prisoner, a gap in the tape does not prove lack of voluntariness of the prisoner's confession after the recorder was turned

back on. *Robinson v. State*, 257 Ga. 194, 357 S.E.2d 74 (1987).

Defendant's mental condition not determinative of voluntariness of statements. — A defendant's mental condition, by itself and apart from its relation to official coercion, should never dispose of an inquiry into constitutional voluntariness of statements made to law enforcement officers. *Wilson v. State*, 257 Ga. 444, 359 S.E.2d 891 (1987).

Fact that defendant's ability to read and write was limited did not make the confession inadmissible. The question of whether or not the defendant was capable or incapable of making a knowing and intelligent waiver of rights is to be answered by the trial judge and will be accepted by an appellate court unless clearly erroneous. *Newsome v. State*, 180 Ga. App. 243, 348 S.E.2d 759 (1986).

Age of person being questioned. — Under Georgia statutes, those who have reached the age of 17 are no longer considered juveniles by Georgia's criminal justice system. Therefore, for purposes of *Miranda*, statements made by a person who is at least 17 years old are admissible if made voluntarily, without being induced by the hope of benefit or coerced by threats. *Garlington v. State*, 268 Ga. App. 264, 601 S.E.2d 793 (2004).

Giving defendant cigarettes and soft drinks. — Confession was not invalidated by fact that officers conducting interrogation gave defendant cigarettes and soft drinks. *Coverson v. State*, 162 Ga. App. 497, 292 S.E.2d 196 (1982).

Adequacy of suppression hearing. — Factual and credibility determinations as to the voluntariness of a confession are normally made at a suppression hearing and must be accepted by appellate courts unless such determinations are clearly erroneous. *Hudson v. State*, 171 Ga. App. 181, 319 S.E.2d 28 (1984).

A federal habeas corpus petitioner is not precluded from claiming that the trial court failed to conduct an adequate hearing on the voluntariness of the petitioner's confession even though the petitioner had a full and fair opportunity to raise this claim in a state court proceeding. *Jarrell v. Balkcom*, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985).

Defendant-initiated discussions. — If a defendant initiates further discussions with the police and is not interrogated but volunteers a statement, the police may listen to that statement and use it against the defendant at trial, and because the record showed that the officer did not interrogate the defendant after the officer initiated discussions with the defendant but rather listened to the defendant's volunteered statement, the statement was admissible. *Hopkins v. State*, 263 Ga. 354, 434 S.E.2d 459 (1993).

Even though the defendant made a request for counsel, because the defendant initiated a conversation with police officers and intelligently waived the defendant's right to have counsel present, videotaping of the defendant's confession did not violate the defendant's fifth or sixth amendment rights. *Mosher v. State*, 268 Ga. 555, 491 S.E.2d 348 (1997).

Statement given to aid child molestation victim not coerced. — Statement of the defendant in a child molestation case was admissible despite the defendant's argument that the defendant was coerced or cajoled into making the statement by being told that it would help the young victim and that it was therefore involuntary because it was made with the hope of benefiting the victim. *Thomas v. State*, 175 Ga. App. 873, 334 S.E.2d 903 (1985).

Finding of voluntariness must appear in record. — The trial judge need not make formal findings of fact or write an opinion, but it must clearly appear from the record that the judge made a primary finding of voluntariness before the confession was introduced into evidence before the jury. *Hilliard v. State*, 128 Ga. App. 157, 195 S.E.2d 772 (1973).

Finding of voluntariness must appear with unmistakable clarity. — Although the judge need not make formal findings of fact or write an opinion, the judge's conclusion that the confession is voluntary must appear from the record with unmistakable clarity. If there has been no ruling on the issue of voluntariness made with the required unmistakable clarity, remand with instruction to conduct a further hearing and make a determination of voluntariness may be appropriate. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Once finding of voluntariness is made, voluntariness is a jury question. — Once the

state has made a prima facie showing of voluntariness and the court has properly admitted a confession into evidence for the jury's consideration, the question of whether or not the confession was freely and voluntarily given, without hope of benefit or fear of injury, becomes one of fact for determination by the jury. *Meyer v. State*, 150 Ga. App. 613, 258 S.E.2d 217 (1979), cert. denied, 445 U.S. 952, 100 S. Ct. 1602, 63 L. Ed. 2d 788 (1980).

Written confession unsigned and transcriber not present at trial is insufficient for exclusion. — The fact that a statement amounting to a confession by the defendant was unsigned and the fact that the stenographer who transcribed it was not present at the trial and did not testify as to its verity is not ground for excluding it from evidence. *Freeman v. State*, 230 Ga. 85, 195 S.E.2d 416 (1973).

Trial court's decision on voluntariness binding on appeal, unless clearly erroneous. — Once a trial judge has made a determination as to the voluntariness of a confession after a suppression hearing, such determination must be accepted by the appellate courts unless the judge's decision is clearly erroneous. *Richardson v. State*, 143 Ga. App. 846, 240 S.E.2d 217 (1977).

Factual and credibility determinations as to the voluntariness of a confession are normally made at a suppression hearing and must be accepted by appellate courts unless such determinations are clearly erroneous. *Thomas v. State*, 174 Ga. App. 761, 331 S.E.2d 627 (1985).

A trial court's findings as to factual determinations and credibility relating to the admission of in-custody statements will be upheld on appeal unless clearly erroneous. *Denton v. State*, 186 Ga. App. 864, 368 S.E.2d 811 (1988).

Introduction of challenged confession without a determination of its voluntariness by the trial judge after an adequate hearing is unconstitutional. *Clark v. Smith*, 224 Ga. 766, 164 S.E.2d 790 (1968), rev'd on other grounds, 403 U.S. 946, 91 S. Ct. 2279, 29 L. Ed. 2d 859 (1971); *Strickland v. State*, 226 Ga. 750, 177 S.E.2d 238 (1970).

Inadmissible evidence of confession. — Because inadmissible evidence of a confession is offered and admitted, its admission constitutes reversible error, unless the jury is

Self-Incrimination (Cont'd)**4. Voluntariness of Confessions (Cont'd)**

expressly instructed that the evidence is admitted for the purpose of impeachment only, whether or not a request to so charge be made, and whether or not any exceptions are made to the charge as given. *Colbert v. State*, 124 Ga. App. 283, 183 S.E.2d 476 (1971).

Inconsistent statement obtained in violation of Miranda admissible for impeachment. — A prior inconsistent statement of a criminal defendant is admissible for the limited purpose of impeaching trial testimony of the defendant even though the prior inconsistent statement would otherwise be inadmissible due to Miranda violations in defendant's trial. *Hicks v. State*, 256 Ga. 266, 347 S.E.2d 589 (1986).

Determination of voluntariness of statement used for impeachment unnecessary. — Since a prior statement is admissible for impeachment purposes even if in violation of Miranda, a *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 hearing and finding of voluntariness is unnecessary. *Tew v. State*, 179 Ga. App. 369, 346 S.E.2d 833 (1986).

Case remanded where no determination of voluntariness. — Defendant's case was remanded for clarification as to the admissibility of any statements or confessions, where there was no actual ruling or finding in the record showing that the trial judge determined the voluntariness of defendant's confession. *Hicks v. State*, 255 Ga. 503, 340 S.E.2d 604, aff'd, 256 Ga. 266, 347 S.E.2d 589 (1986).

Initial burden rests with defendant to present evidence challenging the legality of the confession. *United States v. Morris*, 491 F. Supp. 226 (S.D. Ga. 1980).

Burden of proof as to voluntariness of a confession is upon the state. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Burden and standard of proof. — The standard the state is required to meet before the trial judge concerning the confession is to show that it was voluntary by a preponderance of the evidence considering the totality of the circumstances. *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975); *Lee v. State*, 154 Ga. App. 562, 269 S.E.2d 65 (1980); *United States v. Morris*, 491 F. Supp. 226 (S.D. Ga.

1980); *Christian v. State*, 190 Ga. App. 667, 379 S.E.2d 807 (1989).

Standard of proof for confession given after illegal seizure or consent to search. — In order for a confession given after an illegal seizure to be admissible in evidence, the government must prove two things: that the confession is voluntary for purposes of U.S. Const., amend. 5, and that the confession was not the product of the illegal seizure. The same requirements apply where the evidence has been obtained by means of a consent to search rather than a confession. *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980).

Conflict in evidence over Miranda issue. — Where the evidence bearing on the issue of whether or not the defendant was advised of the defendant's Miranda rights before making a custodial statement was in total conflict and it was apparent that the trial court simply believed the state's witnesses rather than appellant, this was not clearly erroneous. *Hayes v. State*, 203 Ga. App. 143, 416 S.E.2d 347 (1992), cert. denied, 203 Ga. App. 906, 416 S.E.2d 347 (1992).

Jury instruction regarding voluntariness not required absent request. — Under established law of this state it is not necessary to give a charge on the subject of the voluntariness of a confession, unless there is a specific request for it. *Welch v. State*, 235 Ga. 243, 219 S.E.2d 151 (1975).

Test of validity of confession on appeal. — Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981); *Worthy v. State*, 253 Ga. 661, 324 S.E.2d 431 (1985).

Admissibility of volunteered statements. — Co-defendant's statement to the police was properly admitted into evidence as, although the co-defendant invoked the right to counsel, the co-defendant voluntarily confessed to the police after being asked five times whether the co-defendant was sure that the co-defendant wanted to talk to the police. *Smith v. State*, 269 Ga. App. 133, 603 S.E.2d 445 (2004).

Fruits of voluntary confession given after invoking right to counsel. — Officer's statement to the defendant, given after the defendant invoked the right to counsel, in

which the officer expressed the officer's knowledge of the request for a lawyer, urged the defendant not to say anything, and told the defendant that everyone should have the opportunity to bury their loved ones, as did the officer himself recently when the officer's father and brother died, was not calculated to procure an untrue statement, and because the defendant was not threatened with fear of injury nor promised hope of benefit, because there was no deception, nor did the police inject religion into the exchange, and because the officer's speech was not evidence of coercive police activity, which was a necessary predicate to the finding that the confession was involuntary, the police did not violate the defendant's fifth amendment right against coerced self-incrimination; therefore, while the defendant's statements themselves, in which the defendant confessed to killing the defendant's uncle and told the police where the defendant disposed of the body, were inadmissible based on the defendant's invocation of the right to counsel, the fruits of the statements were admissible. *State v. Woods*, 280 Ga. 758, 632 S.E.2d 654 (2006).

5. Voluntariness of Guilty Pleas

Standard for determining the validity of guilty pleas is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Caldwell v. Beard*, 232 Ga. 701, 208 S.E.2d 564 (1974).

Judge must be convinced that plea is voluntary. — Before accepting a guilty plea, a trial judge must be convinced that the defendant's decision is voluntary in the sense that it is made knowingly, intelligently, and not as a result of a coercion by the state or anyone else. *Brown v. Jernigan*, 622 F.2d 914 (5th Cir.), cert. denied, 449 U.S. 958, 101 S. Ct. 368, 66 L. Ed. 2d 224 (1980).

Plea that is intelligent and voluntary must be affirmatively shown. — It is error, plain on the face of the record, for a trial judge to accept a defendant's guilty plea without an affirmative showing that it is intelligent and voluntary. *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971); *Capps v. Ault*, 229 Ga. 873, 195 S.E.2d 22 (1972).

Silence of record as to validity of plea. — If the record is silent on the question of whether or not the judge, who accepted the

defendant's guilty plea, questioned the defendant to insure that the plea was knowingly and voluntarily entered, then there is no evidence in the record from which it can be determined whether the plea was valid and the sentence imposed is invalid and the detention is illegal. *Capps v. Ault*, 229 Ga. 873, 195 S.E.2d 22 (1972).

Determination of voluntariness where questioned in habeas corpus action. — Where the question of the voluntariness of a guilty plea is raised in a habeas corpus action, the court is authorized to and should either hold an evidentiary hearing to establish a record whereby it can be determined that a plea of guilty was freely and voluntarily entered or else rely on an adequate record established in a state habeas corpus hearing. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

Waiver of other constitutional rights by pleading guilty. — Although by pleading guilty the defendant waives the right to a jury trial, the privilege against self-incrimination, and the right of confrontation, neither the Constitution nor any rule of criminal procedure requires express articulation and specific waiver of these rights before a guilty plea may be accepted. *Brown v. Jernigan*, 622 F.2d 914 (5th Cir.), cert. denied, 449 U.S. 958, 101 S. Ct. 368, 66 L. Ed. 2d 224 (1980).

Duty of counsel regarding guilty plea. — When a person indicates a desire to enter a guilty plea, the duty of counsel is limited to ascertaining whether the decision so to plead is voluntarily and knowingly made. *Brown v. Jernigan*, 622 F.2d 914 (5th Cir.), cert. denied, 449 U.S. 958, 101 S. Ct. 368, 66 L. Ed. 2d 224 (1980).

Ordinarily, the mere erroneous prediction of sentence by counsel does not make a guilty plea involuntary, especially when counsel is retained by the defendant rather than appointed by the court. *Lambert v. United States*, 392 F. Supp. 113 (N.D. Ga. 1975).

Lawyer's advice need not withstand retrospective examination in post-conviction hearing. — The requirement that a guilty plea be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. *Lambert v. United States*, 392 F. Supp. 113 (N.D. Ga. 1975).

Self-Incrimination (Cont'd)**5. Voluntariness of Guilty Pleas (Cont'd)****Requirements for enhanced sentencing.**

— Because the defendant's sentence for aggravated assault was enhanced by the use of prior convictions based on guilty pleas during which the defendant was not asked required questions to determine the voluntariness of the pleas, the defendant's sentence had to be vacated and the matter remanded for resentencing, at which time the state would have the burden of proving the voluntariness of the guilty pleas before it could use the prior convictions to enhance the defendant's sentence. *Carswell v. State*, 263 Ga. App. 833, 589 S.E.2d 605 (2003).

Consideration of plea in sentencing.

— For those who plead guilty, that fact itself is a consideration in sentencing, a consideration that is not present when one is found guilty by a jury. *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Avoidance of death penalty. — A plea of guilty entered to avoid a possible death penalty is not for that reason "compelled" within the meaning of U.S. Const., amend. 5. *Miller v. State*, 237 Ga. 823, 229 S.E.2d 648 (1976).

When guilty plea is not intelligently and voluntarily entered. — If a guilty plea is not intelligently and voluntarily entered, sentence imposed is invalid and detention is illegal. *Capps v. Ault*, 229 Ga. 873, 195 S.E.2d 22 (1972).

Sentencing guidelines. — United States Sentencing Guideline § 3 E1.1(b)(2), which instructs the court to reduce a defendant's sentence for "timely notifying authorities of his intention to plead guilty," is not unconstitutional on its face. *United States v. McConaghy*, 23 F.3d 351 (11th Cir. 1994).

6. Silence of the Accused

Prearrest silence. — Prosecutor's comment on the defendant's failure to respond to a police officer's initial questioning prior to arrest was not improper where the defendant did not take the stand in the defendant's own defense and was not, therefore, improperly confronted with the defendant's prearrest silence. *Edwards v. State*, 219 Ga. App. 239, 464 S.E.2d 851 (1995).

Although the evidence was sufficient to show that defendant stalked the victim and

obstructed an officer by fleeing in violation of O.C.G.A. §§ 16-5-91(a) and 16-10-24(a), defendant had a constitutional right to stand silent during a police officer's questioning; as a result, the evidence was insufficient to support a conviction for obstruction of an officer based on defendant's silence. *Johnson v. State*, 264 Ga. App. 889, 592 S.E.2d 507 (2003).

Rules requiring defendant to answer court questions regarding satisfaction with counsel not violative of right to silence. — Georgia's Unified Appeal Procedure, O.C.G.A. § 17-10-36, setting forth rules promulgated by the Georgia Supreme Court that prescribed procedures to be utilized in death penalty cases by the trial court, defense counsel, and the prosecutor prior to, during, and after trial, did not violate a state death row inmate's right to silence by requiring the inmate to answer the court's questions about the inmate's satisfaction with defense counsel and the manner in which the inmate's defense was being conducted. *Ford v. Schofield*, F. Supp. 2d , 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

Evidence of defendant's silence must be excluded, and may not be used against the defendant. — Evidence as to the defendant's silence at the time of the defendant's arrest should be excluded when objected to, since the defendant is then entitled to remain silent, and the prosecution may not use against the defendant the fact that the defendant stood mute or claimed the privilege. *Lowe v. State*, 136 Ga. App. 631, 222 S.E.2d 50 (1975); *Smith v. State*, 140 Ga. App. 385, 231 S.E.2d 83 (1976); *Kitchens v. State*, 150 Ga. App. 707, 258 S.E.2d 544 (1979).

Testimony in violation of defendant's rights. — Testimony to the effect that a defendant made no statements to the police when arrested, violates the defendant's rights under U.S. Const., amend. 5. *DeBerry v. State*, 241 Ga. 204, 243 S.E.2d 864 (1978); *Gibbs v. State*, 217 Ga. App. 614, 458 S.E.2d 407 (1995).

Harmless error. — Because an agent's improper reference during testimony to the defendant's invocation of the right to remain silent was made gratuitously and not in response to a specific question, because the state did not highlight the statement for the jury or suggest any inference that could be drawn from the defendant's invocation, and,

because after several more questions, the trial court removed the jury from the courtroom, but no further reference was made to the improper statement, it was unlikely that the statement had an impact on the verdict; the evidence was strong, when juxtaposed with the likely impact of the statement, and, thus, the improper statement was harmless beyond a reasonable doubt. *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

Use of the accused's silence in the presence of law officers is prohibited for impeachment purposes. *Clark v. State*, 237 Ga. 901, 230 S.E.2d 277 (1976).

Use of accused's silence violates due process. — The use for impeachment purposes of the accused's silence at the time of arrest, and after the defendant had received Miranda warnings which advised the defendant of the defendant's right under U.S. Const., amend. 5 to remain silent, violates the due process clause of the federal Constitution. *Clark v. State*, 237 Ga. 901, 230 S.E.2d 277 (1976).

Rule of *Doyle v. Ohio*, 426 U.S. 610 (1976) will not be applied retroactively to habeas corpus or other post appeal attack for a conviction prior to June 17, 1976, that date on which *Doyle v. Ohio*, was decided, which held that use of the accused's silence at time of arrest, after receiving Miranda warnings, violated the due process clause of U.S. Const., amend. 14. *Clark v. State*, 237 Ga. 901, 230 S.E.2d 277 (1976).

Evidence of defendant's silence requiring reversal. — To reverse a conviction, evidence which is introduced of the defendant's election to remain silent must point directly at the substance of the defendant's defense or otherwise substantially prejudice the defendant in the eyes of the jury. *Duck v. State*, 250 Ga. 592, 300 S.E.2d 121 (1983).

Officer testifying that defendant invoked right to remain silent. — Where a detective testified that after reading the defendant's rights the officer asked the defendant whether the defendant wanted to talk and the defendant checked the "No" box on the waiver form, the trial court did not err in allowing the detective to testify that the defendant invoked the constitutional right to remain silent given that the defendant was found inside the burglarized residence with items stolen from the residence in the defendant's pockets, and the defendant subse-

quently confessed to committing the burglary. *Blige v. State*, 203 Ga. App. 151, 416 S.E.2d 160 (1992).

Comment by the prosecutor cuts down on the privilege against self-incrimination by making its assertion costly. *Gosha v. State*, 239 Ga. 37, 235 S.E.2d 527 (1977).

Testimony that was an improper comment on a defendant's silence or failure to come forward was an impropriety but did not automatically require reversal. *Bruce v. State*, 268 Ga. App. 677, 603 S.E.2d 33 (2004).

Prosecutorial comment on defendant's silence is error. — It is error for a prosecutor to comment to a jury about a criminal defendant's failure to take the witness stand in the defendant's own behalf, or the defendant's failure to answer a particular question which would violate the defendant's right under U.S. Const., amend. 5 against self-incrimination. *Sharp v. United States*, 410 F.2d 969 (5th Cir. 1969).

Prosecution is not permitted to comment on defendant's failure to testify. *Gosha v. State*, 239 Ga. 37, 235 S.E.2d 527 (1977); *United States v. Chandler*, 586 F.2d 593 (5th Cir. 1978), cert. denied, 440 U.S. 927, 99 S. Ct. 1262, 59 L. Ed. 2d 483 (1979).

Remarks that do not imply to the jury that defendant's failure to testify should be construed against the defendant do not constitute cause for a new trial. See *Lackey v. State*, 135 Ga. App. 632, 218 S.E.2d 648 (1975); *Hill v. State*, 250 Ga. 277, 295 S.E.2d 518 (1982), cert. denied, 460 U.S. 1056, 103 S. Ct. 1508, 75 L. Ed. 2d 936 (1983) See *Jenkins v. Byrd*, 103 F. Supp. 2d 1350 (S.D. Ga. 2000).

Comment on the defendant's refusal to respond to cross-examination. — If the defendant testifies in the defendant's own behalf as to sentence, but refuses to respond to the state's cross-examination, asserting the defendant's right under U.S. Const., amend. 5, the state's comment on this is not an instance in which the state commented on a failure of a defendant to testify in the defendant's own behalf. *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981).

Comment did not warrant habeas corpus where evidence strong. — Prosecutor's comment on the defendant's failure to testify violated the defendant's fifth amendment right but did not warrant habeas corpus relief, because it could be said beyond a

Self-Incrimination (Cont'd)**6. Silence of the Accused (Cont'd)**

reasonable doubt, that absent the unconstitutional comment, given the strong evidence of the state, the jury would have found defendant guilty. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990).

Testimony that defendant refused to give, or sign, written statement not improper. — A detective's testifying that the defendant refused to give a written statement and to sign the detective's written memorandum of the defendant's oral statement does not constitute an improper comment on the defendant's right to remain silent. *Bethea v. State*, 251 Ga. 328, 304 S.E.2d 713 (1983).

Reference to the defendant's pretrial statements. — Prosecutor's argument in response to defendant's argument about the defendant's pretrial statements did not constitute an improper comment about defendant's failure to testify, and did not infringe on the defendant's fifth amendment right against self-incrimination. *Christenson v. State*, 261 Ga. 80, 402 S.E.2d 41 (1991), *cert. denied*, 502 U.S. 855, 112 S. Ct. 166, 116 L. Ed. 2d 130 (1991).

Prosecutor's reference to defendant's right to have psychiatrist not testify was not a violation of defendant's right against self-incrimination. *Willett v. State*, 223 Ga. App. 866, 479 S.E.2d 132 (1996).

Permissible references to failure to testify. — Prosecuting attorney's statements during closing argument that the defense presented no evidence to rebut the proof adduced by the state did not constitute reversible error under the self-incrimination clause because the state did not comment that the defendant could have denied, explained, or otherwise disputed the state's case against the defendant, but rather merely commented on the failure to present any evidence in defense. *Smith v. State*, 170 Ga. App. 673, 317 S.E.2d 626 (1984).

Prosecutor's statement during closing argument that "We don't know which the defendant had which gun. The only person who can tell us that is [the defendant]" was permissible because, although an indirect reference to defendant's silence, it was not manifestly intended to be, nor would a jury construe it as such, a comment on silence,

but rather was an objective evaluation of the state of the evidence when taken in context. *Solomon v. Kemp*, 735 F.2d 395 (11th Cir. 1984), *cert. denied*, 469 U.S. 1181, 105 S. Ct. 940, 83 L. Ed. 2d 952 (1985).

To reverse for improper comment by the prosecutor, a court must find one of two things: that the prosecutor's manifest intention was to comment upon the accused's failure to testify or that the remark was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. However, if there is another equally plausible explanation for the prosecutor's statement, a court cannot conclude that it was intended to comment on defendant's failure to testify or that the jury would naturally take it to be such a comment. *Day v. State*, 203 Ga. App. 186, 416 S.E.2d 548 (1992).

Although the defendant did not testify at trial and contended that under the circumstances a portion of the state's closing argument could be viewed as an improper comment on the defendant's failure to do so, the jury could reasonably have interpreted the state's attorney's comment as a reference to the omission of certain evidence rather than as a reference to the defendant's failure to testify. *Day v. State*, 203 Ga. App. 186, 416 S.E.2d 548 (1992).

Prosecutor's argument that defendant had shown no remorse was not improper comment on the right to remain silent. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), *cert. denied*, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

State did not engage in prosecutorial misconduct when it commented on the defendant's lack of remorse as the state's comments were aimed at the defendant's lack of emotion, not the defendant's right to remain silent; the state also did not violate the golden rule by inviting the jurors to "speak for the victim by letting her killer know that you're not going to let him get away with it" as the state did not ask the jurors to put themselves in the victim's place at the time the crime was committed. *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004).

Evidence of failure to answer insurance company inquiry. — Because, in a drug prosecution, the prosecution presented, in its case in chief, evidence that the defendant had failed to respond to a request by the

insurance company for a statement as to the defendant's involvement in the use and damage of an aircraft involved in the alleged drug smuggling, its introduction did not violate the self-incrimination and due process clauses of U.S. Const., amend. 5 even though the defendant did not intend to testify on the defendant's own behalf and objected that the evidence improperly enabled the prosecution to comment on the defendant's silence and allowed the jury to infer guilt therefrom. *United States v. Nabors*, 707 F.2d 1294 (11th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S. Ct. 1271, 79 L. Ed. 2d 677 (1984).

Evidence that defendant requested attorney. — Defendant's fifth amendment rights were not violated by the admission of a police officer's testimony that did not focus on the defendant's silence or suggest that the defendant had asserted the right to remain silent, but simply related, in the course of a lengthy narrative, that the defendant requested an attorney. *Duck v. State*, 250 Ga. 592, 300 S.E.2d 121 (1983).

Defense counsel may comment on codefendants' silence only to avoid prejudice to client. — The right to comment on a codefendants' silence exists only if defense counsel has a clear duty to make the argument in order to avoid prejudicing defense counsel's client; the duty does not arise unless the defenses set forth by the codefendants are truly antagonistic, and then the appropriate remedy is severance. *United States v. Johnson*, 713 F.2d 633 (11th Cir. 1983), cert. denied, 465 U.S. 1081, 104 S. Ct. 1447, 79 L. Ed. 2d 766 (1984).

A defendant's attorney has a clear duty to comment on a codefendant's silence only if those comments are necessary to avoid real prejudice to the defendant. Real prejudice occurs only if the defenses offered by the defendant and the codefendant are antagonistic and mutually exclusive. If the defendants' defenses are not sufficiently antagonistic to require severance, a defendant's attorney does not need to comment on the codefendant's silence to avoid real prejudice to the defendant and the district court does not abuse its discretion in denying the defendant's motion for severance. *United States v. Graziano*, 710 F.2d 691 (11th Cir. 1983), cert. denied, 466 U.S. 937, 104 S. Ct. 1910, 80 L. Ed. 2d 459 (1984).

Fact-finder's consideration of the accused's demeanor in reaction to the testimony of others, even when the accused does not take the stand, does not violate the fifth amendment to the United States Constitution. *In re M.E.H.*, 180 Ga. App. 591, 349 S.E.2d 814 (1986).

Comments based on courtroom observation of a defendant's demeanor do not infringe on the defendant's fifth amendment rights. *Christenson v. State*, 261 Ga. 80, 402 S.E.2d 41 (1991), cert. denied, 502 U.S. 855, 112 S. Ct. 166, 116 L. Ed. 2d 130 (1991).

Closing argument by defendant who did not testify on own behalf. — Because the defendant made a closing argument in the defendant's own behalf, during which the defendant made certain unsworn statements, at which point the judge interrupted to instruct the jury that the defendant, having not testified during the trial, cannot testify now, such remarks did not infringe the defendant's right to remain silent. *Green v. Zant*, 738 F.2d 1529 (11th Cir.), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984).

No rule requires grant of new trial. — There is no ironclad rule that any reference, even unwitting or harmless, to an accused's silence at time of arrest requires the grant of a new trial. *Smith v. State*, 140 Ga. App. 385, 231 S.E.2d 83 (1976).

Instruction on inference of guilt from possession of stolen property. — An instruction stating that guilt of the defendant can be inferred from possession of recently stolen property unaccounted for by the defendant cannot properly be construed as a comment on the defendant's failure to testify. *Horton v. State*, 228 Ga. 690, 187 S.E.2d 677 (1972).

Failure to recharge jury on inference of guilt from silence. — Where during deliberations a juror sent a note asking for an answer from defendant about why the defendant was on the burglary victim's property on the morning of the burglary, the failure to recharge the jury that the defendant was not required to testify and that the jury should not make any adverse inferences against defendant for not testifying did not violate defendant's right against self-incrimination where neither the jury nor defendant requested such a recharge. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Self-Incrimination (Cont'd)**6. Silence of the Accused (Cont'd)**

Prosecutor's statement that only two people knew what went on in the room where an assault occurred, the victim and defendant, did not violate defendant's rights against self-incrimination. *Neal v. State*, 198 Ga. App. 518, 402 S.E.2d 114 (1991).

Refusal to testify is insufficient to support summary judgment. — Adverse inference may be drawn against a party in a civil action when the party refuses to testify in response to probative evidence offered against them. This adverse inference, however, is insufficient by itself to allow summary judgment to be entered against a party. However the additional testimony and affidavits of the court may authorize the granting of summary judgment as a matter of law. *SEC v. Scherm*, 854 F. Supp. 900 (N.D. Ga. 1993).

Determining meaning of prosecutor's comment. — To determine whether a prosecutor intended to comment on a defendant's failure to testify, courts must examine the comment in context, and merely describing the circumstantial nature of the case did not violate the defendant's fifth amendment right to remain silent. *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir.), cert. denied, 516 U.S. 946, 116 S. Ct. 385, 133 L. Ed. 2d 307 (1995).

7. Testimony and Cross-Examination

Invoking privilege by witness. — Where a witness testifies under oath that the witness' answer to any question asked of the witness would incriminate the witness and comes within the constitutional immunities guaranteed to the witness, the court can demand no further testimony of the fact. *Interstate Life & Accident Ins. Co. v. Wilmont*, 123 Ga. App. 337, 180 S.E.2d 913 (1971).

Where a defense witness states the witness' name and thereafter claims the fifth amendment, the trial court does not commit error in denying the defendant's motion to require the state to disclose the witness's criminal record to impeach the witness. *Howard v. State*, 251 Ga. 586, 308 S.E.2d 167 (1983).

Testimony of the defendant's half-sibling that the half-sibling, rather than the defendant, executed a robbery was properly rejected upon half-sibling's subsequent invocation of the half-sibling's fifth amendment

rights. *Kelly v. State*, 209 Ga. App. 789, 434 S.E.2d 743 (1993).

In a prosecution for stalking, it was not error for the trial court to refuse to compel the complaining witness to answer a question on cross-examination when the witness invoked the privilege against self-incrimination. *Robinson v. State*, 216 Ga. App. 816, 456 S.E.2d 68 (1995).

Trial court did not engage in the required analysis for a witness asserting a fifth amendment privilege, but merely declared that answering the questions concerning knowledge of the court's order regarding removing a child from a parent's home would not incriminate the witness; at a minimum, such knowledge would establish a link in the chain of evidence needed to prove the witness was in contempt of that order and the trial court's finding of contempt based on the witness's refusal to answer the question was improper. *In re Tidwell*, 279 Ga. App. 734, 632 S.E.2d 690 (2006).

Trial court did not err under O.C.G.A. § 17-8-4 in denying a defendant's motion to sever the defendant's trial for cruelty to a child and other offenses from that of a codefendant because the defendant did not establish that, if severance were granted, the defendant would have been able to call the codefendant to testify about a letter without the codefendant invoking rights under the fifth amendment to the United States Constitution; even if such questioning could have been conducted, the defendant did not show harm caused by its absence because it was uncontroverted that the codefendant wrote the letter at issue and there was no showing that the codefendant's testimony would have exculpated the defendant. *White v. State*, 281 Ga. 276, 637 S.E.2d 645 (2006).

Hearing to determine if testimony would incriminate witness. — In a criminal prosecution, where the state's attorney ceased the questioning of a witness immediately when it became clear that the witness was invoking the witness' fifth amendment right, it was not necessary for the court to hold a hearing as to whether testimony the state sought to elicit would incriminate the witness. *Bolar v. State*, 216 Ga. App. 195, 453 S.E.2d 790 (1995).

Privilege invoked remains invoked throughout. — The fifth amendment privilege cannot be invoked to oppose discovery

and then tossed aside to support a party's assertions. Therefore, the defendant may not use any evidence that the defendant has withheld by the defendant's invocation of the defendant's testimonial privilege but the defendant is free, of course, to use any other outside discovered evidence. *SEC v. Zimmerman*, 854 F. Supp. 896 (N.D. Ga. 1993).

Criminal defendant must consent to cross-examination. — No cross-examination of a criminal defendant may take place unless the defendant first consents thereto. *Wright v. State*, 113 Ga. App. 436, 148 S.E.2d 333 (1966).

Upon taking stand, defendant waives privilege. — Once a defendant voluntarily takes the witness stand in the defendant's own defense, the defendant waives the defendant's right under U.S. Const., amend. 5 and becomes obligated, as any other witness, to answer all relevant questions. *United States v. Brannon*, 546 F.2d 1242 (5th Cir. 1977).

Having elected to testify, a defendant becomes obligated on cross-examination to answer all proper and relevant questions. *Dickey v. State*, 240 Ga. 634, 242 S.E.2d 55 (1978).

A defendant who takes the stand waives the privilege under U.S. Const., amend. 5 against self-incrimination at least to the extent of cross-examination relevant to the issues raised by the defendant's testimony. *United States v. Dooley*, 587 F.2d 201 (5th Cir.), cert. denied, 440 U.S. 949, 99 S. Ct. 1430, 59 L. Ed. 2d 639 (1979).

The defendant in a criminal case who elects to take the stand in the defendant's own defense is subject to cross-examination and impeachment pursuant to O.C.G.A. § 24-9-82. *Norwood v. State*, 202 Ga. App. 782, 415 S.E.2d 521 (1992).

Because, during direct examination, the defendant voluntarily testified about the defendant's statements to the police, the defendant waived the defendant's privilege against self-incrimination, and the state could properly question the defendant about the statements on cross-examination. *Fairbanks v. State*, 225 Ga. App. 666, 484 S.E.2d 693 (1997).

Waiver is complete, not partial. — A defendant in a criminal case who voluntarily testifies in the defendant's own behalf, waives completely the defendant's privilege

under U.S. Const., amend. 5 and Ga. Const. 1976, Art. I, Sec. I, Para. XIII (see Ga. Const. 1983, Art. I, Sec. I, Para. XVI). Furthermore, when a defendant voluntarily takes the stand in the defendant's own behalf and testifies as to the defendant's guilt or innocence as to a particular offense, the defendant's waiver is not partial. Having once cast aside the cloak of immunity, the defendant may not resume it at will, whenever cross-examination may be inconvenient or embarrassing. *Leonard v. State*, 146 Ga. App. 439, 246 S.E.2d 450 (1978).

An accused has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward the defendant's version of the facts and the defendant's reliability as a witness, not to testify at all. The defendant cannot reasonably claim that U.S. Const., amend. 5 gives the defendant not only this choice but also, if the defendant elects to testify, an immunity from cross-examination on the matters the defendant has put in dispute. *Dickey v. State*, 240 Ga. 634, 242 S.E.2d 55 (1978).

Waiver of privilege where cross-examination precedes testimony. — If a defendant is fully apprised of the rights under U.S. Const., amend. 5 by the trial judge and by the defendant's attorney prior to the defendant's taking the stand for cross-examination, even where the defendant is cross-examined before the defendant testifies, any objection to the procedure must be considered as waived at the trial. *Everett v. State*, 238 Ga. 80, 230 S.E.2d 882 (1976).

Information to be volunteered by prosecution. — Prosecution would have had to volunteer the existence of testimony by co-defendant that defendant was innocent of the arson if codefendant's counsel refused to impart information to defendant's counsel because codefendant claimed the protection of the fifth amendment and such statement on codefendant's willingness to testify were not otherwise discoverable by defendant's counsel. *United States v. Yizar*, 956 F.2d 230 (11th Cir. 1992).

Court's discretion to exclude witness. — If it appears that a witness (other than the defendant) intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow the witness to take the stand. *King v. State*, 202 Ga. App.

Self-Incrimination (Cont'd)**7. Testimony and****Cross-Examination (Cont'd)**

817, 415 S.E.2d 684, cert. denied, 202 Ga. App. 906, 415 S.E.2d 684 (1992).

Defendant's testimony may be impeached by earlier statement. — When a defendant gives one version of the defendant's location for the time of the offense to the police and then gives the jury a different version, the earlier statement of the defendant is admissible for purposes of impeachment of the defendant's sworn testimony at trial. *Wilson v. State*, 145 Ga. App. 315, 244 S.E.2d 355 (1978).

When cross-examination of a testifying criminal defendant may be limited. — A criminal defendant who takes the stand to testify in the defendant's own behalf can be cross-examined and impeached as any other witness, unless under the particular circumstances of the case specific questions should be excluded because their probative value on the issue of the defendant's credibility is so negligible as to be far outweighed by their possible impermissible impact on the jury. *Sharp v. United States*, 410 F.2d 969 (5th Cir. 1969).

Cross-examination may be limited to exclude irrelevant testimony. — Cross-examination of a witness is not unreasonably limited by the witness' refusal under U.S. Const., amend. 5 to tell where the witness obtained the goods which the witness sold to the defendant, since the source of the goods is irrelevant to a charge of passing counterfeit currency, for which the defendant was being tried. *United States v. Ginn*, 455 F.2d 980 (5th Cir. 1972).

Neither testifying defendant, nor the co-defendant, may invoke privilege as to cross-examination of defendant. — If the defendant does not invoke the right against self-incrimination while testifying, the defendant has no right to invoke this privilege on cross-examination in same area, nor does the defendant's codefendant have standing to invoke this privilege, however, incriminating the defendant's codefendant's testimony may be. *Sullivan v. State*, 144 Ga. App. 256, 241 S.E.2d 42 (1977).

Witness's testimony admissible, even if privileged as to witness, where little danger of prejudice. — If the privilege against

self-incrimination has been invoked by a witness as to purely collateral matters bearing on witness credibility, there is little danger of prejudice to the defendant and, therefore, the witness' testimony may be used against the defendant. *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974); *Buford v. State*, 162 Ga. App. 498, 291 S.E.2d 256 (1982).

Striking of testimony where cross-examination hampered by invoking of privilege. — If a witness by invoking the privilege of self-incrimination precludes inquiry into the details of the witness' direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of the witness' direct testimony and, therefore, that witness' testimony should be stricken in whole or in part. *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974).

Defendant's remedy where witness invokes privilege on cross-examination. — If a witness validly claims the privilege against self-incrimination, the defendant's only relief is a motion to strike that portion of the direct testimony with regard to which the confrontation right under U.S. Const., amend. 6 is lost. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

When prosecutorial comment on failure to testify allowed. — Where the defendant testifies in the defendant's own behalf, there is no violation of U.S. Const., amend. 5 when the district attorney comments upon the defendant's failure, when testifying, to explain or deny the testimony of particular witnesses. *Gosha v. State*, 239 Ga. 37, 235 S.E.2d 527 (1977).

O.C.G.A. §§ 17-7-28 and 24-9-20, regarding comment on the defendant's failure to testify, are applicable only where the defendant fails to testify. *Gosha v. State*, 239 Ga. 37, 235 S.E.2d 527 (1977).

Civil defendant not entitled to question-by-question advice as to invoking this privilege. — In deciding whether to invoke the protection of U.S. Const., amend. 5, a defendant in a civil action is not entitled to the advice of the defendant's attorney on a question-by-question basis while testifying, once having been advised of the scope of the privilege and the manner of its invocation. *Page v. Page*, 235 Ga. 131, 218 S.E.2d 859 (1975).

No need to advise defendant of rights. — Because the defendant did not testify and was not cross-examined, there was no harm in the trial court's failure to advise the defendant of the defendant's right not to be compelled to testify under oath. *Coonce v. State*, 171 Ga. App. 20, 318 S.E.2d 763 (1984).

Expert testimony on atomic absorption test for gunpowder. — It was not an abuse of the defendant's constitutional right against self-incrimination for the trial court to permit an expert witness to testify that the atomic absorption test for gunpowder that was performed on defendant's hand was verifiably certain and for the trial court to admit the test results into evidence. *Jones v. State*, 277 Ga. 36, 586 S.E.2d 224 (2003).

Compelled pretrial psychiatric and psychological examinations do not violate the right against self-incrimination where the defendant moves to obtain a private examination and the state examines the defendant only to be in position to rebut, should the defendant choose to present testimony concerning the defendant's private examination. *Godfrey v. Francis*, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

State is bound to inform prospective witness of possible consequences of admitting under oath that the witness sold drugs, instead of the defendant who was jointly indicted with the witness for violating the Controlled Substances Act (21 U.S.C. § 801 et seq.). This duty included notifying the witness that the criminal law would be enforced to the full extent against those who violated it. *Murray v. State*, 157 Ga. App. 596, 278 S.E.2d 2 (1981).

Decision of whether to invoke privilege may be left to witness. — The trial court's instructions to the witness are not erroneous and prejudicial where the trial court advises such witness of the witness' rights under U.S. Const., amend. 5 and leaves the decision of whether or not to invoke the privilege entirely to the witness and, where the trial court's instructions did not have the effect of advising the prospective witness that the witness did not have to testify, but rather, did have the effect of advising the witness that the witness had the right not to answer any

question that might incriminate the witness. *Murray v. State*, 157 Ga. App. 596, 278 S.E.2d 2 (1981).

Invoking of privilege in presence of jury. — Defendant did not have the right to call a witness in order to have the witness assert the fifth amendment privilege in the presence of the jury. *Sweat v. State*, 226 Ga. App. 88, 485 S.E.2d 259 (1997).

Codefendant cannot be compelled to testify. — The defendant is not unfairly deprived of favorable testimony when the trial court, at the state's suggestion, advises an unrepresented codefendant of the codefendant's constitutional rights as a witness and, after the trial court advises the codefendant of those rights and appoints counsel for the codefendant, the codefendant chooses not to testify. Neither the trial court, the state, nor a codefendant can compel another codefendant to testify in favor of a calling codefendant, for to do so violates those very constitutional protections. *In re J.S.S.*, 168 Ga. App. 340, 308 S.E.2d 855 (1983).

Once-unavailable testimony of codefendant who took fifth amendment does not constitute "newly discovered" evidence within the meaning of Rule 33 of the Federal Rules of Criminal Procedure. First, the substance of the testimony is not in fact new evidence, since it was always known by the defendant seeking a retrial. Second, and equally important, the once-unavailable defendant who now seeks to exculpate the codefendant lacks credibility, since the defendant has nothing to lose by testifying untruthfully regarding the alleged innocence of the defendant seeking a retrial. *United States v. Carlin*, 573 F. Supp. 44 (N.D. Ga. 1983), aff'd, 734 F.2d 1480 (11th Cir. 1984).

Rights against self-incrimination were not violated by admission of psychiatrist's testimony relating solely to the defendant's ability to understand the defendant's rights. *Marlowe v. State*, 187 Ga. App. 255, 370 S.E.2d 20 (1988).

Questions by judge. — In armed robbery prosecution, the trial judge's asking the defendant what comments, if any, the defendant made in response to a report the defendant was driving a stolen car, after the defendant had been arrested and warned of the defendant's Miranda rights, exceeded constitutional bounds and required reversal.

Self-Incrimination (Cont'd)**7. Testimony and****Cross-Examination** (Cont'd)

Phillips v. State, 165 Ga. App. 235, 299 S.E.2d 138 (1983).

Instructions concerning prior inconsistent statements. — It is the better practice for the trial court expressly to explain to the jury the limited purpose for the admission of prior inconsistent statements, at the time such testimony is admitted, but there is no authority which holds that the failure so to instruct at that particular time in the trial is reversible error. Moore v. State, 160 Ga. App. 870, 288 S.E.2d 585 (1982).

Where prior inconsistent statements are used to impeach trial statements, a limiting instruction is required even absent a request. The significance of not so limiting the jury's consideration would be to allow a Miranda-violating statement to be used as substantive evidence. However, where the statement is found by the trial court not to have been obtained in violation of the defendant's rights against self-incrimination, the court need not give a limiting instruction absent defendant's request. Fussell v. State, 187 Ga. App. 134, 369 S.E.2d 511 (1988).

Use of post-arrest silence harmless error. — Use of the defendant's post-arrest silence to impeach the defendant's testimony, even assuming that such use was error, was harmless considering the strength of the evidence supporting the conviction. See Bennett v. State, 254 Ga. 162, 326 S.E.2d 438 (1985).

Codefendant who had entered a guilty plea and had invoked the fifth amendment right against self-incrimination was not required to testify, where the codefendant's motion to set aside the codefendant's guilty plea and the codefendant's motion for a new trial were pending before the court. Duvall v. State, 259 Ga. 801, 387 S.E.2d 880 (1990).

Requiring the defendant to testify as to sound of the defendant name. — Defendant's fifth and sixth amendment rights were not violated by requiring the defendant to testify about the sound of the defendant's name. Werts v. State, 196 Ga. App. 452, 395 S.E.2d 922 (1990).

Defendant who entered plea of nolo contendere could not be forced to testify in the sentencing hearing. Fuller v. State, 244

Ga. App. 618, 536 S.E.2d 296 (2000).

Harmless error. — Any error in allowing a state's witness to invoke U.S. Const., amend. 5 in regard to a statement the witness had made to a security officer about shoplifting was harmless, because the officer was questioned extensively about the statement. Jenkins v. State, 260 Ga. 231, 391 S.E.2d 397 (1990).

8. Immunized Testimony

Defendant who gives testimony under a promise of immunity is entitled to the exclusion of any use of that testimony against the defendant. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977); United States v. Weiss, 599 F.2d 730 (5th Cir. 1979).

Effect of grant of immunity. — Trial court's grant of an order of immunity pursuant to O.C.G.A. § 24-9-28(a) removed any right of the witness to invoke the privilege against self-incrimination. Willard v. State, 244 Ga. App. 469, 535 S.E.2d 820 (2000).

Immunity must be as extensive as privilege replaced. — A person may decline to answer self-incriminating questions based on the constitutional privilege against self-incrimination until it is shown that the person has been granted an immunity that is as extensive in scope as the privilege it replaces. Powell v. Allen, 140 Ga. App. 186, 230 S.E.2d 343 (1976), overruled on other grounds, Corson v. Hames, 141 Ga. App. 751, 234 S.E.2d 412, overruled on other grounds, Brooks v. State, 238 Ga. 435, 233 S.E.2d 208 (1977).

Immunity granted in exchange for compelled testimony must be sufficiently broad to protect witness to extent of the fifth amendment privilege against self-incrimination. State v. Hanson, 249 Ga. 739, 295 S.E.2d 297 (1982).

At minimum, the state must grant unconditional use and derivative use immunity to a witness in order to remove the privilege not to testify in a self-incriminating manner. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977).

State may not condition immunity given in an order to compel testimony on "full," "complete," and "truthful" testimony "in every particular." Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977).

No common-law transactional immunity exists in Georgia in the sense of the protec-

tion of a witness who gives up a valuable right. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

No derivative use of immunized testimony where others' testimony not induced thereby. — No derivative use was made by federal prosecutors of the defendant's state grand jury testimony under a grant of immunity where, although the fact that the defendant had testified was one of several factors in the decision of other individuals to pursue or accelerate negotiations with the federal prosecutors, the analysis and evaluation in making those decisions did not involve any participation or influence by the federal prosecutors or any knowledge of the contents of the defendant's testimony, and where, in negotiating and obtaining the cooperation and testimony of those other individuals, the federal prosecutors did not make any use of the fact that the defendant had testified. *United States v. Jones*, 590 F. Supp. 233 (N.D. Ga. 1984).

Defendant cannot compel state into entering immunity agreement. — If the state does not wish to compel a defendant to testify, it is up to the defendant to decide whether the defendant wishes to exercise or waive the fifth amendment right, and the defendant cannot compel the state to enter into an immunity agreement when it has no interest in doing so. *Hayes v. State*, 168 Ga. App. 94, 308 S.E.2d 227 (1983).

Limitation on promise to forego prosecution. — A promise to forego prosecution must be limited to prosecution as to specific crimes or transactions. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

Matters to be specified in promise to forego prosecution. — A valid promise to forego prosecution based on prosecutorial discretion rather than on § 24-9-28 must, first, contain a description of the crimes or transactions in regard to which an individual is excused from prosecution, and, secondly, the prosecutor must obtain court approval of an agreement to forego prosecution. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

Defendant's statements pursuant to informal, oral understandings immunized. — Statements made by the defendant pursuant to informal, oral "understandings" that what the defendant said could not be used against the defendant, while made prior to

any formal written agreement, were "immunized," i.e., given pursuant to an equitable grant of immunity. This immunity was coextensive with the defendant's fifth amendment privilege, i.e., use and derivative use immunity, and the burden was on the government in a later prosecution to show the government's evidence derived from sources wholly independent from the defendant's statements. The government failed to carry this burden, as it could not establish that its questioning of potential witnesses was not "focused" by the information provided by the defendant, nor that the information provided was not used to confirm the truthfulness of what was being told by these witnesses. *United States v. Carpenter*, 611 F. Supp. 768 (N.D. Ga. 1985).

Immunity not available where no constitutional right forfeited. — Because the defendant neither engaged in a plea bargain nor was compelled to testify but apparently gave information in exchange for dismissal of charges against the defendant and a promise of the prosecutor not to prosecute the defendant for any crimes committed prior to September, 1980, the defendant gave up no constitutional right, and was not entitled to immunity for purpose of constitutional protection. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

Government's burden, once the defendant who testified before grand jury under grant of immunity was prosecuted for matters related to the defendant's testimony, was to prove by a preponderance of the evidence that the evidence presented to the second grand jury, which indicted the defendant, and ultimately the evidence used at trial, was derived from legitimate independent sources. The government was not required to demonstrate by the preponderance of the evidence that the decision to seek indictment was not induced by the content of the immunized testimony. Further, it was not improper for the court, in deciding whether the government met its burden of proof, to consider, *in camera*, evidence presented before the grand juries, included the defendant's immunized testimony. *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985).

Convicted defendant may be required to provide information about other involved persons. — O.C.G.A. § 16-13-31(e)(2), regarding reduced sentences for those con-

Self-Incrimination (Cont'd)**8. Immunized Testimony (Cont'd)**

victed of drug trafficking, does not compel a defendant to exchange the defendant's fifth amendment rights for a chance at a reduced sentence, as it only requires the defendant to provide information about other persons involved in the same crime for which the defendant has already been convicted. *Brugman v. State*, 255 Ga. 407, 339 S.E.2d 244 (1986).

Immunity not forfeited by perjury or false swearing. — An immunity given to compel testimony over U.S. Const., amend. 5's objection may not constitutionally be forfeited because of perjury or false swearing in that testimony. *Corson v. Hames*, 239 Ga. 534, 238 S.E.2d 75 (1977).

9. Physical and Other Nontestimonial Evidence

Only evidence of testimonial nature is protected. — The privilege against self-incrimination protects an accused only from being compelled to testify against self or otherwise provide the prosecution with evidence of testimonial nature. *Bonaparte v. Smith*, 362 F. Supp. 1315 (S.D. Ga.), *aff'd*, 484 F.2d 956 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974).

Evidence of a noncommunicative nature may be taken from the defendant without violating any right under U.S. Const., amend. 5 against self-incrimination. *Bonaparte v. Smith*, 362 F. Supp. 1315 (S.D. Ga.), *aff'd*, 484 F.2d 956 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974).

Miranda protects only testimonial evidence, not noncompulsive physical evidence. *Tiller v. State*, 238 Ga. 67, 230 S.E.2d 874 (1976).

What nontestimonial evidence not protected generally. — This amendment offers no protection against compulsion to submit to fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. *Bonaparte v. Smith*, 362 F. Supp. 1315 (S.D. Ga.), *aff'd*, 484 F.2d 956 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974).

Self-incrimination protections of U.S. Const., amend. 5 do not apply to "nontestimonial" evidence such as handwriting samples, blood tests, and voice identifications. *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Handwriting sample refusal admissible. — Trial court properly allowed government to introduce and comment upon evidence of inmate's repeated refusals to provide handwriting exemplars in a prosecution for tax fraud, as the jury could interpret refusals as evidence of a guilty conscience. *United States v. Stone*, 9 F.3d 934 (11th Cir. 1993), *cert. denied*, 513 U.S. 833, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994).

Merely exhibiting one's self for observation by witnesses involves no compulsion to give evidence of a testimonial nature. *Bonaparte v. Smith*, 362 F. Supp. 1315 (S.D. Ga.), *aff'd*, 484 F.2d 956 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974).

Appearance in a police line-up is evidence of a noncommunicative nature and such may be obtained without violating rights against self-incrimination. *Bonaparte v. Smith*, 362 F. Supp. 1315 (S.D. Ga.), *aff'd*, 484 F.2d 956 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974).

Voluntary consent to a line-up does not violate rights under U.S. Const., amend. 5 against self-incrimination, since the line-up process involves no compulsion of the accused to give evidence of a testimonial nature against the accused. *Disby v. State*, 238 Ga. 178, 231 S.E.2d 763 (1977).

Requiring a defendant to appear in a line-up and to repeat words similar to those used at the scene of a bank robbery does not violate rights under U.S. Const., amend. 5 against self-incrimination. *Schmidt v. United States*, 380 F.2d 22 (5th Cir. 1967).

Use of defendant's voice for identification. — Mere use of the defendant's voice as an identifying physical characteristic does not involve or amount to compelling of the defendant to give evidence against the defendant having a testimonial significance. *Bradford v. State*, 118 Ga. App. 457, 164 S.E.2d 264 (1968), *cert. denied*, 394 U.S. 1020, 89 S. Ct. 1644, 23 L. Ed. 2d 46 (1969).

Requiring a suspect to give a voice exemplar for identification purposes does not

violate the privilege against self-incrimination. *Davis v. State*, 158 Ga. App. 549, 281 S.E.2d 305 (1981).

Defendant's consent to use of the defendant's voice in a voice lineup was not required since requiring a suspect to give a voice exemplar does not violate the defendant's privilege against self-incrimination. *Campbell v. State*, 228 Ga. App. 258, 491 S.E.2d 477 (1997).

Voluntarily speaking into telephone for identification purposes. — Where the defendant and three others were requested by investigating officers to speak into a telephone for the purpose of identifying, by voice, which of the four had made obscene telephone calls, and where the suspects complied, the situation did not amount to a critical stage of the defendant's prosecution and the defendant was neither entitled to receive warning of the defendant's rights under U.S. Const., amend. 5 or U.S. Const., amend. 6, nor were the defendant's rights violated. *Bradford v. State*, 118 Ga. App. 457, 164 S.E.2d 264 (1968), cert. denied, 394 U.S. 1020, 89 S. Ct. 1644, 23 L. Ed. 2d 46 (1969).

Voluntary submitting of self for purposes of identification. — The essential element in the provision against self-incrimination is that no one shall be compelled to give evidence tending to incriminate oneself. The provision is not applicable where the defendant voluntarily submits the defendant for the purpose of others identifying him. *Whippler v. State*, 218 Ga. 198, 126 S.E.2d 744 (1962), cert. denied, 375 U.S. 960, 84 S. Ct. 446, 11 L. Ed. 2d 318 (1963).

Actions of a defendant which are inconsistent with innocence are admissible without regard to the fifth amendment privilege against self-incrimination. *United States v. Nabors*, 707 F.2d 1294 (11th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S. Ct. 1271, 79 L. Ed. 2d 677 (1984).

Lack of surprise at accusation. — Where a police officer, who had advised the defendant of the defendant's Miranda rights and then told the defendant that the officer would not arrest the defendant at that moment but would take out a warrant for the defendant's arrest for growing and possessing marijuana, was asked by the district attorney whether the defendant had registered any emotional or facial surprise or other manifestation of emotion, and the

officer stated the defendant remained neutral in expression and actions, there was no Miranda violation under the circumstances. *Gravley v. State*, 181 Ga. App. 400, 352 S.E.2d 589 (1986).

Defendant does not have right to refuse to speak at a post-indictment lineup. *Jenkins v. State*, 167 Ga. App. 840, 308 S.E.2d 14 (1983).

Defendant ordered to stand in jury's presence. — Although the defendant was ordered to take the stand in the presence of the jury, since the defendant neither testified nor invoked the fifth amendment privilege to remain silent, the defendant's constitutional rights were not violated. *Turner v. State*, 162 Ga. App. 806, 293 S.E.2d 67 (1982).

Photographs of defendant. — In a prosecution for murder and armed robbery, admission of photographs of defendant and a portion of defendant's right hand did not violate defendant's right against self-incrimination. *Rivers v. State*, 265 Ga. 694, 461 S.E.2d 205 (1995), cert. denied, 516 U.S. 1177, 116 S. Ct. 1274, 134 L. Ed. 2d 220 (1996).

Photographing defendant's upper body. — Requiring a defendant to strip down to the waist and be photographed neither compelled the defendant to be a witness against the defendant nor compelled the defendant to give testimony tending in any manner to be self-incriminating. *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984), cert. denied, 473 U.S. 911, 105 S. Ct. 3538, 87 L. Ed. 2d 661 (1985).

Field sobriety test results are not inadmissible because they are not evidence of a testimonial or communicative nature. *Coates v. State*, 216 Ga. App. 93, 453 S.E.2d 35 (1994).

Polygraph test as prerequisite to probation. — A condition requiring the probationer to submit to polygraph tests does not violate a defendant's rights under U.S. Const., amend. 5, and that the condition may be imposed, in the discretion of the trial judge, with no more than a general finding of the court that it is reasonably necessary to accomplish the purpose of probation. *Mann v. State*, 154 Ga. App. 677, 269 S.E.2d 863 (1980).

Donning of apparel to facilitate identification. — U.S. Const., amend. 5's privilege

Self-Incrimination (Cont'd)**9. Physical and Other Nontestimonial Evidence (Cont'd)**

against self-incrimination offers no protection against compulsion to don an item of apparel worn by the person committing the offense in order to facilitate identification. *United States v. Roberts*, 481 F.2d 892 (5th Cir. 1973).

Use of police forms as handwriting exemplars. — Use of "personal history forms" which the defendant is instructed to complete following arrest as handwriting exemplars violates none of the defendant's rights under U.S. Const., amend. 5 or U.S. Const., amend. 6. *United States v. Walker*, 453 F.2d 1205 (5th Cir.), cert. denied, 407 U.S. 910, 92 S. Ct. 2432, 32 L. Ed. 2d 683 (1972).

Admissibility of fingerprint evidence is well established. *Grimes v. United States*, 405 F.2d 477 (5th Cir. 1968).

Fingerprints taken in absence of counsel. — Constitutional rights are not denied because fingerprints are taken in the absence of counsel. *Ward v. United States*, 486 F.2d 305 (5th Cir. 1973), cert. denied, 416 U.S. 990, 94 S. Ct. 2398, 40 L. Ed. 2d 768 (1974).

Removal of a substance from the body through a minor intrusion is not self-incriminating within the meaning of U.S. Const., amend. 5. *Strong v. State*, 231 Ga. 514, 202 S.E.2d 428 (1973), cert. denied, 416 U.S. 994, 94 S. Ct. 2408, 40 L. Ed. 2d 773 (1974).

Taking of blood for tests is but a minor intrusion upon one's body so as not to cause the person to be a witness against oneself within the meaning of U.S. Const., amend. 5. *Williams v. State*, 145 Ga. App. 81, 243 S.E.2d 614 (1978).

The compelled taking of a blood sample does not violate a defendant's constitutional privilege against self-incrimination. *Welch v. State*, 254 Ga. 603, 331 S.E.2d 573 (1985).

Results of breathalyzer and intoximeter tests not incriminating statements. — While the state and federal Constitutions do not allow self-incriminating statements in evidence, over the objection of defendant, the results of properly administered breathalyzer or intoximeter tests have not yet been placed in the category of an incriminating statement. *Johnson v. State*, 125 Ga. App. 607, 188 S.E.2d 416 (1972), overruled on other grounds, *Wessels v. State*, 169 Ga. App. 246, 312 S.E.2d 361 (1983).

Constitutional privilege against self-incrimination does not apply to noncommunicative acts such as an intoximeter test. *Purvis v. State*, 129 Ga. App. 208, 199 S.E.2d 366 (1973).

Evidence of the defendant's refusal to take a breath test did not need to be excluded, simply because the officer did not advise the defendant of the defendant's rights. *Lankford v. State*, 204 Ga. App. 405, 419 S.E.2d 498 (1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127 (1993).

Because defendant was not compelled by the state to submit to a breath test after arrest, the admission at trial of the test results did not violate the defendant's right against self-incrimination. *Fantasia v. State*, 268 Ga. 512, 491 S.E.2d 318 (1997).

Admission of breath test results did not violate the defendant's fifth and fourteenth amendment rights even though the defendant was in custody and no Miranda warnings were given; the results obtained from a chemical breath test, like the results obtained from a sobriety test or a blood test, are not evidence of a testimonial or communicative nature. *Scanlon v. State*, 237 Ga. App. 362, 514 S.E.2d 876 (1999), cert. denied, 528 U.S. 1078, 120 S. Ct. 795, 145 L. Ed. 2d 671 (2000).

Hair samples. — The obtaining of hair samples after lawful arrest, where the means employed are reasonable, is not a violation of appellant's constitutional rights. *Grimes v. United States*, 405 F.2d 477 (5th Cir. 1968).

Removal of bullet from defendant's body. — Constitutional rights of the defendant are not violated by the state in requiring the removal of a bullet from the defendant's body. *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972), cert. dismissed, 410 U.S. 975, 93 S. Ct. 1454, 35 L. Ed. 2d 709 (1973).

Lifting of gunshot residue from defendant's person. — Testimony of an expert concerning swabbing procedure used to lift gunshot residue from the hands of the accused, its physical results, and the expert's opinion based on those results does not violate the privilege of the accused against self-incrimination. *Strickland v. State*, 247 Ga. 219, 275 S.E.2d 29, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981).

Physical dexterity tests and alphabet test are not inadmissible under the fifth amend-

ment of the United States Constitution because they were not evidence of a testimonial or communicative nature. *Hughes v. State*, 259 Ga. 227, 378 S.E.2d 853, cert. denied, 493 U.S. 890, 110 S. Ct. 234, 107 L. Ed. 2d 185 (1989).

Production of bodily fluid samples is not communicative or testimonial in nature and thus does not implicate a defendant's privilege against self-incrimination. *Green v. State*, 194 Ga. App. 343, 390 S.E.2d 285 (1990), aff'd, 260 Ga. 625, 398 S.E.2d 360 (1990), cert. denied, 500 U.S. 935, 111 S. Ct. 2059, 114 L. Ed. 2d 464 (1991).

Teacher's right to remain silent was not violated by a school policy requiring drug testing when circumstances reasonably support a suspicion that an employee may have violated the policy. *Hearn v. Board of Pub. Educ.*, 191 F.3d 1329 (11th Cir. 1999), cert. denied, 529 U.S. 1109, 120 S. Ct. 1962, 146 L. Ed. 2d 794 (2000).

Obtaining blood, hair and saliva samples from an accused represents "minor intrusions" that do not cause the person to be a witness against oneself within the meaning of the constitution. *Calloway v. State*, 199 Ga. App. 272, 404 S.E.2d 811 (1991).

Evidence of victim's prior violent acts. — Defendant was properly denied the right to a new trial under O.C.G.A. § 5-5-23 based on defendant's claim that trial counsel rendered ineffective assistance of counsel, as defendant failed to show that the outcome of defendant's criminal trial would have differed if defendant's trial counsel had acted in another manner; moreover, defendant's claims lacked merit, in that defendant's constitutional right, under Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 5, to present evidence of the victim's prior violent acts was contingent upon defendant's showing that the evidence was relevant to defendant's claim of justification, which the defendant failed at showing because there was an eyewitness and medical evidence that defendant shot the victim numerous times in the back. *Robinson v. State*, 277 Ga. 75, 586 S.E.2d 313 (2003).

Due Process

1. In General

Applicability. — It is axiomatic that the fifth amendment due process clause applies

only to the federal government, while the fourteenth amendment due process clause applies to the states. *Mindler v. Clayton County*, 831 F. Supp. 856 (N.D. Ga. 1993).

Due process considerations generally. — Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Tucker v. Caldwell*, 608 F.2d 140 (5th Cir. 1979); *Greenwood Utils. Comm'n v. Schlesinger*, 515 F. Supp. 653 (M.D. Ga. 1981).

Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).

Equal protection concepts are embodied in the due process clause of U.S. Const., amend. 5. *Winningham v. United States Dep't of HUD*, 512 F.2d 617 (5th Cir. 1975).

Basic concepts of equal protection apply to the federal government through the due process clause of U.S. Const., amend. 5. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976).

All standards of equal protection applicable to the states through U.S. Const., amend. 14, are also applicable to the federal government through U.S. Const., amend. 5. *Morris v. Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972), vacated on other grounds, 409 U.S. 464, 93 S. Ct. 629, 34 L. Ed. 2d 647 (1973).

No federal question raised by dismissed federal employee's Bivens theory claim. — Because the plaintiff, a dismissed federal employee, asserted various fourth, fifth, and sixth amendment claims against the plain-

Due Process (Cont'd)**1. In General (Cont'd)**

tiff's superiors under a Bivens theory (see *Bivens v. 6 Unknown Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), the court found no federal question because Congress had established an elaborate remedial scheme for dismissed federal employees. *Metz v. McKinley*, 583 F. Supp. 683 (S.D. Ga.), *aff'd*, 747 F.2d 709 (11th Cir. 1984).

U.S. Const., amend. 5 and U.S. Const., amend. 4, provide protection against all governmental invasions of the sanctity of a person's home and privacies of life. *Smith v. Price*, 446 F. Supp. 828 (M.D. Ga. 1977), *rev'd* on other grounds, 616 F.2d 1371 (5th Cir. 1980).

Fifth and fourteenth amendment restraints essentially same. — The restraint imposed upon legislation by the due process clause of the fifth and fourteenth amendments is essentially the same. *DeLaigle v. Federal Land Bank*, 568 F. Supp. 1432 (S.D. Ga. 1983), *overruled* on other grounds, 777 F.2d 1544 (11th Cir. 1985).

Relationship of presumptions to due process. See *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

Requirements of due process apply only to denial of property or liberty rights protected by the Constitution. *NAACP v. United States Postal Serv.*, 398 F. Supp. 562 (N.D. Ga. 1975).

Property interests, for due process purposes, are not created by the Constitution but by existing rules or understandings that stem from an independent source such as state law. *NAACP v. United States Postal Serv.*, 398 F. Supp. 562 (N.D. Ga. 1975).

Protections of U.S. Const., amend. 5 may be invoked in civil as well as criminal actions. *Page v. Page*, 235 Ga. 131, 218 S.E.2d 859 (1975).

While the power of Congress to investigate for legislative purposes is inherent, it is not unlimited, and is always subject to the limitations imposed by the individual guarantees of the Bill of Rights. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd* on other grounds, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

General welfare acts as limit on individual rights. — While the maxim *salus populi*

suprema lex cannot be used as a mere pretext for the curtailment of constitutional safeguards still, where it does apply it acts as a limitation on the rights of the individual which otherwise would be beyond the power of the General Assembly to regulate or circumscribe. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Termination of protected interests in emergencies. — In emergency situations, the government may terminate a protected interest without affording any protections other than the right to a hearing before the termination becomes final. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Where only property rights are involved, mere postponement of judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).

For the government to compel one to commit an act at one's own peril without any warning of possible criminal consequences violates due process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd* on other grounds, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Counties are not persons as against the state within the meaning of the constitutional provision guaranteeing due process to all persons. *Bibb County v. Hancock*, 211 Ga. 429, 86 S.E.2d 511 (1955).

Commerce power is subject to the due process clause of U.S. Const., amend. 5. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976).

Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Gearin*, 496 F.2d 691 (5th Cir. 1974), *cert. denied*, 419 U.S. 1113, 95 S. Ct. 789, 42 L. Ed. 2d 810 (1975).

Age and education as bearing on effectiveness of waiver. — The mere fact that a defendant is 21 years old with a sixth grade education does not lead to the conclusion that the defendant was incapable of knowingly, voluntarily, and intelligently waiving the defendant's constitutional rights. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979),

cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

Fifth amendment inapplicable to age discrimination. — Insofar as a plaintiff's allegations can be read as encompassing an age discrimination ingredient, U.S. Const., amend. 5 has no application. *Favors v. Ruckelshaus*, 569 F. Supp. 363 (N.D. Ga. 1983).

Jurisdiction over due process questions as between Court of Appeals and Supreme Court. — Jurisdiction of a case which ordinarily is in the Court of Appeals is not conferred on the Supreme Court by a statement in the bill of exceptions, following an assignment of error, that said ruling is contrary to law, contrary to Ga. Const. 1877, Art. I, Sec. I, Para. I (see Ga. Const. 1983, Art. I, Sec. II, Para. I), and violative of U.S. Const., amend. 5. *Chastain v. Alford*, 191 Ga. 677, 13 S.E.2d 769 (1941).

Test for personal jurisdiction in federal question case. — To determine the question of personal jurisdiction in a federal question case with nationwide service of process, the court must apply a two-pronged test. First, the court must determine whether the defendant "purposefully availed" itself of the protection of the federal law, in other words do the requisite national contacts exist? Then, the defendant will have the opportunity to establish a compelling case that exercising jurisdiction would offend "notions of fair play or substantial justice." *Duckworth v. Medical Electro-Therapeutics, Inc.*, 768 F. Supp. 822 (S.D. Ga. 1991).

In a federal securities fraud action, the defendants purposefully availed themselves of the protection of the federal laws, in that they resided in the United States and, by exchanging securities, they should have had fair warning that they may have been haled into federal court to defend themselves in such an action. Thus, the defendants had the requisite national contacts to justify the exercise of personal jurisdiction over them. *Duckworth v. Medical Electro-Therapeutics, Inc.*, 768 F. Supp. 822 (S.D. Ga. 1991).

Jurisdiction over nonresidents. — Jurisdiction over a nonresident exists if the nonresident has purposefully done some act or consummated some transaction in the forum state, if the claim arises from or is connected with the act or transaction, and if the exercise of jurisdiction by the courts of

the forum state does not offend traditional fairness and substantial justice. *Bailey v. London Marina, Inc.*, 151 Ga. App. 73, 258 S.E.2d 738 (1979).

The federal district court's exercise of personal jurisdiction did not offend the constitutional restrictions of the due process clause where defendant's alleged contacts with Georgia satisfied the requirement of a single, purposeful arguably commercial contact of some benefit to defendant. *Thermo-Cell S.E., Inc. v. Technetic Indus., Inc.*, 605 F. Supp. 1122 (N.D. Ga. 1985).

Jurisdiction to review agency's denial of attorney's fees. — While a federal court has no subject matter jurisdiction to review the reasonableness of an award of attorney's fees in connection with a claim for social security benefits, it does have subject matter jurisdiction over claims that the denial by the Secretary of Health and Human Services of the attorney's fees agreed upon between the attorney and the claimant constitutes a denial of due process and an interference with contract. *Siler v. Heckler*, 578 F. Supp. 744 (N.D. Ga. 1983).

Rule that the United States may not be sued without its consent is all embracing. *Lynch v. United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934).

Withdrawal of consent to sue United States. — Although the United States may give consent to sue, Congress retains the power to withdraw the consent at any time. Consent to sue the United States is a privilege accorded, not the grant of a property right protected by U.S. Const., amend. 5. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. *Lynch v. United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934).

Procedural due process imposes restraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the due process clause. *Griffin v. Califano*, 448 F. Supp. 430 (N.D. Ga. 1977).

Governmental deprivation of property or liberty interests requires procedural safeguards. — The constitutional guarantee of procedural due process applies to governmental deprivation of a legitimate property or liberty interest within the meaning of U.S. Const., amend. 5 or U.S. Const., amend. 14,

Due Process (Cont'd)**1. In General (Cont'd)**

and requires that any such deprivation be accompanied by minimum procedural safeguards, including some form of notice and a hearing. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Deprivation of any property or entitlement by state or federal officials, without notice and opportunity for prior hearing may violate procedural due process. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Seizure invalid without notice. — Where it was undisputed that the defendant received neither notice nor a hearing before issuance of the warrants seizing defendant's property and it was also undisputed that the government neither alleged nor established the existence of exigent circumstances that might have allowed ex parte seizure of the properties, there was no question that the warrants were invalid and that the seizure of the properties therefore violated defendant's fifth amendment right to due process. *United States v. 2751 Peyton Woods Trail*, 66 F.3d 1164 (11th Cir. 1995).

Impairment of vested rights prohibited. — Due process clauses of the state and federal constitutions prohibit the enactment of a law which would impair vested rights. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948).

Due process clause does not insure to a person, first in the field, a monopoly in any line of business. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948).

Notice must be reasonably calculated to inform. — The notice required in any particular situation is that which is reasonably calculated to inform interested parties of the action to be taken and of their opportunity to present objections. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Douglas v. United States*, 562 F. Supp. 593 (S.D. Ga. 1983).

Orally given notice may be sufficient. — Full due process notice can be afforded by

telephone, and U.S. Const., amend. 5 does not demand that all pretermination notice be in writing. However, not every oral pretermination notice will be constitutionally sound, for there may be individual situations in which inadequate notice is given, in writing as well as orally, and the matter must be considered a factual question to be decided on a case-by-case basis. *Williams v. Weinberger*, 360 F. Supp. 1349 (N.D. Ga. 1973), aff'd, 494 F.2d 1191 (5th Cir. 1974), vacated on other grounds, *Mathews v. Williams*, 424 U.S. 951, 96 S. Ct. 1423, 47 L. Ed. 2d 357 (1976).

When notice by publication sufficient. — Notice by publication is sufficient only if the party bringing the action cannot by due diligence ascertain either the names or whereabouts of those likely to oppose the action. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Although plaintiff claimed never to have received any notice from the Postal Service regarding receipt of certified or registered mail, the forfeiture was allowed to stand, as adequate notice was given by the publication of the notice in a newspaper of general circulation. *Coggins v. United States*, 860 F. Supp. 845 (M.D. Ga. 1994), aff'd, 53 F.3d 1287 (11th Cir. 1995).

Due process requires a competent and impartial tribunal in administrative hearings and in trials to a judge. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Due process is denied by circumstances that create the likelihood or the appearance of bias, even if no showing of actual bias in the tribunal. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Hearing must be granted only before one is finally deprived of one's property. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Legislative acts adjusting burdens and benefits of economic life include a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that the Legislature has acted in an arbitrary and irrational way. *Hall v. Landmark Fin. Corp.*, 13 Bankr. 205 (Bankr. N.D. Ga. 1981).

Notice must be given and a judicial determination made before a debtor's rights can

constitutionally be terminated. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

No right to hearing where direct contempt committed in court's presence. — Where direct contempt is committed in the presence of the court, the offender is not entitled as a matter of right to a hearing before the court. The court may act on its own knowledge of the facts and proceed to impose punishment for the contempt, or it may in its discretion allow a hearing. The refusal to allow a hearing does not deprive the defendant of the due process of law guaranteed by the state and federal constitutions. *Martin v. Waters*, 151 Ga. App. 149, 259 S.E.2d 153 (1979).

If an act of criminal contempt is not committed in the court's immediate presence, due process requires that the accused be given an opportunity to be heard. *Martin v. Waters*, 151 Ga. App. 149, 259 S.E.2d 153 (1979).

Contempt proceedings. — Federal district court exceeded its civil contempt power by fining a county for operating its jail in violation of prior court orders, where the county was deprived of its due process right to show cause why it should not be held in contempt. *Mercer v. Mitchell*, 908 F.2d 763 (11th Cir. 1990).

That an oral hearing is not held on reconsideration of a motion for summary judgment is not a denial of due process. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

Pretermination notice and hearing required except in emergencies. — Except in emergency situations, due process requires that when a state seeks to terminate a protected interest, it must afford notice and opportunity for a hearing appropriate to the nature of the case before the termination becomes effective. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Constitutional doctrine of separation of powers may not limit an individual's right to a fair hearing of the individual's case and the individual's right to present the individual's defense. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

When congressional inquiry and a criminal prosecution cross paths, congressional privilege is not absolute, and Congress must accommodate the public interest in legitimate legislative inquiry with the public interest in securing the witness a fair trial. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Due process permits states wide latitude. — Due process clause has always been interpreted as permitting the states wide latitude in fashioning rules of evidence and procedure. *Bassett v. Smith*, 464 F.2d 347 (5th Cir. 1972), cert. denied, 410 U.S. 991, 93 S. Ct. 1509, 36 L. Ed. 2d 190 (1973).

Congress may not abrogate federal contractual obligations. — Rights against the United States arising out of a contract with it are protected by U.S. Const., amend. 5, so that Congress is without power to reduce expenditures by abrogating contractual obligations of the United States. *Lynch v. United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934). But see *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986).

Notice to creditors. — Due process under the fifth amendment to the United States Constitution prevents actions taken against the interests of a creditor without notice. In re *Hamilton*, 179 Bankr. 749 (Bankr. S.D. Ga. 1995).

Under the bankruptcy power Congress has authority to impair the obligation of contracts, but may do so, only when property is not, contrary to U.S. Const., amend. 5, taken without due process of law. In re *Philibosian*, 19 F. Supp. 787 (N.D. Ga. 1937).

Discharge of unsecured debt in bankruptcy not a violation of due process. — An unsecured note is property, whose value rests wholly in the debtor's obligation to pay it and in the right to seize the holder's property to satisfy a judgment on the note. The holder may be deprived of the holder's property by a process of bankruptcy resulting in the bankrupt's discharge without any payment, and due process of law is not lacking. In re *Philibosian*, 19 F. Supp. 787 (N.D. Ga. 1937).

Secured creditor may not be deprived of security, but that is due to a limitation in the bankruptcy power, not a result of due pro-

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1. In General (Cont'd)

cess. It is not clear that to deprive a secured creditor of creditor's security through a bankruptcy deprives the secured creditor of property any more than to deprive the unsecured creditor of the unsecured creditor's debt does or that the process of bankruptcy is any less a due process of law in the one case than in the other. The true reason why bankruptcy may not nullify a security is not U.S. Const., amend. 5 but the fact that it never has. It lies in the limitations inherent in the bankruptcy power. *In re Philiposian*, 19 F. Supp. 787 (N.D. Ga. 1937).

Provisions for discharge in bankruptcy of alimony and support debts violate due process. — By providing the benefit of dischargeability of alimony and support debts owed by wives, but not those owed by husbands, 11 U.S.C. § 523(a)(5) violates the equal protection component of the due process clause of U.S. Const., amend. 5. *Crist v. Crist*, 632 F.2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986, 101 S. Ct. 2321, 68 L. Ed. 2d 844, cert. denied, 454 U.S. 819, 102 S. Ct. 100, 70 L. Ed. 2d 90 (1981).

Bankruptcy power is subject to U.S. Const., amend. 5, and under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the states, it is not prohibited from impairing the obligation of contracts. *Jenkins v. Northwest Ga. Bank*, 11 Bankr. 958 (Bankr. N.D. Ga. 1981); *Hall v. Landmark Fin. Corp.*, 13 Bankr. 205 (Bankr. N.D. Ga. 1981); *ITT Indus. Credit Co. v. Scarboro*, 13 Bankr. 439 (M.D. Ga. 1981).

"Contacts" with forum state not germane to Bankruptcy Act. — As federal district courts have personal jurisdiction in federal bankruptcy actions over any person with minimum contacts with the United States, and as the federal Bankruptcy Act (T. 11, U.S.C.) permits nationwide service of process, a federal district court had ancillary personal jurisdiction over a nonresident defendant in a "non-core," related bankruptcy proceeding. This was true even though the defendant lacked minimum contacts with the forum state. *Chemical Bank v. Grigsby's World of Carpet, Inc.* (In re WWG Indus., Inc.), 44 Bankr. 287 (N.D. Ga. 1984).

The minimum contacts analysis applicable

in a federal bankruptcy proceeding requires only that the defendant be within the territorial boundaries of the United States. *Wallace v. Milrob Corp.* (In re Rusco Indus., Inc.), 104 Bankr. 548 (Bankr. S.D. Ga. 1989).

While U.S. Const., amend. 5 forbids destruction of a contract it does not prohibit bankruptcy legislation affecting creditor's remedy for its enforcement against debtor's assets, or the measure of the creditor's participation therein, if the statutory provisions are consonant with a fair, reasonable, and equitable distribution of those assets. *ITT Indus. Credit Co. v. Scarboro*, 13 Bankr. 439 (M.D. Ga. 1981).

There is a significant difference between property interest and contract as respects exertion of bankruptcy power, since the Constitution does not forbid impairment of the obligation of the latter. *ITT Indus. Credit Co. v. Scarboro*, 13 Bankr. 439 (M.D. Ga. 1981).

Although provisions of Bankruptcy Code (T. 11, U.S.C.) ultimately impair obligation of contracts, this impairment alone does not constitute denial of due process. *In re Scales*, 10 Bankr. 981 (Bankr. N.D. Ga. 1981); *In re Colston*, 11 Bankr. 251 (Bankr. N.D. Ga. 1981).

While creditors are required to pay fee to file complaint initiating adversary proceeding in court, debtors are not required to pay. This policy does not unfairly discriminate against creditors in violation of the equal protection guaranties of U.S. Const., amend. 5. *Maddox v. Southern Dist. Co.*, 34 Bankr. 801 (Bankr. N.D. Ga. 1982).

Farming bankruptcy provisions constitutional. — Chapter 12 of the Bankruptcy Code (11 U.S.C. § 1201 et seq.), designed specifically for farmers and intended to meet a perceived crisis in the agricultural community, does not, on its face, violate the taking and due process clauses of the fifth amendment and therefore does not exceed the bankruptcy powers of Congress. *Travelers Ins. Co. v. Bullington*, 89 Bankr. 1010 (M.D. Ga. 1988), aff'd, 878 F.2d 354 (11th Cir. 1989).

Foreclosure and equity of redemption. — Although state law prescribes the method for conducting a foreclosure, a mortgagor's equity of redemption rights constitute property protected by the due process clause of the fifth amendment. *Foster v. F & M Bank*, 105

Bankr. 746 (Bankr. M.D. Ga. 1989).

Forfeiture of property. — Due process is violated when a claimant is deprived of the claimant's property for an unreasonable amount of time prior to a hearing on the merits, not when there is a delay that postpones the seizure of the property. *Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992).

Congress does not have an unlimited right to tax the citizenry. A federal statute passed under the taxing power may be so arbitrary and capricious as to violate the due process of law clause of U.S. Const., amend. 5. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), *aff'd*, 518 F.2d 1405 (5th Cir. 1975).

Constitutional challenge to tax based on distribution of benefit. — It is not a constitutional defense to a tax that the taxpayer is not directly benefited from a tax or is less benefited than others who pay the same or less tax. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), *aff'd*, 518 F.2d 1405 (5th Cir. 1975).

When withholding of taxes for social welfare barred. — U.S. Const., amend. 5 bars the withholding of taxes to support a social welfare program only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), *aff'd*, 518 F.2d 1405 (5th Cir. 1975).

Cutoff of taxpayer's right to hearing on assessment violates due process where not due to own action. — Allowing the rights of a taxpayer to a hearing on the assessment of the taxpayer's property to be cut off by passage of time or the independent action of other parties would be violative of due process, unless caused by culpable or negligent conduct on the part of the taxpayer. *Ward v. Landrum*, 140 Ga. App. 497, 231 S.E.2d 347 (1976).

Taxpayer estopped from protesting paving assessments as confiscatory where he fails to timely object. — Where a city has obtained jurisdiction to make an assessment against an abutting property owner's property for the purpose of paving a street, and all the provisions and requirements of the special act authorizing such assessment have been complied with by the city, and the abutting property owner has been given fair opportunity to object to the street improvement and the assessment against the property therefor, but fails to object and then

stands by and sees the street paving improvements made at expense to the city, without entering any objection thereto, the property owner is then estopped to raise the question that the assessment was confiscatory and void in that it deprived the property owner of the property in violation of the due process clause of the state and federal Constitutions, although under the facts of the case this point would have been good and could have been sustained had it been raised in time. *City of Waycross v. Harrell*, 59 Ga. App. 615, 1 S.E.2d 681 (1939).

Constitutionality of license or occupation tax on food, entertainment, or lodging facilities. — Act approved March 29, 1937, Ga. L. 1937, p. 624 (now repealed), providing that no person should establish a public dance hall, boxing or wrestling arena, or amusement place, tourist camps, and barbecue stands, for money or profit, outside the limits of incorporated towns or cities of a certain minimum population without first obtaining the permission of the commissioners or other authority in charge of such counties, and conferring authority on them to grant or refuse such permission for such time or under such regulations as they might deem proper for the public good, to levy a license or occupational tax on the same and to provide punishment for a violation of the act was not violative of the due process and equal protection clauses of the state and federal Constitutions, nor of Ga. Const. 1877, Art. III, Sec. I, Para. I (see Ga. Const. 1983, Art. III, Sec. I, Para. I), vesting legislative power in the General Assembly. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

All property is held subject to the police power of the state. The due process clauses are not intended to limit the right of the state to properly exercise the police power in the enhancement of public safety. The police power has never been surrendered by the states and to the exercise of police power, all rights of natural persons and corporations are subject. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Damages cannot be recovered for expenses incurred obeying a police regulation enacted for the common welfare and safety of the public. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Residency requirements for licensing. — It is not an unreasonable exercise of the

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police power to require that a licensee, whether as an individual or as a member of a partnership, must have been a resident of the county for one year preceding the application for license. There is a reasonable basis for distinction between wholesale and retail dealers, and the residence requirement as to retail dealers is not unfairly discriminatory because it does not apply to wholesale dealers. *Bonner v. Maddox*, 227 Ga. 598, 182 S.E.2d 122 (1971).

Benefits conferred by the government cannot be conditioned on the relinquishment of constitutional rights. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Waiver of due process as condition on government privilege or benefits. — When the government extends privileges or benefits to its citizens, the individual has little or no meaningful choice but to accept the benefits on whatever conditions the government chooses to impose. It would make no sense to allow the government to exact prospective due process waivers as a matter of course. The individual has no real choice but to submit to the waiver, and, if waiver were possible, due process protections would be quickly and thoroughly erased. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

The state cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Property interest in benefits. — To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. The person must have more than a unilateral expectation of it. *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 678 (1975).

Due process challenges to statutory classification in the social welfare area. — If the goals sought by legislation are legitimate, and the classification adopted is rationally related to the achievement of those goals,

then such action of Congress is not so arbitrary as to violate the due process clause of U.S. Const., amend. 5. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga.), aff'd, 518 F.2d 1405 (5th Cir. 1975).

The test for a statutory classification in the social welfare area challenged under the due process clause of U.S. Const., amend. 5 is the same as the standard under the equal protection clause of U.S. Const., amend. 14, that is, if the classification does not implicate a constitutionally-suspect class or a fundamental constitutional right, the classification is constitutional if it is rationally related to furthering a legitimate state interest. *Bussey v. Harris*, 611 F.2d 1001 (5th Cir. 1980).

Equal protection under such statutory classifications. — A statutory classification in the area of social welfare is consistent with the equal protection clauses of U.S. Const., amend. 5 and U.S. Const., amend. 14, if it is rationally based and free from invidious discrimination. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga.), aff'd, 518 F.2d 1405 (5th Cir. 1975).

Congress is not constitutionally obligated to solve all social problems at one time. It may select one phase of one field and apply a remedy there, neglecting the others. *Winningham v. United States Dep't of HUD*, 512 F.2d 617 (5th Cir. 1975).

In economics and social welfare, a statute is not unconstitutional merely because its classifications are imperfect. *Winningham v. United States Dep't of HUD*, 512 F.2d 617 (5th Cir. 1975).

Underinclusion in statutory classification scheme in social welfare area. — In a statutory classification scheme in the social welfare area, if the classification neither implicates a constitutionally-suspect class nor a fundamental constitutional right, underinclusion that is not irrational does not violate U.S. Const., amend. 5 because equal protection does not require that all evils of the same genus be eradicated or none at all. *Bussey v. Harris*, 611 F.2d 1001 (5th Cir. 1980).

Due process prohibits arbitrary discrimination having no rational basis. — The due process clause of U.S. Const., amend. 5 prohibits the federal government from creating statutes that establish arbitrary discrimination having no rational basis in legitimate governmental purposes. *Morris v. Richard-*

son, 346 F. Supp. 494 (N.D. Ga. 1972), vacated on other grounds, 409 U.S. 464, 93 S. Ct. 629, 34 L. Ed. 2d 647 (1973).

Where an unconstitutional deprivation of a government benefit is alleged, there must be a three-part inquiry to determine: whether the programs involve sufficient government action to invoke federal constitutional protections, whether the private interest involved is a property or liberty interest within the meaning of the due process clause, and after balancing the various interests involved, what procedure is appropriate for the protection of the private interest. *Bloodworth v. Oxford Village Townhouses, Inc.*, 377 F. Supp. 709 (N.D. Ga. 1974).

Liability under federal civil rights statute. — Because a plaintiff in a civil rights case prosecuted under 42 U.S.C. § 1983 alleging excessive force used in an arrest may receive compensatory damages for such things as physical pain and suffering and mental and emotional anguish, and because such a plaintiff whose constitutional rights are violated is entitled to receive nominal damages even if the plaintiff fails to produce any evidence of compensatory damages, the district court erred in granting judgment to defendant officers as a matter of law. *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000).

Burden is on the one complaining of a due process violation by a regulatory agency to establish that the agency has acted in an arbitrary and irrational way. A regulation is valid if it has a rational basis. *Springdale Convalescent Ctr. v. Mathews*, 545 F.2d 943 (5th Cir. 1977), disapproved on other grounds, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988).

Homosexual couple did not have constitutional rights violated when bankruptcy court ruled that 11 U.S.C.A. § 302 did not apply to them as they were not legally married. *Bone v. Allen*, 186 Bankr. 769 (Bankr. N.D. Ga. 1995).

No right to trial where dispute of material fact not shown. — No constitutional right to a trial exists when after notice and a reasonable opportunity a party fails to make a rule-required demonstration that some dispute of material fact exists which a trial could resolve. *Oglesby v. Terminal Transp. Co.*, 543 F.2d 1111 (5th Cir. 1976).

No rational justification for denying survivors' benefits to illegitimate children. — Since denial of social security survivors' benefits to illegitimate children will not deter persons from entering into illicit relations, promotion of legitimate family relationships by condemnation of illegitimate relationships and their progeny is not acceptable rational justification for a statute discriminating between legitimate and illegitimate children in allocating survivor's benefits. *Morris v. Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972), vacated on other grounds, 409 U.S. 464, 93 S. Ct. 629, 34 L. Ed. 2d 647 (1973).

Nor for granting them only benefits remaining after distribution to legitimate children. — A federal social security provision which allows illegitimate children to receive survivor's benefits only from the residual benefits, if any, remaining after the insured's surviving legitimate children have received their individual maximum shares violates U.S. Const., amend. 5 and U.S. Const., amend. 14, since the discrimination between legitimate and illegitimate children under the statute in question bears no rational connection to the purposes of the Social Security Act. *Morris v. Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972), vacated on other grounds, 409 U.S. 464, 93 S. Ct. 629, 34 L. Ed. 2d 647 (1973).

Rules of the Department of Medical Assistance (now Department of Community Health) as to medicaid abortions. — The rules promulgated by the Department of Medical Assistance (now Department of Community Health) restricting reimbursement to medicaid enrollees for medically necessary abortions are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., and because the plaintiff classes will suffer irreparable injury for which there is no adequate legal remedy, the defendants, their agents and employees, must be permanently enjoined from refusing to provide medicaid reimbursement to the members of the plaintiff classes for the provision of all medically necessary abortions. *Doe v. Busbee*, 481 F. Supp. 46 (N.D. Ga. 1979).

The restrictions on reimbursement for abortions contained in this state's rules amount to a denial or reduction of a required service to an otherwise eligible recip-

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ient solely because of that eligible recipient's condition, that is, pregnancy, and furthermore, these restrictions are not based on medical necessity or utilization control procedures nor is any contention made by the defendants in this action that the abortions sought by the plaintiffs were not medically necessary or presented utilization control problems; therefore, under 42 C.F.R. § 440.230(c) the Georgia Department of Medical Assistance (now Department of Community Health) must provide reimbursement for these medically necessary abortions. *Doe v. Busbee*, 481 F. Supp. 46 (N.D. Ga. 1979).

Protective services in event of medical emergency. — Federal constitutional law does not require a state to provide its citizens with protective services in the event of medical emergencies. Even if the state undertakes to provide protective services in medical emergency services, its failure to render same in a proper manner or in violation of state law does not violate the Due Process Clause of the United States Constitution, unless the state created the medical emergency or the person was in state custody or control at the time of the emergency. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

Differences in amounts paid for federal retirement benefits. — The fact that railroad employees pay a greater amount for retirement benefits under a federal pension plan than under federal Social Security Act is not a denial of equal protection. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga.), *aff'd*, 518 F.2d 1405 (5th Cir. 1975).

Tenants in federally-subsidized public housing project are entitled, under U.S. Const., amend. 5, to limited procedural due process safeguards, before a rent increase is approved, because such tenants have a sufficient property interest in low-cost housing to entitle them to some due process protection. *Dew v. McLendon Gardens Assocs.*, 394 F. Supp. 1223 (N.D. Ga. 1975).

Only private associations have the right to obtain a waiver of notice and hearing before depriving a member of a valuable right. *Roberts v. Cameron-Brown Co.*, 410 F. Supp.

988 (S.D. Ga. 1975), *rev'd* on other grounds, 556 F.2d 356 (5th Cir. 1977).

Due process inapplicable without state action. — The constitutional limitations imposed by due process requirements for the taking of property and liberty were not implicated by a public utility's actions as a private actor in terminating plaintiff's employment pursuant to the positive results of a urinalysis drug screening test, as defendant was under no governmental compulsion in administering the test. *Parker v. Atlanta Gas Light Co.*, 818 F. Supp. 345 (S.D. Ga. 1993).

Applicability of due process requirements to private sector. — Constitutional due process requirements are applicable in some situations to persons and organizations in the private sector. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), *rev'd* on other grounds, 556 F.2d 356 (5th Cir. 1977).

Applicability of due process requirements to private companies. — There can be such an interdependence between the federal government and private companies so as to subject the actions of the private companies to the procedural due process mandated by U.S. Const., amend. 5. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), *rev'd* on other grounds, 556 F.2d 356 (5th Cir. 1977).

Test is interdependence between governmental and private bodies. — In determining whether the due process mandates are applicable to private bodies, the initial question is whether the state or the federal government has become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis without the private body necessarily becoming either their instrumentality or agent in a strict sense. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), *rev'd* on other grounds, 556 F.2d 356 (5th Cir. 1977).

Company level disciplinary hearing. — There is no independent legal right to counsel or other aspects of due process at a company level disciplinary hearing. *Clark v. Seaboard Coast Line R.R.*, 332 F. Supp. 380 (N.D. Ga. 1970).

Permanent or classified state employee has sufficient property interest in the job to warrant due process protection, even

though such protection may not include the right to a pretermination hearing. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Government employee may not be deprived of the property or liberty interest in continued government employment absent due process. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Procedural due process does not entitle a public employee to a full evidentiary hearing prior to discharge. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Post-termination hearing is sufficient to protect interests of a discharged government employee meriting due process protection, whether those interests are in the nature of property or liberty. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Adequate pretermination procedures for public employees need not include a full, evidentiary hearing, provided an employee is protected by a timely and effective post-discharge hearing procedure. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Immediate discharge of employees in exceptional cases. — Adequate pretermination procedures for public employees may contain some provision for exceptional cases warranting an immediate discharge. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Termination of state employees without specific charges and other predetermined protections violates due process. — A statutory and regulatory scheme governing the termination of classified state employees covered by the State Merit System is unconstitutional if it fails to provide a list of specific charges prior to termination and in failing to provide for a pretermination hearing or other meaningful opportunity to protect employees' interests before termination. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Retaliatory dismissal of teachers who speak out regarding school funding, and other issues. — Whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the school board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers, as a class, are the members of the community most likely to have informed and defi-

nite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. *Lindsey v. Board of Regents*, 607 F.2d 672 (5th Cir. 1979).

Student cannot be suspended without a hearing complying with due process, regardless of a purported waiver in the school board's regulations. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Student suspension procedures. — Students facing temporary suspension have interests qualifying for protection of the due process clause, and due process requires, in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against the student and, if the student denies them, an explanation of the evidence the authorities have and an opportunity to present the student's side of the story. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Involuntary committal to mental hospital. — Due process requires a clear and convincing standard of proof in a civil proceeding to commit an individual to a mental hospital involuntarily. *Pitts v. State*, 151 Ga. App. 691, 261 S.E.2d 435 (1979).

Continuing presumption of insanity. — Because the defendant in a hearing for release from a hospital had been examined three separate times to determine mental competency in relation to a criminal trial, and there had been a judicial determination that the defendant was not mentally responsible for the crimes and apparently not competent to stand trial, there existed a continuing presumption of insanity at the time of the release hearing. *Pitts v. State*, 151 Ga. App. 691, 261 S.E.2d 435 (1979).

Federal drug sentencing statute constitutional. — The Anti-Drug Abuse Act of 1986 (21 U.S.C. § 841 et seq.) worked no violation of due process in fixing the punishment for cocaine base offenses substantially higher than similar offenses involving other forms of cocaine, as it had a rational purpose for doing so in attempting to reduce greater risks and dangers distinguishing the drugs, and as it was not proven to adversely impact on non-whites. *United States v. Mosley*, 808 F. Supp. 1572 (N.D. Ga. 1992).

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Hearing or trial not required in determining amenability to treatment by juvenile courts. — Due process does not require that a separate hearing or jury trial be held when the judge makes a finding of fact that a child is not amenable to treatment or rehabilitation in the juvenile court system. *Long v. Powell*, 388 F. Supp. 422 (N.D. Ga.), vacated on other grounds, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975).

Forty days commitment to an adult imprisonment facility is not a "reasonably short time," and such delay in transferring a juvenile to a Department of Human Resources facility violates due process as well as the legislative intent of § 15-11-38. *Long v. Powell*, 388 F. Supp. 422 (N.D. Ga.), vacated on other grounds, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975).

Denial of rights available in criminal proceeding and inadequate treatment violates due process. — Where the state treats a juvenile proceeding as civil, thereby denying the child certain important rights which would be available in a criminal proceeding, and proceeds on the premise that the state is acting as *parens patriae* in order to provide measures of guidance and rehabilitation for the child and protection of society, and not to fix criminal responsibility, guilt and punishment, committing the child for rehabilitative treatment which the state knows to be inadequate constitutes a violation of the child's right to due process. *Long v. Powell*, 388 F. Supp. 422 (N.D. Ga.), vacated on other grounds, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975).

Hospital authority may restrict a staff member's privileges by reasonable and non-discriminatory rules and regulations. *Yeargin v. Hamilton Mem. Hosp.*, 229 Ga. 870, 195 S.E.2d 8 (1972).

Military tribunals not unconstitutional but jurisdiction narrowly limited. — Although trial by a military tribunal deprives one of trial by jury and other constitutional rights, it is not unconstitutional. However, military jurisdiction is restricted to the narrowest limits consistent with the power granted Congress in U.S. Const., art. I, sec. VIII. *Torres v. Connor*, 329 F. Supp. 1025 (N.D. Ga. 1970).

In the military judicial system, improper command influence violates impartial hearing requirements under U.S. Const., amend. 5. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Fixing of a minimum wage is within the legislative power and is not a denial of due process under U.S. Const., amend. 5 or U.S. Const., amend. 14. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

Minimum wages not unconstitutional. — Establishment of minimum wages by the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., is not arbitrary or capricious or an unreasonable interference with liberty of contract in violation of the due process clause of U.S. Const., amend. 5. *Morgan v. Atlantic Coast Line R.R.*, 32 F. Supp. 617 (S.D. Ga. 1940).

Indemnification for past discrimination. — Although statutes which indemnify women for past discrimination have been approved, more than blanket declaration of this objective is required as justification for gender-based distinctions. With regard to the constitutionality of gender-based classifications, it must be ascertained whether women have in fact been significantly discriminated against in the sphere to which the statute applied a sex-based classification. *Crist v. Crist*, 632 F.2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986, 101 S. Ct. 2321, 68 L. Ed. 2d 844, cert. denied, 454 U.S. 819, 102 S. Ct. 100, 70 L. Ed. 2d 90 (1981).

Utility rates as constitutionally protected property rights. — Utility customers must show they have a legal entitlement to or a vested right in the utility rates being charged before any proposed increase, before they can claim any property rights protected by the United States Constitution. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Utility customers have no sufficient property interest in a given utility rate increase to invoke the procedural protections of the due process clause of U.S. Const., amend. 14. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

The fact that utility customers have an interest in lower electric rates, an interest which they share with all consumers, does not mean that they have a sufficient property

interest in lower rates to invoke constitutional due process protection. Their interest is much too general; that is, their interest is shared by practically everyone. In this sense their interest is somewhat abstract. However, the simple fact that an interest is shared by everyone does not automatically mean that it is not deserving of constitutional protection. Nevertheless most of the United States Supreme Court cases in this area involve either individual claims of entitlement of identifiable classes for whom a benefit was specifically intended. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Governmental attack on one's reputation may infringe constitutionally protected liberty. First, governmental degradation of one's standing in one's community may be denial of liberty and, second, governmental communication of derogatory information to employers may be an attack on liberty. *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 678 (1975).

Liberty is not infringed by the mere presence of derogatory information in confidential files. *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 678 (1975).

Scheme for regulating practice of dentistry not unconstitutional. — The contention that former Code 1933, §§ 84-701 and 84-702 (see O.C.G.A. §§ 43-11-2 and 43-11-17) are unconstitutional because they violate the due process clauses of the Constitution of the United States and the privileges and immunities clauses thereof, as set forth in U.S. Const., amends. 5 and 14 and likewise violates the due process clause of the Constitution of Georgia is without merit. *Hortman v. Yarbrough*, 214 Ga. 693, 107 S.E.2d 202 (1959).

Classification of substance as narcotic, where evidence exists to the contrary. — The classification of cocaine by the General Assembly as a narcotic drug, when there is scientific evidence to the contrary, does not violate the due process and equal protection clauses of the United States and Georgia Constitutions. *Robinson v. State*, 244 Ga. 15, 257 S.E.2d 523 (1979).

Due process does not bar taping of incident by police. — There is no due process bar under U.S. Const., amend. 5 to conviction

because of electronic taping of an incident by police officers who anticipated the offense. *Cross v. Georgia*, 581 F.2d 102 (5th Cir. 1978).

Right to wear one's hair as one sees fit has not been found to be within the periphery of any of the specific constitutional rights. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), aff'd, 505 F.2d 868 (5th Cir. 1975).

Act which abrogates requirements that obligations be paid in gold is not unconstitutional. — 31 U.S.C. § 463, providing for discharge, by payment in legal tender, of obligations for payment in gold or any particular coin or currency, or in money of the United States measured thereby, of the then standard weight and fineness, is not unconstitutional as in violation of U.S. Const., art. I, sec. VIII, as the exercise of a power not delegated to the Congress, nor in violation of the due process clause of U.S. Const., amend. 5 or U.S. Const., amend. 10. *Smith v. Bukofzer*, 180 Ga. 585, 180 S.E. 358 (1935).

Decision by the United States Postal Service to move its postal operations to a different building does not deprive any class of plaintiffs of property or liberty, and, consequently, notice and hearing are not constitutionally mandated. *NAACP v. United States Postal Serv.*, 398 F. Supp. 562 (N.D. Ga. 1975).

Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000e-16, is the exclusive, preemptive, administrative, and judicial remedy for the redress of federal employment discrimination, but is not a remedy for the denial of due process not based on race (or any of the other proscribed classes). *Grier v. Headquarters, United States Army Forces Command*, 574 F. Supp. 183 (N.D. Ga. 1983), aff'd in part, and modified in part on other grounds, 799 F.2d 721 (11th Cir. 1990).

United States Constitution does not create property interests; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *Winkler v. County of DeKalb*, 648 F.2d 411 (5th Cir. 1981).

Mutually recognized entitlement will receive constitutional protection, although a unilateral expectation of a benefit does not rise to the level of a protected interest.

Due Process (Cont'd)**1. In General (Cont'd)**

Winkler v. County of DeKalb, 648 F.2d 411 (5th Cir. 1981).

There is no constitutionally protected right to government employment. *Favors v. Ruckelshaus*, 569 F. Supp. 363 (N.D. Ga. 1983).

Government employer may withhold promotion, require performance of added duties. — A government agency does not violate U.S. Const., amend. 5 by: (1) withholding a promotion; or (2) requiring an employee to perform certain duties without added compensation. *Favors v. Ruckelshaus*, 569 F. Supp. 363 (N.D. Ga. 1983).

Discharge of FBI agent. — Discharged Federal Bureau of Investigation agent did not have a protectable property right in the agent's job. *Painter v. FBI*, 537 F. Supp. 232 (N.D. Ga.), *aff'd*, 694 F.2d 255 (11th Cir. 1982).

No property right in social security. — Recipients have no constitutionally protected property interest against a direct or an indirect diminution by Congress of their old age, survivors, and disability benefits under the Social Security Act. *Oliver v. Ledbetter*, 821 F.2d 1507 (11th Cir. 1987).

Social security benefits of child affecting sibling's right to welfare not unconstitutional. — The regulations and policy requiring that old age, survivors, and disability insurance benefits received by children must be included in calculating their coresident siblings' eligibility for assistance under the aid to families with dependent children program do not deny them substantive due process by imposing a financial burden on a sibling who bears no financial responsibility for brothers or sisters, nor by depriving the sibling of property to which the sibling is entitled, without just compensation in violation of the fifth and fourteenth amendments, nor are the siblings deprived of procedural due process when a sibling is denied property to which the sibling is legally entitled without a hearing. *Oliver v. Ledbetter*, 821 F.2d 1507 (11th Cir. 1987).

Procreation is a fundamental right. *Motes v. Hall County Dep't of Family & Children Servs.*, 251 Ga. 373, 306 S.E.2d 260 (1983).

As such, "clear and convincing evidence," not "legal preponderance," required to au-

thorize sterilization. — The seriousness of an individual's interest at stake in a state initiated sterilization proceeding is such that due process requires "clear and convincing evidence" to authorize the sterilization of an individual. The standard of a "legal preponderance" set by former O.C.G.A. § 31-20-3(c)(4) did not meet constitutional requirements. *Motes v. Hall County Dep't of Family & Children Servs.*, 251 Ga. 373, 306 S.E.2d 260 (1983).

Child support. — It is a denial of due process to order a defendant to pay temporary child support prior to an adjudication of paternity. *Hulen v. State*, 207 Ga. App. 465, 428 S.E.2d 405 (1993).

"Doctrine of binding precedent" was violative of due process as applied to situation where defendant was granted summary judgment in the driver's claim for damages resulting from a collision after the passenger's case was tried before a jury and resulted in a verdict for defendants. *Stanley v. Booz*, 179 Ga. App. 257, 346 S.E.2d 1 (1986).

Unadmitted aliens did not have nonconstitutionally-based liberty interests subject to due process protections which would entitle them to parole revocation hearings. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889, 107 S. Ct. 289, 93 L. Ed. 2d 263 (1986).

Deportable aliens. — Prior to the rendering of a final order of removal, deportable aliens enjoy greater constitutional procedural due process rights than do aliens who are first seeking entry to this country. *Sengchanh v. Lanier*, 89 F. Supp. 2d 1356 (N.D. Ga. 2000).

A deportable alien's detention cannot be excessive and such a determination requires a fact specific analysis, including consideration of the length of the alien's likely detention, the likelihood of deportation, the potential length of future detention, the likelihood of flight, and the danger to the community posed by the alien if he or she is released. *Sengchanh v. Lanier*, 89 F. Supp. 2d 1356 (N.D. Ga. 2000).

Failure to notify of certification of class action. — Court's failure to notify plaintiffs with claims pending against the alleged tortfeasor in several different states, of the certification of a mandatory class in a mass tort case hearing, violated due process. In re Temple, 851 F.2d 1269 (11th Cir. 1988).

Lack of discretion in hearing officer's powers not denial of due process. — Licensee was not denied due process and equal protection in the Department of Public Safety hearing simply because the hearing officer had no authority or discretion to reinstate an habitual violator. *Hardison v. Booker*, 179 Ga. App. 693, 347 S.E.2d 681 (1986).

Intimidation tactics used by police. — Even though interrogating police officers threatened to charge a witness with murder, threatened to lynch him, put words in the witness' mouth, and told the witness that the witness was headed for eternal damnation, and subjected another witness to similar treatment, there was no evidence of physical abuse or threats or improper inducements or promises in exchange for a statement implicating the defendant, and police misconduct was not so egregious as to constitute a violation of defendant's due process rights. *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 246 (1987).

Police use of gunfire against suspect armed with knife was not constitutionally excessive, because the suspect had just stabbed several people and refused to respond to the officers' demands to surrender. *O'Neal v. DeKalb County*, 850 F.2d 653 (11th Cir. 1988).

To be entitled to bring a claim of due process violations following termination, an employee must show that the employee has a property interest in continued employment. *Abernathy v. City of Cartersville*, 642 F. Supp. 529 (N.D. Ga. 1986).

White male who had been discriminated against in an application for the directorship of a city cyclorama had no substantive due process claims against the city because no property interest in obtaining city positions was created by the city code providing for appointment without regard to political affiliation. *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986).

Unlawful intrusion on lawful powers of court. — Regulations purporting to excuse compliance with a judgment and order of the federal district court which is "subject to review . . . by a higher reviewing authority" was invalid insofar as it might conflict with the order in the case or affect the jurisdiction of the court to fashion a remedy in the

matter. *Charter Medical Corp. v. Heckler*, 604 F. Supp. 638 (M.D. Ga. 1985).

Where administrative arena in which to assert claim, federal claim fails. — A claim by federally employed pilots against their supervisors in their individual capacities for alleged deprivation of property — revocation of their pilot certificates — without due process failed, for the reason that the pilots had available to them administrative arenas in which to assert their claims. *Wells v. FAA*, 755 F.2d 804 (11th Cir. 1985).

Disbarment proper following sufficient notice. — Attorney was properly served with notice and afforded due process of law where at least six notices were placed in the attorney's post office box as the last address that the attorney listed with the membership department of the State Bar after the attorney's failure to inform the State Bar of the attorney's new address. *In re Bishop*, 264 Ga. 241, 442 S.E.2d 734, cert. denied, 513 U.S. 987, 115 S. Ct. 483, 130 L. Ed. 2d 39 (1994).

Discipline of attorney under rule governing signing of papers. — Attorneys and clients facing possible discipline under Fed. R. Civ. P. 11, regarding signing of pleadings, motions, and other papers, have interests qualifying for protection under the due process clause of the fifth amendment, and procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a property interest. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987).

Procedure for imposing monetary sanction under civil procedure rule. — Nothing in the text of Fed. R. Civ. P. Rule 11, regarding signing of pleadings, motions, and other papers, or in the Advisory Committee note, indicates that due process requires a court to follow the procedures called for by Fed. R. Crim. P. Rule 42(b) for criminal contempt proceedings before it can impose a monetary sanction pursuant to Fed. R. Civ. P. 11. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987).

Claims against municipalities. — Since right to sue municipality is statutory, the Legislature may attach notice-of-claim requirement as precondition to maintenance of such suit. *Shoemaker v. Aldmor Mgt., Inc.*, 249 Ga. 430, 291 S.E.2d 549 (1982).

Six-month time limit for presenting claims against a municipal corporation cannot be

Due Process (Cont'd)**1. In General** (Cont'd)

said to be unreasonable. *Shoemaker v. Aldmor Mgt., Inc.*, 249 Ga. 430, 291 S.E.2d 549 (1982).

Standing. — It is not necessary that a party first expose oneself to actual arrest or prosecution to be entitled to challenge a statute that the party claims deters the exercise of the party's constitutional rights. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

Surviving relatives have no constitutionally protected due process right in a decedent's body. *Georgia Lions Eye Bank, Inc. v. Lavant*, 255 Ga. 60, 335 S.E.2d 127 (1985), cert. denied, 475 U.S. 1084, 106 S. Ct. 1464, 89 L. Ed. 2d 721 (1986).

License revocation. — Pharmacist whose license had been properly revoked had no protectable property right in reinstatement of that license. *Hicks v. Georgia State Bd. of Pharmacy*, 553 F. Supp. 314 (N.D. Ga. 1982).

Doctor's staff privileges may be suspended before hearing. — Doctor was not denied due process when the doctor's hospital staff privileges were suspended prior to a hearing since the protection of human health and life is a valid governmental and medical interest permitting summary action preceding a hearing. *Richards v. Emanuel County Hosp. Auth.*, 603 F. Supp. 81 (S.D. Ga. 1984).

Question of doctor's competency may be referred to panel of doctors. — Hospital's offer to submit the question of doctor's competence to serve on the medical staff to a panel of three doctors not on the staff did not violate due process requirements, even assuming that the procedure was not part of the bylaws of the hospital. *Richards v. Emanuel County Hosp. Auth.*, 603 F. Supp. 81 (S.D. Ga. 1984).

Property interest. — While absence of a contractual right to employment does not preclude the existence of a property interest, plaintiff must show a mutually recognized entitlement, as opposed to a unilateral expectation of a benefit, to establish the existence of a property interest. *Durham v. Jones*, 698 F.2d 1179 (11th Cir. 1983).

Tickets for traffic violations. — It is neither feasible nor constitutionally mandated for a city to provide notice and an opportu-

nity to be heard prior to ticketing an illegally parked car. *Armstrong v. Mayor of Savannah*, 250 Ga. 121, 296 S.E.2d 690 (1982).

Motorcycle helmet law. — O.C.G.A. § 40-6-315 does not violate due process on grounds that a motorcyclist cannot determine whether the motorcyclist is meeting the headgear requirements of the statute. *ABATE of Ga., Inc. v. Georgia*, 137 F. Supp. 2d 1349 (N.D. Ga. 2001), aff'd, 264 F.3d 1315 (11th Cir. 2001).

The motorcycle helmet law, O.C.G.A. § 40-6-315, does not require that the Georgia Board of Public Safety issue a list approving specific types of headgear and, therefore, the failure of the board to publish a list of approved headgear and eye-protective devices did not violate the plaintiff's rights under the first, fifth, and fourteenth amendments to the United States Constitution. *Abate of Ga., Inc. v. Georgia*, 264 F.3d 1315 (11th Cir. 2001), cert. denied, 536 U.S. 924, 122 S. Ct. 2592, 153 L. Ed. 2d 781 (2002).

Taxation. — Georgia's remedies for contesting tax assessments and collection practices are sufficient to protect taxpayers' federal rights. *Ayers v. Polk County*, 697 F.2d 1375 (11th Cir. 1983).

Maritime attachment procedures. — In relation to the issuance of a writ of attachment by a federal court against bankers and stores located aboard a vessel, procedural due process did not require the posting of a preattachment bond, nor a preattachment ex parte hearing. A prompt post-garnishment hearing before a judge provided the maritime debtor with the procedure the debtor was due. *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528 (11th Cir. 1985).

Right to travel is a privilege of national citizenship, and an aspect of liberty that is protected by the due process clauses of U.S. Const., amend. 5 and U.S. Const., amend. 14. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Warrantless arrest upon reasonable information that accused charged with serious crime constitutionally justified. — Section 17-13-34, which authorizes a warrantless arrest by officers in this state upon reasonable information that an accused is charged in the courts of a state with a crime punishable by death or imprisonment for more than a year, is justified under the fourth, fifth, and

fourteenth amendments, in that it is based upon a standard that comports with the constitutional standard of probable cause as set forth in *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Ledesma v. State*, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

Person who has committed an offense against the laws of Georgia may be stopped at its borders and temporarily deprived of the freedom to travel elsewhere within or without the state. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Permissive or rebuttable presumption that contraband found in a house belongs to the husband by virtue of the husband's statutory status as head of the household cannot withstand due-process scrutiny. *Knighton v. State*, 248 Ga. 199, 282 S.E.2d 102 (1981).

Government involvement in criminal schemes, where outrageous, offends due process, but to amount to a constitutional violation, the law enforcement techniques must be so outrageous that they are fundamentally unfair and shocking to the universal sense of justice, mandated by the due process clause of the fifth amendment. *United States v. Mulherin*, 710 F.2d 731 (11th Cir.), cert. denied, 464 U.S. 964, 104 S. Ct. 402, 78 L. Ed. 2d 343 (1983); 465 U.S. 1034, 104 S. Ct. 1305, 79 L. Ed. 2d 703 (1984).

Outrageous government conduct in course of investigation. — The government did not employ unconscionable conduct in the course of its investigation in violation of the defendant's rights under the due process clause by exploiting the defendant's severe financial problems and inducing the defendant to engage in fraudulent schemes despite the defendant's repeated insistence on legitimate business practices where the stipulated facts demonstrated not only that defendant had a predisposition to engage in the illegal activity but that the defendant played a significant role in the enterprise as well. *United States v. Puett*, 735 F.2d 1331 (11th Cir. 1984).

Constitutional for informant to suggest illegal activity where defendant obtains necessary equipment. — Government conduct falls far short of a due process violation if, although a confidential government informant suggests an illegal activity and gives

advice, it is the defendant who obtains the necessary equipment and supplies for the activity. *United States v. Mulherin*, 710 F.2d 731 (11th Cir.), cert. denied, 464 U.S. 964, 104 S. Ct. 402, 78 L. Ed. 2d 343 (1983); 465 U.S. 1034, 104 S. Ct. 1305, 79 L. Ed. 2d 703 (1984).

Uncertain time of commencement of sentence. — Sentences given to two defendants, which were to be consecutive to their release from detention as illegal aliens, were not illegal despite the uncertainty as to when the exact date the sentences were to begin. *United States v. Buide-Gomez*, 744 F.2d 781 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1774, 84 L. Ed. 2d 833 (1985).

Constitution imposes constraints on exercise of personal jurisdiction but not on location of permissible venues. *Clement v. Pehar*, 575 F. Supp. 436 (N.D. Ga. 1983).

Fifth amendment imposes limitations upon obtaining personal jurisdiction in federal question case. — To apply the test of amenability to personal jurisdiction in a federal question case, the test of constitutionality, the appropriate inquiry lies with the due process of law clause of the fifth amendment. While the limitations imposed in the fifth amendment are similar to those imposed upon the state courts under the fourteenth amendment, they are not necessarily identical. *Vest v. Waring*, 565 F. Supp. 674 (N.D. Ga. 1983).

Federal court may exercise in personam jurisdiction where conspiracy arose within Georgia. — In an action under the federal antitrust laws, it is sufficient for a federal court in Georgia to find, for purposes of exercising in personam jurisdiction over nonresident defendants, that if a conspiracy did or does exist, it appears to have had its genesis at a meeting occurring within the state of Georgia. *Vest v. Waring*, 565 F. Supp. 674 (N.D. Ga. 1983).

Court approved notice not required in class action where individual opts into action. — While court approved notice to potential plaintiffs is necessary in a class action since class members will be bound by any judgment unless they opt out of the action, court involvement was not required in an action in which the only way an individual would be bound was if he or she affirmatively chose to opt into the action. *Goerke v. Commercial Contractors & Supply*

Due Process (Cont'd)**1. In General (Cont'd)**

Co., 600 F. Supp. 1155 (N.D. Ga. 1984).

Notice of levy given to a savings and loan association is sufficient to apprise persons claiming an interest in the account of a levy on that account under 26 U.S.C. §§ 6532(c) and 7426(a). *Douglas v. United States*, 562 F. Supp. 593 (S.D. Ga. 1983).

IRS is under no duty, constitutional or otherwise, to notify every person claiming an interest in property levied upon. *Douglas v. United States*, 562 F. Supp. 593 (S.D. Ga. 1983).

Government exclusion of independent journalists from prisons upheld. — Given a prison's obvious need to maintain security and order, and the need for administrative ease in implementing visitor regulations, the federal government had a rational basis for defining "representatives of the news media" so as to exclude independent journalists not affiliated with a federally recognized and licensed media organization from conducting interviews with prisoners. *Jersawitz v. Hanberry*, 610 F. Supp. 535 (N.D. Ga. 1985), *aff'd*, 783 F.2d 1532 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S. Ct. 272, 93 L. Ed. 2d 249 (1986).

Zoning. — Failure to scrutinize a rezoning application in light of the character of the land in question and the impact of the zoning decision upon the property owner's rights amounts to a denial of due process. *Sellers v. Cherokee County*, 254 Ga. 496, 330 S.E.2d 882 (1985).

Peanut farmers did not have protected property interest in peanut quota allotments under the Agriculture and Food Act of 1981. Under the act, which created and defined quota rights, the farmers were entitled to their 1981 quota allotments as adjusted by the 1984 regulations of the secretary of agriculture, which amounted to a nominal allotment or none at all. *Callaway v. Block*, 763 F.2d 1283 (11th Cir. 1985).

Due process clause inhibits government, not private persons. — The provisions of the federal due process clause are inhibitions upon the power of government and its agencies rather than upon the freedom of action of private persons. *DeLaigle v. Federal Land Bank*, 568 F. Supp. 1432 (S.D. Ga. 1983), *disapproved on other grounds*, *Smith v.*

Russellville Prod. Credit Ass'n, 777 F.2d 1544 (11th Cir. 1985).

Hospital's actions not federal or state action subject to due process. — Private, operated-for-profit hospital's decision to change bylaws so as to allow only doctors eligible for membership in the American Medical and Dental Associations (AMA and ADA) to obtain medical staff privileges and thus denying defendants continued staff privileges because they were doctors of podiatric medicine ineligible for membership in the AMA or ADA was neither state nor federal action subject to scrutiny under the due process or equal protection clauses of the federal Constitution merely because the hospital derived 55 percent of its income from federal medicaid and Medicare funds, was licensed by the state and was regulated as a certified provider under the medicare and Medicaid programs. *Todd v. Physicians & Surgeons Community Hosp.*, 165 Ga. App. 656, 302 S.E.2d 378 (1983).

Federal land bank private corporation, not government agency. — The heavy regulation of federal land banks does not transform these entities into governmental agencies. Therefore, a federal land bank is a private corporation without sufficient governmental involvement to support a cause of action under the federal due process clause of U.S. Const., amend. 5. *DeLaigle v. Federal Land Bank*, 568 F. Supp. 1432 (S.D. Ga. 1983), *disapproved on other grounds*, *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544 (11th Cir. 1985).

Flight examiner's FAA certificate was a valuable fifth amendment property right because it afforded the flight examiner the means by which the flight examiner earned a living, and fifth amendment procedural due process protections were necessary before the certificate could be terminated. *Green v. Brantley*, 719 F. Supp. 1570 (N.D. Ga. 1989), *vacated on other grounds*, 981 F.2d 514 (11th Cir. 1993).

Statute of limitations of Securities Exchange Act. — Federal Securities Exchange Act statute specifying that the limitation period for certain civil actions commenced on or before June 19, 1991 shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, and reinstating certain dis-

missed actions, did not violate due process, even though it had an effect on pending litigation, nor did it violate equal protection since it did not affect a fundamental right or discriminate on the basis of a suspect classification and was rationally related to furthering its purpose of reinstating those causes of action that were timely when filed but which had been subsequently rendered untimely by a Supreme Court decision. *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 510 U.S. 828, 114 S. Ct. 95, 126 L. Ed. 2d 262 (1993).

Sufficiency of indictment. — Defendant could not have been convicted of aggravated assault based on a co-defendant's beating of the victim because the defendant's indictment gave defendant no notice that defendant could be charged with and convicted of aggravated assault of the victim based on any method other than with the shotgun with which defendant shot the victim after the codefendant beat the victim. *Petty v. Smith*, 279 Ga. 273, 612 S.E.2d 276 (2005).

2. Vagueness and Other Issues with Statutes

Statute should sufficiently warn of proscribed conduct. — So as not to be vague, indefinite, and uncertain so that U.S. Const., amend. 5 is violated, the language of the statute should convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962).

Language of a statute must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Johnson v. State*, 246 Ga. 126, 269 S.E.2d 18 (1980).

Laws must give fair warning of what is proscribed, provide standards to see that they are not arbitrarily and discriminatorily applied, and be explicit enough to avoid a chilling effect. *United States v. Irving*, 509 F.2d 1325 (5th Cir.), cert. denied, 423 U.S. 931, 96 S. Ct. 281, 46 L. Ed. 2d 259 (1975).

Void for vagueness. — It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *United States v. Irving*, 509 F.2d 1325 (5th Cir.), cert. denied, 423 U.S. 931, 96 S. Ct. 281, 46 L. Ed. 2d 259 (1975).

Vagueness challenges to statutes not involving first amendment. — Vagueness challenges to statutes which do not involve freedoms under U.S. Const., amend. 1, must be examined in light of facts of the case at hand. *Hardison v. Shepard*, 246 Ga. 196, 269 S.E.2d 458 (1980); *State v. Hudson*, 247 Ga. 36, 273 S.E.2d 616 (1981).

If a statute that does not involve freedoms under U.S. Const., amend. 1, is alleged to violate due process and equal protection, and if, from the record, it is impossible to determine the nature of the conduct giving rise to the charge under the statute, such statute cannot be declared void for vagueness on its face. *State v. Hudson*, 247 Ga. 36, 273 S.E.2d 616 (1981).

Application of due process with respect to vagueness and uncertainty is not applied as strictly to civil statutes as to those penal in nature. The rule is that a statute may be too vague and uncertain to be capable of enforcement as a penal statute and yet may be sufficiently certain to set forth a rule of civil conduct. *Campbell v. J.D. Jewell, Inc.*, 221 Ga. 543, 145 S.E.2d 569 (1965).

Certainty and definiteness of statutes penal in nature. — Even in statutes penal in nature, due process only requires that they be of such certainty and definiteness as would enable a person of ordinary intelligence to comprehend that the particular act the person proposes to do is forbidden by the statute. *Campbell v. J.D. Jewell, Inc.*, 221 Ga. 543, 145 S.E.2d 569 (1965).

Doctrine of vagueness is anchored in due process clauses of U.S. Const., amend. 5 and U.S. Const., amend. 14. *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Purpose of striking down statutes which are "vague" is to prevent the arbitrary enforcement of laws that fail to give officials or the public any notice of what is prohibited. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

Statutes should be construed as constitutional whenever possible; in certain situations, for example, the court may imply a missing mens rea element in a statute to give the statute constitutional viability. *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Due Process (Cont'd)**2. Vagueness and Other Issues with Statutes (Cont'd)**

Certain amount of vagueness must be tolerated in law-making due to inherent imprecision in language; all that due process requires is that the law give sufficient warning to enable a person to conform his or her conduct in accordance with the law and to guard against discriminatory enforcement. *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Reliance on case law and regulations not tracking statute. — The fact that an insurer did not comply with a statutory provision and relied on precedent construing other statutes and on regulations that did not track with the statute did not make O.C.G.A. § 33-34-5 (repealed), relating to optional motor vehicle insurance coverage, unconstitutionally vague. *State Farm Mut. Auto. Ins. Co. v. Bates*, 542 F. Supp. 807 (N.D. Ga. 1982).

Criminal statutes. — A criminal statute is not unconstitutionally vague if it defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Due process is violated, however, when persons of ordinary intelligence must guess at a statute's meaning. *United States v. Moody*, 977 F.2d 1420 (11th Cir. 1992), aff'd, 977 F.2d 1425 (11th Cir. 1992), cert. denied, 507 U.S. 944, 113 S. Ct. 1348, 122 L. Ed. 2d 730 (1993).

Pay-day lender statutes. — The trial court did not err in rejecting both the defendants' equal protection and vagueness challenges to O.C.G.A. § 16-17-1 et seq., after they were charged with violating O.C.G.A. § 16-17-2, as both the defendants, as in-state lenders, were not similarly situated with out-of-state banks designated in O.C.G.A. § 16-17-2(a)(3), and hence were subject to state regulation restricting high interest rates on loans, whereas the out-of-state banks were not; the Georgia legislature had a rational basis for creating a class based on those in-state payday lenders who were subject to state regulation, and moreover the prohibition against payday loans in whatever form transacted, was sufficiently definite to satisfy due process

standards. *Glenn v. State*, Ga. , S.E.2d , 2007 Ga. LEXIS 346 (May 14, 2007).

Penal statute must be sufficiently explicit to inform those who are subject to it as to what conduct will render them liable to its penalties. If persons of common intelligence must guess at the meaning of a statute, the statute violates due process of law. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976).

Flag burning falls within the range of acts proscribed by Code 1933, § 26-2803 (see O.C.G.A. § 50-3-9) and as defendants cannot say they did not have notice that their acts were in violation of the law it is not in violation of the due process provision of U.S. Const., amend. 5. *Monroe v. State*, 250 Ga. 30, 295 S.E.2d 512 (1982).

Absent some qualification on "bias or prejudice," O.C.G.A. § 17-10-17 is left so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application and, thus, O.C.G.A. § 17-10-17 is too vague to justify the imposition of enhanced criminal punishment for its violation; also, O.C.G.A. § 17-10-17 may not be upheld because it impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications; therefore, the sentence enhancement that defendants selected their victims because of racial bias and prejudice violated defendants' due process rights under U.S. Const., amend. 1, 5, 8, and 14 and the corresponding state constitutional provisions and accordingly defendants' sentence enhancements were reversed. *Botts v. State*, 278 Ga. 538, 604 S.E.2d 512 (2004).

New criminal statutes that punish a novel offense that has no established bounds are particularly susceptible to void for vagueness challenge. *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Due process has two requirements: (1) laws must provide fair notice to persons of ordinary intelligence of the precise conduct proscribed; and (2) laws must provide standards and guidance to law enforcement officers, judges, and juries, to prevent arbitrary and discriminatory enforcement. *High Ol'*

Times, Inc. v. Busbee, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, as a matter of due process. *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981).

Term "substantial assistance" in O.C.G.A. § 16-13-31(e)(2), reducing sentences for those convicted of drug trafficking, is not too vague for persons of ordinary intelligence to understand. *Brugman v. State*, 255 Ga. 407, 339 S.E.2d 244 (1986).

Statutory definition of "mentally ill" sufficient. — While the definition of "mentally ill" in O.C.G.A. § 17-7-131 is not a model of specificity, the definition is sufficient to inform the jury of the meaning of a verdict of guilty but mentally ill and is not so vague as to violate due process. *Cooper v. State*, 253 Ga. 736, 325 S.E.2d 137 (1985).

Sodomy statute. — Claim of defendant that state sodomy statute violates due process and equal protection because it is selectively enforced against unmarried persons, and because "victims" are not prosecuted for engaging in the consensual conduct, failed where defendant did not establish the actual manner of enforcement. *King v. State*, 265 Ga. 440, 458 S.E.2d 98 (1995).

Loitering statute not void for vagueness. — The prohibition of loitering and prowling in the total context of O.C.G.A. § 16-11-36 is not void for vagueness insofar as it is limited to activity that amounts to a threat to the safety of persons or property. *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984).

Ordinance revoking license for drug or alcohol law violation not void. — City ordinance that includes as grounds for revocation of a license the violation of federal, state, or local law relating to drugs or alcoholic beverages was not unconstitutional for vagueness. *Bryant v. Mayor*, 252 Ga. 76, 311 S.E.2d 174 (1984).

Teaching contract renewal denied. — Fact that law providing grounds for terminating or suspending teachers' or principals' contracts could be construed as excluding some crimes as a basis for nonrenewal but not others does not in and of itself render it vague or overbroad, so as to deprive plaintiff whose contract was not renewed, due to the

plaintiff's convictions for submitting false documents to the IRS, of due process. *Logan v. Warren County Bd. of Educ.*, 549 F. Supp. 145 (S.D. Ga. 1982).

Business license tax. — A catchall category of "agent or agency not specifically mentioned" following a list of specifically covered occupations was sufficient description to include the occupation of using a talking cat to obtain economic benefits on the streets of the city. *Miles v. City Council*, 551 F. Supp. 349 (S.D. Ga. 1982), aff'd, 710 F.2d 1542 (11th Cir. 1983).

"Place of amusement" not vague and indefinite. — The words "place of amusement" in former act forbidding establishment of certain businesses outside municipal limits without obtaining a license from municipal authorities was not so vague and indefinite that the same could not be made the basis of a criminal prosecution. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Federal drug sentencing statute not unconstitutionally vague. — The federal Anti-Drug Abuse Act of 1986 (21 U.S.C. § 841 et seq.) is not unconstitutionally vague — the term "cocaine base" encompasses "crack cocaine" and the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *United States v. Mosley*, 808 F. Supp. 1572 (N.D. Ga. 1992).

Municipal beer license ordinance. — Municipal beer license ordinance, prohibiting the granting of beer or wine licenses to businesses located within 100 yards of a church, violated plaintiff's due process rights because it gave no notice that a person's past misdemeanor convictions could be used as a basis for denial, and because under the specific facts of the case, its language was distorted to apply to the run-down remnants of a building, not a functioning church. *Gates v. Chadwick*, 812 F. Supp. 1233 (M.D. Ga. 1993).

Loitering ordinance void for vagueness. — Ordinance on loitering or prowling that followed the language of O.C.G.A. § 16-11-36, but added "circumstances which cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity" was void for vagueness. *Johnson v. Athens-Clarke County*, 272 Ga. 384, 529 S.E.2d 613 (2000).

Due Process (Cont'd)

3. Pretrial Criminal Proceedings

Preaccusation delay cases. — Due process considerations under U.S. Const., amend. 5 govern preaccusation delay cases. *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979).

Rights of defendants against excessive preaccusation delay are protected by the due process clause of U.S. Const., amend. 5. *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

When prosecution follows investigative delay, a defendant is not deprived of due process, even if the defendant's defense might have been prejudiced by the lapsed time. *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

When preaccusation delay merits dismissal. — Under the due process clause, dismissal for preaccusation delay is required when it is shown that such delay caused substantial prejudice to defendant's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

Proof of prejudice from preaccusation delay is a necessary but not sufficient element of a due process claim. *United States v. Pitts*, 569 F.2d 343 (5th Cir.), cert. denied, 436 U.S. 959, 98 S. Ct. 3076, 57 L. Ed. 2d 1125 (1978).

Due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. *United States v. Pitts*, 569 F.2d 343 (5th Cir.), cert. denied, 436 U.S. 959, 98 S. Ct. 3076, 57 L. Ed. 2d 1125 (1978); *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979).

What constitutes irreparable prejudice from preaccusation delay. — Denial of the right under U.S. Const., amend. 5 to due process of law because preaccusation delay irreparably prejudiced one's ability to prepare one's defense is shown when substantial prejudice resulted from the delay and the delay was an intentional device to obtain a tactical advantage over the accused. *United States v. Byrum*, 540 F.2d 833 (5th Cir. 1976), cert. denied, 429 U.S. 1076, 97 S. Ct. 819, 50 L. Ed. 2d 796 (1977).

Where claim based on preindictment delay, actual prejudice must be shown. — A claim by a defendant that preindictment delay deprives him of due process in violation of U.S. Const., amend. 5 requires a showing of actual prejudice. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

To establish a due process violation based on preindictment delay, a defendant must show that the reason for the delay "violates our fundamental conceptions of justice". The defendant must show that the defendant suffered substantial prejudice and that the delay was the product of deliberate action by the government to gain a tactical advantage. *United States v. Hayes*, 40 F.3d 362 (11th Cir. 1994), cert. denied, 516 U.S. 812, 116 S. Ct. 62, 133 L. Ed. 2d 24 (1995).

No actual prejudice shown due to 24-year delay. — Defendant's fifth and fourteenth amendment due process rights were not violated by the 24-year delay between the crimes and the indictment as defendant failed to show actual prejudice; that the defense was weakened by the absence of witnesses who had died or could not be found and by the faded memories of witnesses who testified did not satisfy the actual prejudice prong of the Wooten test. *Jackson v. State*, 279 Ga. 449, 614 S.E.2d 781 (2005).

Post-arrest delay covered by U.S. Const., amend. 6. — Delay which occurs between commission of an offense and arrest or indictment may violate the right to due process under U.S. Const., amend. 5. If, however, the delay occurs between arrest or indictment and trial, the controlling constitutional provision is guarantee under U.S. Const., amend. 6 of the right to a speedy trial. *United States v. Smith*, 65 F.R.D. 464 (N.D. Ga. 1974).

Due process considerations under U.S. Const., amend. 5 apply to oppressive prearrest and preindictment delay, but the more specific guarantees of U.S. Const., amend. 6 apply to post-arrest delay. *United States v. Traylor*, 578 F.2d 108 (5th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S. Ct. 848, 59 L. Ed. 2d 41 (1979).

Due process requires notice sufficient to prepare defense. — Notice of criminal charges with such specificity so as to allow the accused to defend against those charges

is an inherent ingredient of due process of law. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Because the defendant was charged by indictment with crimes against a minor victim who was identified by initials only, the court found that such was insufficient because the defendant was entitled to be charged by an indictment in perfect form; failure to identify the victim with a full name, if known, violated the defendant's constitutional rights to due process under Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 5, as well as defendant's double jeopardy rights under Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5. *Sellers v. State*, 263 Ga. App. 144, 587 S.E.2d 276 (2003).

Failure to hold commitment hearings. — Although the commitment hearing is a "critical stage" of criminal procedure entitling a defendant to counsel, failure to hold such a hearing does not constitute a deprivation of a defendant's constitutional rights. *State v. Godfrey*, 204 Ga. App. 58, 418 S.E.2d 383, cert. denied, 204 Ga. App. 922, 418 S.E.2d 383 (1992).

Fact of one-on-one show-up, without more, does not necessarily violate due process. *Goswick v. State*, 150 Ga. App. 279, 257 S.E.2d 303 (1979); *Belcher v. State*, 159 Ga. App. 146, 282 S.E.2d 760 (1981).

Although one-on-one showups are inherently suggestive the identification need not be excluded as long as the identification is reliable notwithstanding any suggestive procedure under all the circumstances, including consideration of the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Thus, the trial court did not err in denying defendant's motion to suppress an out-of-court showup identification by the manager of a store who identified defendant as the shoplifter of several store items given that: (1) the manager had a good opportunity to view defendant in the store parking lot as defendant was leaving

with the items; (2) the manager quickly gave a physical identification to another store and defendant was soon observed in an apparent attempt to shoplift at the other store; and (3) the manager from the first store then positively identified defendant for the police at the scene within 30 minutes of the original shoplifting incident, all of which indicated that the identification was reliable. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Due process test applicable to show-ups is likelihood of misidentification. — The due process test to be applied to a show-up, (as distinguished from a line-up) is the likelihood of misidentification. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, and the level of certainty demonstrated by the witness at the confrontation. *Yancey v. State*, 232 Ga. 167, 205 S.E.2d 282 (1974).

One-on-one show-up not necessarily a violation of due process. — A claimed violation of due process in the conduct of a pretrial confrontation depends on the totality of the circumstances. A one-on-one show-up, without more, does not necessarily violate due process. The primary evil to be avoided is the substantial likelihood of irreparable misidentification. *Daniel v. State*, 150 Ga. App. 798, 258 S.E.2d 604 (1979).

Validity of showing suspects and photos singly depends on circumstances. — Although the practice of showing suspects and photos of suspects singly to a witness for purposes of identification has been widely condemned, a claimed violation of due process of law in the conduct of pretrial confrontation depends on the circumstances. *Goswick v. State*, 150 Ga. App. 279, 257 S.E.2d 303 (1979); *Coleman v. State*, 150 Ga. App. 380, 258 S.E.2d 12 (1979).

One-person show-up after photographic identification by victim. — Appellant is not denied due process by a one-person show-up shortly after the victim selected the appellant's photograph as that of the person who robbed the victim, where the one-person show-up was conducted in a room at the police station within approximately one and one-half hours after the robbery. *Coleman v.*

Due Process (Cont'd)**3. Pretrial Criminal Proceedings (Cont'd)**

State, 150 Ga. App. 380, 258 S.E.2d 12 (1979).

Accidental pretrial confrontation. — If a pretrial confrontation is accidental and not so arranged by the authorities as to make resulting identification virtually inevitable, there is no denial of due process. *Herron v. State*, 155 Ga. App. 791, 272 S.E.2d 756 (1980).

Selection system whereby the grand jury foreman is selected from the membership of each grand jury, and the grand jury selects its own foreman, rather than for him or her to be appointed by the superior court judge provides no ground for reversal of a conviction obtained by a properly constituted traverse jury. *Wright v. State*, 179 Ga. App. 325, 346 S.E.2d 361 (1986).

Knowing and intelligent waiver of rights. — Trial court did not err in finding that the defendant, although mentally retarded, gave a knowing and intelligent waiver of the defendant's rights. *Worthy v. State*, 253 Ga. 661, 324 S.E.2d 431 (1985).

Failure of defendant to offer evidence where prejudicial delay alleged. — Preindictment delay did not deny the defendant due process of law where the defendant offered no evidence in support of the defendant's theory of why the charges were dropped before the preliminary hearing, or contrary to the government's theory. *United States v. Puett*, 735 F.2d 1331 (11th Cir. 1984).

Mere fact that police officer handed photographs to victim for identification did not render the photographic identification procedure impermissibly suggestive. *Whitfield v. State*, 176 Ga. App. 476, 336 S.E.2d 356 (1985).

A "show-up" identification where the defendant was returned to convenience store the defendant had attempted to rob for identification purposes conducted immediately after the arrest was not unduly suggestive and testimony concerning this identification need not have been excluded upon objection. *Manora v. State*, 179 Ga. App. 791, 347 S.E.2d 727 (1986).

Photo spreads were not so impermissibly suggestive as to result in a substantial likelihood of misidentification because the defen-

dant was only an arm's length away from the victim when the defendant assaulted the victim; the light was good; the victim's attention was focused on the defendant; and the victim accurately described defendant immediately after the attack. *Dudley v. State*, 179 Ga. App. 252, 345 S.E.2d 888 (1986).

Fact that defendant's picture was the only one to appear in two photo spreads shown to the victim does not demonstrate that the spreads were impermissibly defective, especially since the two photographs of defendant were different. *Dudley v. State*, 179 Ga. App. 252, 345 S.E.2d 888 (1986).

Isolation of defendants in lineup by age, weight, and height did not taint identification. — Though the evidence supported the defendant's contentions that the ages, weights, and heights of the persons in the lineup were different and that the dress and complexions could also have helped to isolate the two defendants, the victim based the lineup (and in-court) identification of the two defendants upon their facial characteristics and the traumatic exposure to each of them the victim had experienced a matter of twenty minutes before so that there was no improper suggestion of identity nor other improper procedures followed by the police to taint the results of the pre-indictment lineup. *Kennedy v. State*, 179 Ga. App. 587, 347 S.E.2d 604 (1986).

Identification not tainted by defendant's wearing of prison garb. — Victim's identification testimony was not tainted simply because the victim saw the defendant dressed in prison garb at the preliminary hearing especially since the observation of the defendant at the preliminary hearing was not a confrontation and the victim had previously identified the defendant positively from photographs. *Dudley v. State*, 179 Ga. App. 252, 345 S.E.2d 888 (1986).

How likelihood of misidentification evaluated. — The factors to be considered in evaluating the likelihood of misidentification, in order to determine whether an alleged criminal's due process guarantee of a fair trial has been violated, include the opportunity of the victim to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a witness' prior description of the criminal, the level of certainty demonstrated by a witness at a confrontation, and the length of time

between the crime and the confrontation. *Carter v. State*, 157 Ga. App. 445, 278 S.E.2d 93 (1981).

Discriminatory use of peremptory challenges not shown. — Where all of the juries relied on by defendant to show a systematic exclusion of blacks from petit juries were composed of at least 25% black jurors with the exception of one jury which had only one black juror, the State used all of its peremptory challenges in only four of the ten cases, and there were no cases involving all-white juries, defendant failed to establish a constitutional denial of due process and the right to a fair trial through the discriminatory use of peremptory challenges. *Patterson v. State*, 176 Ga. App. 784, 338 S.E.2d 283 (1985).

Denial of defendant's motion for severance did not deny due process. *Short v. State*, 256 Ga. 165, 345 S.E.2d 340 (1986); *Short v. State*, 256 Ga. 172, 345 S.E.2d 344 (1986).

Without a high likelihood of prejudice, due process does not mandate severance of a charge requiring proof of a prior conviction from other counts in a criminal indictment. *United States v. Jiminez*, 983 F.2d 1020 (11th Cir.), cert. denied, 510 U.S. 925, 114 S. Ct. 330, 126 L. Ed. 2d 276 (1993).

Requiring counsel in joint case to make opening statements at same time not error. — The trial court did not err in ruling that both defense counsel in joint case for theft would have to make their opening statements at the same point in the trial; i.e., either prior to the presentation of the state's case or at its conclusion. *Manora v. State*, 179 Ga. App. 791, 347 S.E.2d 727 (1986).

4. Criminal Trials

Requirement that a court protect an accused person who appears before it is fundamental to due process of law. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Waiver of right to due process. — The fourth provision of U.S. Const., amend. 5, "nor [shall any person] be deprived of life, liberty, or property, without due process of law," allows, but does not require, a person to defend one's rights, hence one may waive them. *Barkman v. Sanford*, 162 F.2d 592 (5th

Cir.), cert. denied, 332 U.S. 816, 68 S. Ct. 155, 92 L. Ed. 393 (1947).

Proof that selective prosecution violates equal protection guarantees. — Though selective prosecution, if based on improper motives, can violate constitutional guarantees of equal protection, selective enforcement in and of itself is not a constitutional violation. Therefore, to support a defense of selective prosecution, one must establish that others similarly situated have not generally been prosecuted and that the government's discriminatory selection of a person is invidious, or in bad faith — that is, based on constitutionally impermissible considerations, such as race or religion. *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir.), cert. denied, 447 U.S. 907, 100 S. Ct. 2991, 64 L. Ed. 2d 856 (1980).

Constitutional right to a jury trial may be waived by proceeding to trial without demanding a jury. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Defendant need not personally waive the defendant's right to a jury trial in order to preserve due process. *Little v. Stynchcombe*, 227 Ga. 311, 180 S.E.2d 541 (1971).

Defendant in a misdemeanor case can waive trial by jury. — There is no reason why a prisoner in a case of this kind should not have the right to be tried by a conscientious and intelligent judge, if the prisoner prefers it, as well as the right to be tried by a jury. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Right to testify versus right to counsel. — Where federal district court presented the defendant with a choice: either to proceed with counsel with the caveat that the defendant could be kept off the witness stand, if the attorney so desired, or to proceed pro se, the defendant was impermissibly forced to choose between two constitutional rights: the right to testify and the right to counsel. *United States v. Scott*, 909 F.2d 488 (11th Cir. 1990).

Defendant entitled to opportunity to disprove intent. — Due process requires that, if one of the elements of the charged crime requires proof of specific intent, the defendant must be given the opportunity to disprove the government's contention. *United States v. Hill*, 750 F. Supp. 524 (N.D. Ga. 1990).

Waiver of defendant's right to testify. — A criminal defendant has a fundamental con-

Due Process (Cont'd)**4. Criminal Trials** (Cont'd)

stitutional right to testify in his or her own behalf at trial. This right is personal to the defendant and cannot be waived either by the trial court or by defense counsel. *United States v. Teague*, 953 F.2d 1525 (11th Cir.), cert. denied, 506 U.S. 842, 113 S. Ct. 127, 121 L. Ed. 2d 82 (1992).

Use of handcuffs in transporting defendant not prohibited. — The Constitution does not prohibit the official in charge of an accused from deciding that handcuffs are necessary for a safe and orderly transportation to the courtroom. *Allen v. Montgomery*, 728 F.2d 1409 (11th Cir. 1984).

Refusal to sever trials. — Trial court did not deprive the first and second defendants of due process under Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 5 in failing to sever, pursuant to O.C.G.A. § 17-8-4, their trials in a case involving the three defendants, who were allegedly involved in a conspiracy; because each defendant was implicated by each defendant's own statement, the defendants failed to show how they were prejudiced by the joint trial, and there was no showing of antagonistic defenses. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 2007 U.S. LEXIS 2212 (U.S. 2007).

Due process requires a fair trial before a fair and impartial judge. *Cross v. Georgia*, 581 F.2d 102 (5th Cir. 1978).

Only when a judge's conduct strays from neutrality is a defendant thereby denied a fair trial as required by the Constitution. *United States v. Bartlett*, 633 F.2d 1184 (5th Cir.), cert. denied, 454 U.S. 820, 102 S. Ct. 101, 70 L. Ed. 2d 91 (1981).

Improper communication with jury. — Trial court erred in communicating with the jury outside the presence of appellant and appellant's counsel where it denied jury's request to see transcript of an eyewitness' statements to police in writing without notifying or consulting either side. *Burtt v. State*, 269 Ga. 402, 499 S.E.2d 326 (1998).

Judge is not a mere moderator, and has an obligation and duty to question witnesses and comment on evidence when necessary. The judge may elicit facts not yet adduced or clarify those previously presented and the judge may maintain the pace of the trial by

interrupting and curtailing counsel's examinations as a matter of discretion. *United States v. Bartlett*, 633 F.2d 1184 (5th Cir.), cert. denied, 454 U.S. 820, 102 S. Ct. 101, 70 L. Ed. 2d 91 (1981).

Threat by court to remove unruly defendant. — No rights under the fifth and sixth amendments to the Constitution of the United States were violated where after several outbursts on the defendant's part, the trial court informed the defendant, outside the jury's presence, that the defendant would be removed from the courtroom if the defendant again engaged in such unseemly behavior. *Russell v. State*, 181 Ga. App. 665, 353 S.E.2d 565 (1987).

Competency requirement. — Due process requires that no person be convicted of a crime while incompetent to stand trial. *United States v. Swanson*, 572 F.2d 523 (5th Cir.), cert. denied, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978).

Presently incompetent defendant may never be able to stand trial and may have to be released. *United States v. Swanson*, 572 F.2d 523 (5th Cir.), cert. denied, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978).

Determination of competency of amnesiac defendant. — Although the competency determination cuts to the heart of the trial process, the standard for determining the competency of an amnesiac defendant must remain flexible. Because nonpathological amnesia may be difficult to ascertain, the trial judge is in the best position to make a determination between allowing amnesia to become an unjustified haven for a defendant and, on the other hand, requiring an incompetent person to stand trial. *United States v. Swanson*, 572 F.2d 523 (5th Cir.), cert. denied, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978).

Defendant can be barred from raising the issue of insanity as a defense if the defendant does not submit to an examination by a court-designated psychiatrist. Empowering the court to order a psychiatric examination concerning the insanity defense does not violate per se the defendant's rights under U.S. Const., amend. 5. *United States v. Leonard*, 609 F.2d 1163 (5th Cir. 1980).

Facts related in a psychiatric examination are not admissible on the issue of guilt and the only purpose for which the statements can be admitted is to determine the issue of

sanity. *United States v. Leonard*, 609 F.2d 1163 (5th Cir. 1980).

Indication by state of witnesses to be called is adequate substitute for purging of list. — The failure of the state to purge its list of over 500 witnesses of the names of those persons who do not testify in a felony murder case does not constitute the denial of the effective assistance of counsel in the preparation of accused's defense nor the deprivation of due process of law, where the state voluntarily reduces the number of witnesses which might be called on direct examination to 40 by placing a check mark beside the names to be called. *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974).

When doctrine of inherent prejudice applies. — The doctrine of inherent prejudice, in regard to the accused's right to a fair trial applies when, because of the circumstances, there is such a high probability that prejudice will result that the procedure is deemed inherently lacking in due process, and in such cases, no showing of identifiable prejudice is necessary. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Evidence against defendant must come from witnesses in public courtroom. — The individual's right to a fair trial, whether it be in a civilian court or in a military court, requires, in the constitutional sense, that the evidence developed against a defendant comes from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, cross-examination, and counsel. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Fact-finder's conclusions should be induced only by evidence and argument in open court, not by any outside influence, whether of private talk or public print. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

In capital cases, the jury should pass upon the case free from the jury causes tending to disturb the exercise of deliberate unbiased judgment. *Calley v. Callaway*, 382 F.

Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Burden on prosecution to protect against prejudicial news coverage. — Although the right of a free press embodied in U.S. Const., amend. 1, is guaranteed, the individual's right to a fair trial guaranteed by U.S. Const., amend. 5's due process clause and in the other individual provisions of the Bill of Rights is absolute. Where prejudicial news coverage is present, the burden is on the government to protect the rights of the defendant. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Defendant has right to expect protection from prejudicial news coverage. — Although the government has no authority to restrain the reporting of the press, nor to dictate what it does or does not report, a person accused of crime has the right to expect the government and its judicial officers to protect the defendant from massive and prejudicial publicity surrounding the case. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Conviction secured, in whole or in part, by use of information secured from nonjudicial sources obviously constitutes a denial of due process of law in its most rudimentary conception. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

To deny the accused the right to impugn a witness's testimony is to deny the opportunity for cross-examination, and the denial of the right to cross-examine denies due process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Jurors need not be totally ignorant of the facts and issues involved in a case and the mere existence of a preconceived notion as to the guilt or innocence of the accused is not, in itself, sufficient to rebut the presump-

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tion of impartiality if the juror can lay aside the juror's impression and render a verdict based only on the evidence presented in court. However, this general rule does not foreclose inquiry whether, in a given case, the application of the rule works as a deprivation of liberty without due process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Juror's statement that the juror can lay aside already-formed impressions. — The rule that it is sufficient for juror to state that the juror can lay aside the juror's impressions and render a verdict based only on the evidence does not close inquiry to determine whether in a given case the application of the rule deprives a defendant of due process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Disclosure to jury of agreement between prosecutor and accomplice. — Due process mandates that the jury be informed of any understanding or agreement reached between the prosecutor and an alleged accomplice, on whose testimony the state's case depends. *Williams v. State*, 151 Ga. App. 683, 261 S.E.2d 430 (1979).

There was no denial of due process or confrontation rights where the trial court ruled improper a question by defense counsel on cross-examination that presumed the existence of an unprovable "deal" between the state and the witness; the court did not preclude all inquiry on a subject with respect to which the defendant was entitled to reasonable cross-examination. *Watkins v. State*, 264 Ga. 657, 449 S.E.2d 834 (1994).

Disclosure to jury of nolle prosequi agreement. — Where the jury is made aware of a nolle prosequi agreement between defendant and the prosecutor by the prosecutor's disclosure of the agreement, the requirements of due process are satisfied. *Williams v. State*, 151 Ga. App. 683, 261 S.E.2d 430 (1979).

If a case has been submitted to the jury on several alternative theories, one of which is

unconstitutional, a general verdict of guilty which does not indicate it was based upon one of the constitutional theories must be set aside. *Crawford v. State*, 254 Ga. 435, 330 S.E.2d 567 (1985), aff'd, 256 Ga. 57, 344 S.E.2d 215 (1986); 257 Ga. 681, 362 S.E.2d 201 (1987), cert. denied, 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989).

Where jury was charged on both malice murder and felony murder and returned a general "guilty" verdict, the conviction required reversal where the indictment did not allege facts which would put the defendant on notice that he would be required to defend against the felony-murder charge at trial. *Crawford v. State*, 254 Ga. 435, 330 S.E.2d 567 (1985), aff'd, 256 Ga. 57, 344 S.E.2d 215 (1986); 257 Ga. 681, 362 S.E.2d 201 (1987), cert. denied, 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989).

Charge as to jury presumptions and inferences. — Charge telling jury that they were entitled to make certain presumptions or draw certain inferences from the evidence, not that the law required them to do so, did not violate due process. *Freeman v. State*, 183 Ga. App. 264, 358 S.E.2d 623, cert. denied, 183 Ga. App. 906, 357 S.E.2d 869 (1987).

Due process not violated. — Although the jury charge was taken from poorly drafted legislation, it did not violate defendants' right to due process of law by improperly shifting the burden of persuasion regarding venue to defendants. *Napier v. State*, 276 Ga. 769, 583 S.E.2d 825 (2003).

Charge as to conflict in testimony. — A trial court's charge to the jury that any conflict in the testimony of witnesses should, if possible, be settled "without believing that the witnesses made a false statement" is not unconstitutionally burden shifting nor violative of the fifth amendment privilege against self-incrimination. *Madyun v. State*, 188 Ga. App. 253, 372 S.E.2d 655 (1988).

Recharge instruction constitutional. — The trial court did not err in recharging the jury on malice murder and not on manslaughter, since the instruction was limited to the specific point raised by the jury's inquiry and was followed by a general statement disclaiming any instructional emphasis. *Williams v. State*, 263 Ga. 135, 429 S.E.2d 512 (1993).

Order compelling psychiatric examination. — Trial court's order to compel psychi-

atric examination did not violate the petitioner's privilege against self-incrimination under the fifth and fourteenth amendments because, among other things, the petitioner's counsel both received ample notice of the state's intention to seek a psychiatric examination and had ample opportunity to confer with the petitioner to inform the petitioner of the right against self-incrimination and because prior to trial there had been indications that the petitioner might present a defense of insanity or diminished capacity. *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992).

Appointment of psychiatrist to assist in defense. — When a criminal defendant makes an ex parte showing that the defendant's sanity is likely to be a significant factor in the defendant's defense, the defendant must be provided with a psychiatrist to assist in the defense. *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (1985).

For interpretation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) regarding procedure to be followed in providing psychiatric assistance to criminal defendants, see *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (1985).

Trial court is under no constitutional or statutory duty to appoint state paid psychiatrist to evaluate a defendant even though special plea of insanity has been filed. *Blankenship v. State*, 247 Ga. 590, 277 S.E.2d 505 (1981), overruled on other grounds, *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993) and, overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

Psychiatric testimony in rebuttal of defendant's psychiatric evidence. — Because the defendant expressly consented to examinations by the state psychiatrist and psychologist, and because their testimony was used by the state only in rebuttal to the defendant's psychiatric and psychological testimony, defendant's fifth amendment rights were not violated by admission of their testimony as to statements made by the defendant during their examinations of the defendant. *Speights v. State*, 163 Ga. App. 738, 294 S.E.2d 650 (1982).

Improper psychiatric testimony as to criminal responsibility. — A psychiatrist's reference during the psychiatrist's testimony to the defendant's "criminal responsibility" vi-

olated fifth amendment rights, as the psychiatrist based the diagnosis on the substance of disclosures made during a custodial interrogation, but the admission of the testimony was harmless error because no reasonable doubt existed that the defendant would have otherwise been found guilty and because the testimony was at worse redundant, as the defendant, who was presumed sane under Georgia law, never raised the insanity defense. *Cape v. Francis*, 741 F.2d 1287 (11th Cir. 1984), cert. denied, 474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 245 (1985).

Privilege of evaluation made by court-funded psychiatrist. — Criminal defendant who requested funds for hiring a psychiatrist was not denied due process where court granted funds but reserved ruling on the question of whether the evaluation would be privileged, prompting the defendant to hire a psychiatrist out of the defendant's own funds to assure privilege, since the defendant abandoned the matter by not presenting authority supporting the privilege and by failing to evoke a ruling of law from the court. *Crawford v. State*, 254 Ga. 435, 330 S.E.2d 567 (1985), cert. denied, 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989).

Prosecution need not state reasons for refusing to stipulate to admission of polygraph evidence. — Since the Georgia Supreme Court has left intact the general rule of inadmissibility of polygraph evidence but has merely recognized a party's right, within that rule, to waive objection to otherwise inadmissible evidence, no substantive right to introduce polygraph evidence has been created in Georgia; and no written statement of reasons for a prosecutor's refusal to stipulate to the admission of polygraph evidence is constitutionally required as a matter of due process as a safeguard against arbitrariness. *Jones v. Weldon*, 690 F.2d 835 (11th Cir. 1982).

Absence of the defendant at the jury view of a crime scene, when made for the purpose of better understanding the evidence and not introducing new evidence, is not a denial of due process. *Forney v. State*, 255 Ga. 316, 338 S.E.2d 252 (1986).

Absence of defendant from evidentiary hearing. — Defendant's exclusion from an evidentiary hearing on the defendant's motion for new trial did not violate the defen-

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dant's rights to confrontation or due process. *United States v. Boyd*, 131 F.3d 951 (11th Cir. 1997).

Juror's contact with victim's brother not prejudicial. — Because, during the trial, one of the jurors gave the trial judge a note in which the juror informed the judge that the juror worked with the victim's sibling about eight years before trial; that the juror spoke with the victim's sibling before the trial began and exchanged pleasantries; that the juror inquired what the sibling was doing at the courthouse and the sibling replied "that boy shot my sister;" that no one else was aware of the exchange; that the exchange would not influence the juror's decision; and that the juror would base the juror's decision in the case on the evidence, and because the juror was admonished not to tell the other jurors what transpired, the defendant was not prejudiced by the communication. *Dudley v. State*, 179 Ga. App. 252, 345 S.E.2d 888 (1986).

Presumption concerning willful acts. — Instructions charging that the acts of a person of sound mind and discretion are presumed to be a product of a person's will, but such presumption may be rebutted and that a person of sound mind and discretion is presumed to intend the natural and probable consequences of the person's acts, but the presumption may be rebutted create an unconstitutional burden-shifting presumption with respect to the element of intent. *Boswell v. State*, 176 Ga. App. 855, 338 S.E.2d 62 (1985).

A charge, in a homicide and burglary prosecution, that there is a rebuttable presumption that a person of sound mind and discretion intends the natural and probable consequences of the person's acts, was unconstitutionally burden-shifting, notwithstanding an additional charge that criminal intent is not presumed. This error did not require a reversal of the defendant's convictions, because the defense raised the question of whether the defendant participated in the acts causing the victim's death but did not create any material issue on the question of whether the defendant intended the consequences of the defendant's acts. *Williams v. Kemp*, 255 Ga. 380, 338 S.E.2d 669, cert.

denied, 478 U.S. 1022, 106 S. Ct. 3341, 92 L. Ed. 2d 744 (1986).

Instruction as to implication of malice in murder prosecution. — A trial court's jury instruction in a murder prosecution that malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart, in view of the strong circumstantial evidence that preceded it, could not have been interpreted by the jury as changing the reasonable-doubt burden of proof they were initially told that the prosecution had to meet. *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S. 1024, 103 S. Ct. 1276, 75 L. Ed. 2d 496 (1983).

Videotaping. — The state's failure to videotape a defendant's statement so that the jury can evaluate the defendant's condition while making the statement is not a denial of due process, even though the police videotaped the murder scene where the statement was made. *Patterson v. State*, 258 Ga. 592, 372 S.E.2d 809 (1988).

Delay in bringing indictment. — Defendant's fifth amendment due process rights and sixth amendment right to a speedy trial were not violated through the bringing of an indictment against him in 1992 for criminal conduct that occurred in 1987. *United States v. Lockett*, 867 F. Supp. 1044 (M.D. Ga. 1994), aff'd, 70 F.3d 126 (11th Cir. 1995).

Delay solely by state authorities. — The fifth, sixth, and fourteenth amendments did not bar a federal prosecution because any arguably improper or unconstitutional delay in the prosecution was occasioned solely by Georgia authorities; there was no basis here for imputing Georgia's dilatory conduct to the United States or to the federal prosecution. *United States v. Boone*, 959 F.2d 1550 (11th Cir. 1992).

Fourteen-year delay between arrest and trial for murder did not violate defendant's due process rights since defendant was not prejudiced by the passage of time, nor was there any evidence to indicate that the delay was designed by the prosecution. *Wooten v. State*, 262 Ga. 876, 426 S.E.2d 852, cert. denied, 510 U.S. 853, 114 S. Ct. 156, 126 L. Ed. 2d 117 (1993).

State did not violate defendant's speedy trial rights, and, thus, defendant's double

jeopardy rights were not implicated where defendant was arrested on a charge of DUI—less safe driver and defendant was not tried for 14 years because defendant failed to appear for the trial scheduled a few weeks after defendant's arrest for that offense; any delay in bringing defendant to trial was defendant's own fault because defendant had notice of when that trial was to take place and did not show up. *Smith v. State*, 260 Ga. App. 403, 579 S.E.2d 829 (2003).

Twenty-year delay. — Defendant failed to establish a due process violation for a 20-year delay in the prosecution of a murder case against the defendant because the defendant failed to show either that the delay actually prejudiced the defense or that the prosecution deliberately delayed the case to gain a tactical advantage, both of which showings were needed to prevail on that claim; while several witnesses died in the intervening years and some evidence was missing, this hindered the prosecution as much as the defendant. *Holton v. State*, 280 Ga. 843, 632 S.E.2d 90 (2006).

Trial calendar. — Where defendant had actual knowledge of the pendency of the case, the publication of the trial calendar in the county's legal organ constituted sufficient notice of the trial date, so as to satisfy due process. *Carson v. Morris*, 164 Ga. App. 732, 297 S.E.2d 513 (1982).

When conviction based upon in-court identification which follows pretrial identification set aside. — A conviction based upon an in-court identification following a pretrial identification will be set aside on that ground only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Herron v. State*, 155 Ga. App. 791, 272 S.E.2d 756 (1980).

In-court identification by witness previously exposed to suggestive photographic array. — A conviction based on a witness' in-court identification of the defendant, when the witness has been previously exposed to a suggestive photographic array, will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The central question is whether, under the totality of the circum-

stances, the identification is reliable even though a pretrial identification procedure was suggestive. *Stroud v. State*, 246 Ga. 717, 273 S.E.2d 155 (1980).

In-court identification where there has been a one-on-one show-up. — As a general rule, the one-on-one confrontation between the eyewitness and the suspect before a trial has been condemned. However, the appellate courts have consistently upheld the admission of in-court identifications when prior one-on-one show-ups are reasonably and fairly conducted at or near the time of the offense. *Arnold v. State*, 155 Ga. App. 782, 272 S.E.2d 751 (1980); *Perkins v. State*, 216 Ga. App. 118, 453 S.E.2d 135 (1995).

Criminal defendant is deprived of due process if a conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction. Equally clear is the defendant's constitutional right at some stage in the proceeding to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *James v. State*, 223 Ga. 677, 157 S.E.2d 471 (1967).

Coercive police force in obtaining confession. — Coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the due process clause. *United States v. Moody*, 977 F.2d 1425 (11th Cir. 1992), cert. denied, 507 U.S. 1052, 113 S. Ct. 1948, 123 L. Ed. 2d 653 (1993).

Effect in rape prosecution of statement admitting intercourse but not use of force. — Because, in a rape case, the accused made a statement that admitted the intercourse but fell short of admitting that the intercourse was accomplished by means of force and against the will of the victim or prosecutrix, such statement was insufficient to amount to a confession of rape, since force is an essential element of the crime of rape. However, if the statement in question clearly makes out a case of conspiracy between the defendant on trial and other individuals charged with the commission of the same crime at the same time and place, and if, from all reasonable inferences and

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deductions that may be drawn from the statement, it is apparent that all the participants in the crime were exercising and using force or threats of force upon the victim, the defendant, being a participant in the conspiracy, is equally chargeable under the facts related in the statement with the force exerted upon the victim by means of threats of violence and bodily harm visited upon the victim by the defendant's coconspirators even though the defendant may not have admitted in the defendant's statement to have personally exerted any such force and violence upon the victim. *Jackson v. State*, 225 Ga. 553, 170 S.E.2d 281 (1969).

That exclusionary sperm test not performed is not grounds for reversing rape conviction. — In a rape trial, the fact that an exclusionary sperm test is not performed (which test purportedly classifies sperm into particular blood groupings for identification purposes) is not grounds for reversal, neither does due process require the performance of the test. *Gray v. State*, 151 Ga. App. 684, 261 S.E.2d 402 (1979).

Denial of use immunity to defense witnesses. — Defendant's compulsory process rights under U.S. Const., amend. 6 and equal protection and due process rights under U.S. Const., amend. 5 are not violated by denial of use immunity to defense witnesses if such immunity is not requested by the defendant in the trial court and no prejudice would have resulted had a request been made and denied; nor are such rights violated if the defendant fails to demonstrate that a grant of immunity is required to preserve fundamental fairness in the trial. *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980).

Statement of a witness that an arrest was made under a warrant is not proof that it was legal. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

Witness' conclusion is not proper proof that a given paper is a warrant. — The conclusion of a witness that a given paper is a warrant under which an arrest may legally be made is not proper proof that such a paper is in fact a warrant by virtue of which a legal arrest has been made, so as to authorize the admission of evidence obtained by

means of an arrest under such paper or alleged warrant. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

Defendants who are not convicted on charges under which they were placed in custody does not negate probable cause for that arrest. *United States v. Gidley*, 527 F.2d 1345 (5th Cir.), cert. denied, 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110 (1976).

Accused is entitled to assistance of counsel at all stages of the trial, including sentencing, and if counsel for accused is not present when the accused is sentenced to be executed, the constitutional right to the assistance of counsel at all stages of the proceedings is violated. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), aff'd, 131 F.2d 110 (5th Cir. 1942), cert. denied, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

Mere participation of special prosecutor is not sufficient grounds to show denial of due process, without some additional showing of a violation of the rules relating to prosecuting attorneys. There is no constitutional prohibition against the use of special prosecutors, and so long as the criminal district attorney retains control and management of the prosecution, the special prosecutor is not guilty of conduct prejudicial to the defendant, and the rights of the defendant are duly observed, no reason exists why such settled practice, in and of itself, should cause the reversal of a case. *Woods v. Linahan*, 648 F.2d 973 (5th Cir. 1981).

Knowing prosecutorial use of false evidence or perjured testimony violates due process. — The knowing use by the prosecution of false evidence or perjured testimony which is material to the issues in a criminal trial is a denial of due process. A conviction obtained by the use of such evidence cannot be permitted to stand. The same rule applies if the prosecution, although not actively soliciting false evidence, passively, but knowingly, allows it to go uncorrected or allows it to be presented with a materially false impression. The same result may obtain even though the false nature of the evidence concerns only the credibility of an important witness, rather than the ultimate issue of guilt or innocence. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Conviction of a crime following a trial in which perjured testimony on a material

point is knowingly used by the prosecution is an infringement on the accused's fifth and fourteenth amendment rights to due process of law. *Kitchens v. State*, 160 Ga. App. 492, 287 S.E.2d 316 (1981).

It is sufficient to show that police officers acting in behalf of the state in connection with the prosecution had knowledge of the perjured character of the testimony given by a witness for the state. *Kitchens v. State*, 160 Ga. App. 492, 287 S.E.2d 316 (1981).

Admission of co-conspirator's prior statement proper. — Defendant was not denied due process when the trial court admitted hearsay testimony of a detective regarding statements made by a co-conspirator after co-conspirator denied remembering the crime or giving the police any information; the testimony was admissible as substance evidence under the prior inconsistent statement exception to the hearsay rule. *Robinson v. State*, 278 Ga. 31, 597 S.E.2d 386 (2004).

Perjured testimony disclosed at trial. — Conviction did not need to be reversed for use of perjured testimony as inconsistencies and discrepancies were disclosed at trial and available as a basis for attacking the credibility of the state's witnesses. *Cammon v. State*, 269 Ga. 470, 500 S.E.2d 329 (1998).

Prosecutorial use of false or perjured testimony which prosecution neither knows nor believes to be such. — Due process is not implicated by the prosecution's introduction or allowance of false or perjured testimony, unless the prosecution actually knows or believes the testimony to be false or perjured. It is not enough that the testimony is challenged by another witness or is inconsistent with prior statements. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Where the prosecutor knows that false or perjured testimony will be elicited on cross-examination of a government witness, and also knows that the assertion of a privilege during the defendant's case will prevent the defense from challenging the testimony, the prosecutor's failure to notify the defendant of the anticipated claim of privilege in advance of the defendant's attempt to elicit the false or perjured responses may constitute passive but knowing action which allows false or perjured testimony to be presented with a materially false impression. If so, the government will be treated as if it intro-

duced the false or perjured testimony itself, and the defendant's right to due process of law will likely be implicated. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Prosecutorial vindictiveness. — Where permitting reindictment of a defendant would chill the defendant's exercise of procedural rights to a greater extent than forbidding reindictment would infringe upon the prosecutor's exercise of independent discretion, the reasonable apprehension of vindictiveness, without a showing of actual retaliatory motive, is sufficient to establish a due process violation. *United States v. Spence*, 719 F.2d 358 (11th Cir. 1983).

The government's decision to indict a defendant on additional charges, following the reversal of a lesser charge on appeal, was free of vindictiveness, under the following circumstances: (1) the initial indictment was based on the defendant's agreement to plead guilty to a single count carrying a possible 15-year sentence; (2) that indictment was not superseded by a larger indictment, following the defendant's refusal to plead guilty, due to an agreement to allow the defendant to litigate the validity of the search leading to the indictment and to preserve that issue for appeal; and (3) the government's motive in reindicting the defendant was not to punish the defendant for the defendant's successful appeal, but to make sure the defendant received a sentence commensurate with the defendant's criminal activity. *United States v. Taylor*, 749 F.2d 1511 (11th Cir. 1985).

Fingerprint evidence alone, under proper circumstances, can be sufficient to sustain a conviction for an offense like burglary against a constitutional attack on the sufficiency of evidence. *Duncan v. Stynchcombe*, 704 F.2d 1213 (11th Cir. 1983).

Evidence outside record on appeal. — Although appellate court considered evidence outside the record in affirming murder conviction, there was no prejudice to defendant, as on appeal from habeas proceeding, court could disregard such evidence and re-review record to determine if jury was authorized to find that state had met its burden, and defendant could re-argue sufficiency of the evidence. *Zant v. Nelson*, 250 Ga. 152, 296 S.E.2d 590 (1982), cert. denied, 460 U.S. 1056, 103 S. Ct. 1507, 75 L. Ed. 2d 936 (1983).

Due Process (Cont'd)**4. Criminal Trials (Cont'd)**

Evidence of another criminal act is admissible to show motive, intent, plan, identity, bent of mind and course of conduct. — where the state shows that the accused was the perpetrator of the other criminal act and that there is a sufficient similarity between the other criminal act and the crime charged. *Dudley v. State*, 179 Ga. App. 252, 345 S.E.2d 888 (1986).

Evidence of unreported similar crimes admissible. — The trial court did not err in allowing in evidence the testimony of the defendant's former spouse as to the defendant's alleged assaults upon the spouse, even though the spouse never reported these crimes to the police, because the evidence of these independent crimes was sufficiently similar to the crimes charged as well as relevant to the issues at trial to warrant its admission. *Lewis v. State*, 179 Ga. App. 121, 346 S.E.2d 70 (1986).

Evidence of crimes for which defendant acquitted. — The trial court committed harmless error in admitting the testimony of a witness who swore that appellant had kidnapped, raped, and sodomized the witness some ten days prior to the crimes in the case at bar, though defendant had been tried and acquitted of these earlier crimes because there was properly admitted evidence of independent offenses in addition to evidence of the erroneously admitted acquittal. *Lewis v. State*, 179 Ga. App. 121, 346 S.E.2d 70 (1986).

Testimony by the victim that the victim waited until the victim heard that the defendant was in jail before reporting the crimes to the police, testimony was properly admitted as explaining the victim's conduct in waiting several days before reporting the crimes, notwithstanding any potential prejudice to the defendant. *Lewis v. State*, 179 Ga. App. 121, 346 S.E.2d 70 (1986).

Erroneous admission of a statement obtained in violation of the *Miranda* rule was harmless error, where there were no coercive police tactics inherently offensive to due process and no reasonable chance that the error contributed to the verdict. *Metheny v. State*, 197 Ga. App. 882, 400 S.E.2d 25 (1990).

Exclusion of confession. — Although not every denial of a motion for continuance to

obtain witnesses will violate an accused's right to compulsory process, and not every exclusion of hearsay testimony will violate an accused's right to due process, when there is a confession and the circumstances present a compelling case of the reliability and important relevance of the excluded testimony, the trial of such a case without the confession being made known to the jury fails to provide due process of the law. *Wilkerson v. Turner*, 693 F.2d 121 (11th Cir. 1982).

Admission of breath test results. — Trial court properly denied the defendant's amended motion for a new trial, holding that the administration of breath tests pursuant to Ga. Comp. R. & Regs. 92-3-.06(12)(b) did not violate the due process clause under both U.S. Const., amend. 5 or Ga. Const. 1983, Art. I, Sec. I, Para. I, given that: (1) said claim was raised for the first time at the same time as the new trial motion, and was thus untimely; (2) the defendant had an alternative remedy under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1; (3) the defendant failed to show that the Division of Forensic Sciences (DFS) eliminated meaningful procedures for conducting breath tests when it promulgated the rule; and (4) the techniques and methods approved by DFS were sufficient to ensure fair and accurate testing. *Palmaka v. State*, 280 Ga. App. 761, 634 S.E.2d 883 (2006).

Retaliatory prosecutorial increase in charges. — Once a prosecutor exercises the discretion to bring certain charges against a defendant, neither the prosecutor nor a successor may, without explanation, increase the number of or severity of those charges in circumstances that suggest that the increase is retaliation for the defendant's assertion of a statutory or constitutional rights. *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).

Reindictment of a defendant violates due process whenever a prosecutor adds new charges merely to retaliate against the defendant for exercising statutory or constitutional rights. *United States v. Spence*, 719 F.2d 358 (11th Cir. 1983).

Sentencing structure constitutional. — Statute outlining a sentencing structure that punished individuals convicted of possessing marijuana plants in proportion to the num-

ber of plants seized, regardless of the actual weight of marijuana obtainable from those plants, was constitutional. *United States v. Osburn*, 955 F.2d 1500 (11th Cir.), cert. denied, 506 U.S. 878, 113 S. Ct. 223, 121 L. Ed. 2d 160, 506 U.S. 901, 113 S. Ct. 290, 121 L. Ed. 2d 215 (1992).

Imposition by jury of higher sentence upon reconviction. — When a jury imposes a higher sentence on reconviction this is not a violation of due process so long as the jury is not informed of the prior sentence. *Shields v. State*, 147 Ga. App. 96, 248 S.E.2d 171 (1978).

Sanctions in a disbarment proceeding are not criminal in nature. *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed. 2d 71 (1970).

Proof requirements in proceedings of State Bar of Georgia. — The requirement of proof beyond a reasonable doubt by former Rule 4-215(f) (Rule 4-221(e)) of the State Bar of Georgia does not convert the disciplinary proceeding into a criminal one. The exclusion of reasonable doubt means no more than that the jury or trier of fact must be clearly satisfied. *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed. 2d 71 (1970).

Proof of venue is an essential element in proving guilt in a criminal case. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Venue in conspiracy prosecutions. — Venue in a conspiracy prosecution is properly laid either in the jurisdiction where the conspiracy was formed or in any jurisdiction wherein a conspirator committed an overt act in furtherance of the conspiracy. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Where overt acts are alleged to have been committed in more than one jurisdiction, it is essential in a conspiracy prosecution that the jury be properly instructed as to venue. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

No presumption of innocence at sentencing phase of trial. — If a defendant testifies during the sentencing phase of the trial, and when cross-examined about the defendant's participation in the crimes charged, the defendant elects to stand on the defendant's

right against self-incrimination, the defendant, having already been convicted of crimes, has no presumption of innocence. The defendant stands before the sentencing jury as a convicted criminal. *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981).

Federal sentencing guidelines constitutional. — The career offender scheme of using a defendant's criminal record in considering both the defendant's offense level and the defendant's criminal history under the federal sentencing guidelines does not violate due process or equal protection. *United States v. Johns*, 984 F.2d 1162 (11th Cir. 1993).

Sentencing compliant with Sentencing Guidelines. — A defendant's due process rights are violated only when a judge-decided fact actually increases a defendant's sentence beyond the prescribed statutory maximum penalty for the convicted crime and has no application to, or effect on, cases where a defendant's sentence falls at or below that maximum penalty; thus, there can be no due process violation in connection with either mandatory minimum sentences or Sentencing Guidelines calculations, when in either case the ultimate sentence imposed does not exceed the prescribed statutory maximum penalty. *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001), cert. denied, 535 U.S. 942, 122 S. Ct. 1327, 152 L. Ed. 2d 234 (2002).

Validity of presumptions in prosecutions under former Code 1933, § 26-1808.1 (see O.C.G.A. § 16-8-15). — Whether presumption of former Code 1933, § 26-1808.1 (see O.C.G.A. § 16-8-15), dealing with conversion of certain payments, that failure to pay for material or labor is prima facie evidence of intent to defraud is constitutionally invalid, depends upon whether the jury in a particular case, after instructions, interprets presumption as burden-shifting or conclusive rather than permissive only. *State v. Hudson*, 247 Ga. 36, 273 S.E.2d 616 (1981).

Burden of proving entrapment. — In a prosecution for conspiracy to possess with intent to distribute cocaine, the defendant was not entitled to have the jury instructed as to the defense of entrapment where the defendant failed to meet the burden of producing evidence to establish government

Due Process (Cont'd)**4. Criminal Trials** (Cont'd)

misconduct. *United States v. Lockett*, 867 F. Supp. 1044 (M.D. Ga. 1994), *aff'd*, 70 F.3d 126 (11th Cir. 1995).

Jury charge as to standard of proof for alibi defense. — The remote possibility that an alibi charge stating that the defendant must establish the defendant's alibi to the reasonable satisfaction of the jury may have affected the integrity of the fact-finding process in the trials in which it was given is outweighed by considerations of reliance upon prior law and of the potential impact upon the administration of justice. Accordingly, the rule will be applied only to trials conducted after December 16, 1968, the date on which *Johnson v. Bennett*, 393 U.S. 253, 89 S. Ct. 436, 21 L. Ed. 2d 415 (1968) and *Bennett v. Stump*, 393 U.S. 1001, 89 S. Ct. 483, 21 L. Ed. 2d 466 (1968) were decided. *Bassett v. Smith*, 464 F.2d 347 (5th Cir. 1972), *cert. denied*, 410 U.S. 991, 93 S. Ct. 1509, 36 L. Ed. 2d 190 (1973).

A charge to the jury requiring that a defendant presenting alibi evidence must establish the defendant's alibi to the reasonable satisfaction of the jury, violates due process because such a highly ambiguous and contradictory charge might lead the jury to an erroneous belief that it is free to apply a lesser standard of proof to an essential element of the crime, that is, the defendant's presence. *Bassett v. Smith*, 464 F.2d 347 (5th Cir. 1972), *cert. denied*, 410 U.S. 991, 93 S. Ct. 1509, 36 L. Ed. 2d 190 (1973).

Instructions as to mitigating circumstances need not necessarily accompany those for aggravating circumstances. — The portion of former Code 1933, § 27-2534.1 (see O.C.G.A. § 17-10-30) that requires the trial court to give in writing to the jury the statutory instructions as to mitigating or aggravating circumstances does not violate due process and equal protection under U.S. Const., amend. 5 or U.S. Const., amend. 14, and without a concurrent right to send written instructions to the jury as to mitigating circumstances, the aggravating circumstances are not prejudicially emphasized, because the written material furnished to the jury is purely of a procedural nature and amounts to nothing more than a written formulation of the jury's potential verdicts.

Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), *cert. denied*, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

Instruction as to burden of proof on issue of insanity. — Where the court's charge includes instruction as to insanity but places the burden of proof as to each essential element of the crime, including intent, upon the state beyond a reasonable doubt, it is not a denial to the defendant of due process of law for the court not to instruct the jury specifically, absent a request, as to any burden of proof regarding sanity. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), sentence vacated, 243 Ga. 244, 253 S.E.2d 707 (1979).

Curative instruction to jury to disregard testimony. — Because the trial judge, after the witness relied upon U.S. Const., amend. 5 when counsel for the defendant began to cross-examine the witness, instructed the jury that the witness' evidence was not admissible and that "you should not let what this witness has said up to this point have any bearing on the verdict you make in this case," there was no error harmful to the defendant. Especially is this true since counsel made no motion for mistrial or request for additional instructions to the jury. *Smith v. State*, 120 Ga. App. 613, 171 S.E.2d 755 (1969).

5. Jury Selection

Due process governs jury composition, even where not constitutionally compelled. — If a state chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Duties of jury selection officials. — There is an affirmative duty imposed by the Constitution upon the jury selection officials, the jury commissioner, and clerk of court, to know the availability of potentially qualified persons within significant elements of the community, including those which have been the object of state discrimination, to

develop and use a system that will result in a fair cross section of qualified persons in the community being placed on the jury rolls, and to follow a procedure which will not operate to discriminate in the selection of jurors on racial grounds. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Protection from jurors incapable of rendering impartial verdict. — The due process clause of U.S. Const., amend. 5 protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Juries must be drawn from a fair cross section of the community. — It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Pursuit of juror competency must not prevent fair cross section. — In compiling jury lists, both the need for competency and for a fair cross section of the community are important elements but the desire for competency must not be pursued to the extent that it prevents a fair cross section and any attempt to gain competent jurors that would result in a less representative cross section than one drawn from the statutorily qualified pool would destroy the right to serve on juries. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Jury lists need not exactly reflect racial make-up of population. — The Constitution does not require an exact proportion between the percentage of blacks in the population and those on jury lists. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Constitution does not require that any particular panel of jurors in a criminal trial include members of the defendant's race. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Decided, unexplained, long-term variations are sufficient proof of systematic exclusion. — Very decided variations in proportions of blacks and whites on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnish sufficient evidence of systematic exclusion from jury service. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Exclusion of blacks injures potential jurors as well as defendants. — The exclusion of blacks from jury service injures not only defendants, but also other members of the excluded class. It denies the class of potential jurors the privilege of participating equally in the administration of justice, and it stigmatizes the whole class, even those who do not wish to participate. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Effect of systematic exclusion from jury venire of members of defendant's race. — A conviction of a black person cannot stand if the petit jury is drawn from a jury venire that systematically and arbitrarily excludes blacks, for such constitutes a denial of due process and equal protection of the laws. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Exclusion of persons not of defendant's race. — If blacks are systematically excluded from a white defendant's grand and petit juries, then the defendant is indicted and convicted by tribunals that fail to satisfy the elementary requirements of due process, and neither the indictment nor the conviction can stand. *Ferguson v. Dutton*, 477 F.2d 121 (5th Cir. 1973).

Exclusion of discernible classes from jury service. — The exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Exclusion of occupational categories. — A state may exclude certain occupational categories from jury service on the bona fide ground that it is for the good of the community that their regular work should not be interrupted. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Lowering of minimum jury service age to 18 not constitutionally required. — A jury list which excludes all people 18 to 21 years of age does not deny the defendant the right to a public trial and due process of law, despite the lowering of the minimum age for federal jurors to 18 by 28 U.S.C. § 1865. *United States v. Dukes*, 479 F.2d 324 (5th Cir. 1973).

Defendant's standing to attack jury selection system. — Whatever the criminal defen-

Due Process (Cont'd)**5. Jury Selection** (Cont'd)

dant's race, the defendant has standing to challenge the system used to select the grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies the defendant due process of law. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Burden of proof in attack on jury selection procedure. — The burden of proof is on the person attacking a jury selection procedure to show the existence of purposeful discrimination. Purposeful discrimination may not be assumed or merely asserted, it must be proven. *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

Replacing one juror with an alternate juror after out-of-court contact between the juror and defense counsel did not violate a murder defendant's constitutional rights to due process and trial by an impartial jury, where the trial court had a sound basis for exercising its discretion to discharge the juror. *Miller v. State*, 261 Ga. 679, 410 S.E.2d 101 (1991).

Discriminatory intent not shown. — Trial court did not err when it did not uphold defendant's challenge to the state's exercise of its peremptory strikes to remove two African-American individuals from the venire; not only was defendant's challenge untimely because it was made after the jury was selected and sworn, but, also, defendant did not carry defendant's burden of showing the state's exercise of its peremptory strikes was motivated by discriminatory intent. *Oliver v. State*, 276 Ga. 665, 581 S.E.2d 538 (2003).

In a Batson challenge, the trial court found that defendant made a prima facie showing of racial discrimination and proceeded to an evaluation of the state's explanations for its strikes against two African-American members of the jury venire, but the state's explanations that: (1) it struck the first prospective juror because that juror's answers did not relate to the questions asked of the juror and were not well articulated, leading the prosecutor to suspect that the juror possessed limited intelligence; and (2) it struck the second juror because the second juror's perceptions of an incident at a water fountain with another

juror and the second juror's decision to report it indicated undue attention to issues of race, and that it would have struck any potential juror who reported such an incident, regardless of that juror's race were race neutral and did not show any discriminatory intent. *Roberts v. State*, 278 Ga. 541, 604 S.E.2d 500 (2004).

Trial court was not clearly erroneous in finding that the state gave race-neutral reasons for its peremptory strikes of African-American jurors and that those reasons were not a pretext for purposeful discrimination; thus, defendant's Batson claim failed. *Wicks v. State*, 278 Ga. 550, 604 S.E.2d 768 (2004).

6. Assistance of Counsel

What due process requires as to representation by counsel. — If, as in this state, the law requires the appointment of counsel for indigent persons, and certainly in a capital case, if the defendant is unable to engage a lawyer and is incapacitated by ignorance, illiteracy, physical disability, or the like, to adequately make the defendant's own defense, due process of law requires that the court assign counsel for the defendant, competent to serve, and who shall give more than casual or perfunctory service to the prisoner. Lip service only will not do. And the constitution also requires that a fair opportunity shall be afforded such counsel to consult the client and to prepare a defense against the charge. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), aff'd, 131 F.2d 110 (5th Cir. 1942), cert. denied, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

Comparison of right under fifth and sixth amendments. — The events triggering the attachment of a right to counsel under the fifth amendment differ from those which trigger the attachment under the sixth amendment, but once attached, either right may be waived in an essentially identical manner and subject to the same limitations. *Housel v. State*, 257 Ga. 115, 355 S.E.2d 651 (1987), cert. denied, 487 U.S. 1240, 108 S. Ct. 2915, 101 L. Ed. 2d 946 (1988).

Four-month delay in appointment of counsel is not, ipso facto, a denial of effective assistance of counsel, if the appellant is appointed counsel at arraignment, and granted a continuance to allow adequate

preparation time. *Wells v. State*, 151 Ga. App. 416, 260 S.E.2d 374 (1979), overruled on other grounds, *Copeland v. State*, 160 Ga. App. 786, 287 S.E.2d 120 (1982).

If person is in no way compelled to forego right to counsel, no constitutional right is violated. — If the petitioner is not forced to go to trial without counsel; and does not ask for counsel; and is not denied the opportunity to procure counsel; and nothing done by the trial court forbids the petitioner's securing counsel or obtaining the benefit thereof, there is no denial, or even an abridgment, of any right secured to the petitioner by the federal or state Constitutions. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

An application for appointment of counsel prior to the initiation of an adversarial judicial proceeding against defendant did not constitute the invocation of the right to counsel for fifth amendment purposes. *Turner v. State*, 267 Ga. 149, 476 S.E.2d 252 (1996).

The mere completion of an application to obtain appointed counsel, without more, is not sufficient to invoke the fifth amendment right to counsel. *Beck v. State*, 235 Ga. App. 707, 510 S.E.2d 368 (1999).

Ineffective assistance not shown. — Because the evidence showed that the defendant's counsel discussed with the defendant the right to testify and advised against it, and the defendant never affirmatively asked to testify, the defendant failed to demonstrate that counsel erroneously deprived the defendant of the choice to testify and that counsel's deficiency in this regard deprived the defendant of a fair trial. *Mobley v. State*, 264 Ga. 854, 452 S.E.2d 500 (1995); *Barron v. State*, 264 Ga. 865, 452 S.E.2d 504 (1995).

Improper denial of the right to counsel of choice violates Ga. Const. 1976, Art. I, Sec. I, Para. XI, (see Ga. Const. 1983, Art. I, Sec. I, Para. XIV), and former Code 1933, § 27-403 (see O.C.G.A. § 17-7-24), and abrogates the right of procedural due process. *Johnson v. State*, 139 Ga. App. 829, 229 S.E.2d 772 (1976).

Accused has right to retain counsel, regardless of offense. — Without regard to the grade or seriousness of crimes, U.S. Const., amend. 5 requires, if a person accused of crime procures counsel, that the court shall permit such counsel to represent

and assist the accused, but it does not require the court to furnish counsel. It is implied that reasonable opportunity shall be afforded to obtain counsel. *Sanford v. Robbins*, 115 F.2d 435 (5th Cir. 1940), cert. denied, 312 U.S. 697, 61 S. Ct. 737, 85 L. Ed. 1132 (1941).

Constitutional guarantees of counsel of choice may be waived by action or declaration. *Johnson v. State*, 139 Ga. App. 829, 229 S.E.2d 772 (1976).

An accused who expresses a desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. *Barksdale v. State*, 161 Ga. App. 155, 291 S.E.2d 18 (1982).

Improper interrogation. — Law enforcement authorities violated the defendant's right to counsel when they interrogated the defendant knowing that the defendant had previously requested and consulted with an attorney. *Gissendan v. State*, 269 Ga. 495, 500 S.E.2d 577 (1998).

Waiver. — If the defendant has announced only the intention to retain the services of an attorney to represent the defendant at a committal hearing, the accused has not sufficiently expressed "his desire to deal with the police only through counsel" so as to successfully invoke the defendant's rights to counsel and not to be subject to further interrogation by authorities which are provided by *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). *Ross v. State*, 254 Ga. 22, 326 S.E.2d 194, cert. denied, 472 U.S. 1022, 105 S. Ct. 3490, 87 L. Ed. 2d 623 (1985).

When an accused has invoked the right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that the defendant responded to further police-initiated custodial interrogation even if the defendant has been advised of the defendant's rights. *Barksdale v. State*, 161 Ga. App. 155, 291 S.E.2d 18 (1982).

No invocation of right to lawyer. — Neither the defendant's refusal to sign a waiver nor the defendant's attempt to make a "deal" with the defendant's interrogator was an invocation of the defendant's right to a

Due Process (Cont'd)**6. Assistance of Counsel** (Cont'd)

lawyer so that the interview with the defendant should not have taken place. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Because the defendant did not request the presence of an attorney at any time, merely inquired about when in the future the defendant could see a lawyer, and initialed and signed the waiver form that the defendant understood the defendant's rights, the fifth amendment right to counsel was not invoked. *Beck v. State*, 235 Ga. App. 707, 510 S.E.2d 368 (1999).

Effect of execution of eligibility form for court appointed counsel. — Defendant's execution of an "eligibility affidavit form," essentially a financial statement made for the purpose of informing the county indigent defense program of an accused's financial condition, constituted a request for court-appointed counsel once judicial proceedings were initiated and did not constitute an invocation of the right to counsel for fifth amendment purposes; thus, a statement given to police while in custody was not taken in violation of the defendant's constitutional rights because at the time the defendant completed the form, no adversarial criminal proceeding had been initiated against the defendant and no sixth amendment concerns had come into play; reversing *Hatcher v. State*, 212 Ga. App. 46, 441 S.E.2d 672. *State v. Hatcher*, 264 Ga. 556, 448 S.E.2d 698 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 291 (1995).

Determination as to whether waiver intelligent. — The determination as to an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case. *Johnson v. State*, 139 Ga. App. 829, 229 S.E.2d 772 (1976).

Obligation not to reject "the cause of the defenseless". — Lawyers undertake certain professional obligations over and above those demanded of some of the other professions, among them being never to reject, for a consideration personal to themselves, the cause of the defenseless. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d

143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Judge's request that an attorney represent an indigent criminal is tantamount to a demand with which the attorney must necessarily comply. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Compensation for services not constitutionally required. — An attorney's professional services, work product, and necessary out-of-pocket expenses in providing competent representation are not required by the Constitution to be compensated. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Court's failure to make effective appointment violates due process. — The necessity of counsel is so vital and imperative that the failure of the trial court to make an effective appointment of counsel is likewise a denial of due process within the meaning of U.S. Const., amends. 5 and 14. *Bridwell v. Aderhold*, 13 F. Supp. 253 (N.D. Ga. 1935), aff'd sub nom. *Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937), rev'd on other grounds, *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 ALR 357 (1938), overruled on other grounds, *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

Counsel has broad discretion in conduct of trial. — In the conduct of a trial, broad latitude of advice, direction, and policy in the interest of the client is essentially vested in counsel. Counsel often waive apparently important points in the bona fide belief that, on the whole, greater advantage will be gained indirectly than might have been gained directly by insisting on them, and such a waiver either express or implied would ordinarily not tend to show incompetency. No lawyer is infallible, and the constitutional guaranties of the benefit of counsel, and of due process, do not contemplate such infallibility. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Due process violated by deficient performance of counsel. — The due process clause of U.S. Const., amend. 5 is violated whenever the performance of counsel, whether retained or appointed, is so deficient as to render the proceedings fundamentally un-

fair. *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978).

Defendant's due process rights were violated where throughout the state and federal habeas proceedings the defendant was induced to plead guilty by the defendant's counsel's erroneous advice that the plea bargain would enable the defendant to serve the federal and state sentences concurrently. Thus, the attorney provided ineffective assistance to the defendant as the guilty plea was not knowing, intelligent and voluntary. *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995).

Counsel's errors not necessarily a denial of due process. — That attorneys do not move for a continuance and obtain a longer time to prepare the case, because they allow irrelevant or otherwise illegal evidence to be admitted without objection, that they rely solely on the statement of the defendant to the jury without introducing testimony, and that they themselves do not actively pursue a motion for new trial are not matters which would constitute a denial of the right to due process, but at most would amount to alleged negligence or errors of judgment. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Counsel's conflict of interest violates right to counsel, even absent showing of prejudice. — An accused, whether represented by appointed or retained counsel, is deprived of the right to effective assistance of counsel under U.S. Const., amend. 5 and U.S. Const., amend. 6, even in the absence of a showing of prejudice, when the accused's attorney operates under an actual conflict of interest. *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978).

Absence of counsel during subsequent jury poll. — Where defense counsel is present at the first poll of the jury and fails to apprise the court of any defect in the polling procedure, absence of defense counsel at the post-sentence poll, held after realization that two jurors had inadvertently not been polled, of two jurors inadvertently omitted in original poll is not violative of any appellant's constitutional rights to counsel or due process. *Hargett v. State*, 151 Ga. App. 532, 260 S.E.2d 406 (1979).

Defendant not denied assistance of counsel where co-counsel present and defendant

uninjured. — If none of the statutory requirements necessary for the granting of a continuance are put forth by co-counsel when the case is called, and there is no showing that the defendant was injured by the absence of the defendant's lead counsel, there is no merit in the complaint that the trial court erred in denying the defendant's motion for continuance because of the absence of counsel and that the defendant has been denied the sixth amendment right to counsel and the fifth amendment right to due process as guaranteed by the state and federal constitutions. *Blair v. State*, 166 Ga. App. 434, 304 S.E.2d 535 (1983).

Where a preliminary hearing is held in the absence of defendant's counsel, the reviewing court must reverse if it determines that the lack of counsel might have contributed to the conviction. *Mitchell v. State*, 173 Ga. App. 560, 327 S.E.2d 537 (1985).

Waiver of right to counsel at plea hearing. — A judge must be present before a defendant may waive the constitutional right to be represented by counsel at a plea hearing. *Penney v. Vaughn*, 870 F. Supp. 1093 (M.D. Ga. 1994).

Abandonment of appeal without notice and without defendant's consent. — Counsel's abandonment of a criminal appeal, without notice and without the defendant's consent, deprives the defendant of right to counsel and right to appeal. *Chapman v. United States*, 469 F.2d 634 (5th Cir. 1972).

Notice of right to rehearing under former Rule 33 (Rule 48) of Georgia Court of Appeals. — Even if appointed counsel is not required to file a petition for rehearing under former Rule 33 (now Rule 48) of the Georgia Court of Appeals, a defendant is denied due process if that court fails to notify the defendant adequately of the right to file the petition pro se. *Moye v. Highsmith*, 460 F.2d 1388 (5th Cir. 1972), superseded, overruled on other grounds, *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978).

7. Discovery, Compulsory Process, and Suppression of Evidence

Criminal Procedure Discovery Act constitutional. — Because the Criminal Procedure Discovery Act (O.C.G.A. § 17-16-1 et seq.) provides for reciprocal discovery in criminal felony cases with any imbalance favoring the

Due Process (Cont'd)**7. Discovery, Compulsory Process, and Suppression of Evidence** (Cont'd)

defendant, it does not violate the due process clause of the United States or Georgia Constitutions. *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999).

Withholding or suppression by the prosecution of evidence material to guilt or punishment is violative of due process. *United States v. D'Antignac*, 628 F.2d 428 (5th Cir. 1980), cert. denied, *D'Antignac v. United States*, 450 U.S. 967, 101 S. Ct. 1485, 67 L. Ed. 2d 617 (1981).

Presence of defendant's material witnesses may be required. — Right of the criminal defendant to compulsory process under U.S. Const., amend. 6 and the right to due process under U.S. Const., amend. 5 are sufficiently pervasive to require the presence of material witnesses in defendant's behalf. *Wingfield v. State*, 159 Ga. App. 69, 282 S.E.2d 713 (1981).

Omitted evidence must create a reasonable doubt of guilt that did not otherwise exist in order to justify a new trial. *United States v. D'Antignac*, 628 F.2d 428 (5th Cir. 1980), cert. denied, *D'Antignac v. United States*, 450 U.S. 967, 101 S. Ct. 1485, 67 L. Ed. 2d 617 (1981).

No statutory authority for discovery in criminal cases exists in this state. *Brooks v. State*, 141 Ga. App. 725, 234 S.E.2d 541 (1977).

Due process requires that the state not suppress evidence in its files that may be favorable to the accused. *Brooks v. State*, 141 Ga. App. 725, 234 S.E.2d 541 (1977).

Defendant has no pretrial discovery rights in state prosecution. — A defendant does not, as a matter of right, have the right to discover evidence, from a district attorney or other prosecuting officer of the state, documentary or otherwise, for use by the defendant or defense counsel before trial. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Prosecution need not actively seek material not within its file. — There is no provision of Georgia law providing for discovery in criminal cases, and the due process requirements stated in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny do not compel the

prosecution to actively seek material which is not within its file in order to provide such to the defense. *Honrine v. State*, 177 Ga. App. 490, 339 S.E.2d 768 (1986).

State is under no requirement to conduct investigation on behalf of a defendant. *Dalton v. State*, 251 Ga. 641, 308 S.E.2d 835 (1983).

Exculpatory evidence delayed. — Defendant's fifth amendment rights were not violated when the defendant did not receive a copy of an exculpatory witness' statement until after indictment and following the defendant's second attorney's discovery motion. Defendant failed to prove how the outcome of the case would have been any different if defendant had been supplied the exculpatory statement at an earlier date. *Rock v. Lowe*, 893 F. Supp. 1573 (S.D. Ga. 1995), aff'd without op., 79 F.3d 1161 (11th Cir. 1996).

Evidence not destroyed but transferred. — Defendant's due process rights were not violated by the state's turning over of a vehicle to co-defendant's insurance company since the state did not destroy or fail to preserve the alleged exculpatory evidence. *King v. State*, 262 Ga. App. 37, 584 S.E.2d 652 (2003).

Defendant has burden of showing favorable information improperly withheld, denying defendant fair trial. — In a criminal case, in order to establish a due process violation based on denial of a *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) motion for discovery of exculpatory material, the defendant has the burden of showing that any of the information allegedly withheld improperly was favorable to the defense, and that the withholding in any way denied the defendant a fair trial. *Lewis v. State*, 166 Ga. App. 428, 304 S.E.2d 531 (1983).

If the police lose evidence, no statutory or constitutional violation occurs. A *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) violation occurs only when the state withholds exculpatory information in its possession from the defendant, and if the state does not withhold any information, but the police lose it, there is no error under O.C.G.A. § 17-7-211 (repealed), which entitles the defendant to copies of scientific reports possessed by the state. *Dawson v. State*, 166 Ga. App. 515, 304 S.E.2d 570 (1983).

Evidence favorable to accused. — The prosecution is required to turn over to the defense evidence which is favorable to the accused and material to guilt or punishment. *Stroud v. State*, 246 Ga. 717, 273 S.E.2d 155 (1980).

Due process considerations enter only if state purposefully suppresses evidence. — Due process considerations are not relevant to a discussion of a case where it had not been argued that the state purposefully suppressed evidence favorable to the accused. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Requested material favorable to accused. — Pretrial discovery in favor of defendants is not required by considerations of due process in the absence of a showing that the evidence denied disclosure of by the prosecution upon request was materially favorable to the accused either as direct or impeaching evidence. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Refusal to compel discovery not error where materials sought are not exculpatory. — Where none of the materials sought for inspection were exculpatory in nature, the trial court does not err in refusing to compel discovery pursuant to defendant's notices to produce any subpoenas. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Where defendant's conviction or acquittal is dependent upon the identification of the substance as contraband, due process of law requires that analysis of the substance not be left completely within the province of the state, but the defendant does not have an absolute, unqualified right to examine such evidence. *Emmett v. State*, 243 Ga. 550, 255 S.E.2d 23 (1979).

Nondisclosure of statements made under hypnosis not denial of due process where inadmissible. — The refusal to disclose to the defendant the statements made to a psychologist by a prosecution witness during hypnotic sessions did not deny the defendant due process of law nor effective assistance of counsel because such statements were inadmissible at trial. *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974).

Government's duty to disclose in federal cases. — The government in a federal prosecution has an affirmative duty under the due process clause of U.S. Const., amend. 5 to make available to an accused at the appro-

priate time, well in advance of trial, information which would be favorable to the accused as either direct or impeaching evidence. *United States v. Houston*, 339 F. Supp. 762 (N.D. Ga. 1972).

Suppression of evidence requested by accused. — The suppression by the prosecution of evidence favorable to an accused, who has requested such evidence, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 47 L. Ed. 2d 760, 96 S. Ct. 1505 (1976); *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978).

Exculpatory evidence includes evidence useful for impeachment. — Disclosure of material evidence favorable in the sense of mitigation or exculpation also requires the prosecution to disclose evidence important and useful for impeachment purposes. *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 47 L. Ed. 2d 760, 96 S. Ct. 1505 (1976).

Furnishing to defendant in federal case of list of persons with information about case. — The prosecution, in federal court, must disclose to an accused before trial, upon timely request, the names and addresses of persons known to the government who have information about the accused or about the facts of the case. *United States v. Houston*, 339 F. Supp. 762 (N.D. Ga. 1972).

Knowing prosecutorial use of false evidence or perjured testimony. — The knowing use by the prosecution of false evidence or perjured testimony which is material to the issues in a criminal trial is a denial of due process. A conviction obtained by use of such evidence cannot be permitted to stand. *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978).

Failure to disclose plea bargaining negotiations with key prosecution witness. — Failure of government to disclose to the defense and to the trial jury the existence of plea bargaining negotiations with a key witness deprives a defendant of due process of law under U.S. Const., amend. 5. *United States v. Fontenot*, 483 F.2d 315 (5th Cir. 1973).

Right to offer testimony and to compel witness' attendance is, in essence, the right to present a defense, and a fundamental

Due Process (Cont'd)**7. Discovery, Compulsory Process, and Suppression of Evidence (Cont'd)**

element of due process of law. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Grant of subpoena of witness on relevant issue is mandatory. — Once it is established that a defendant's subpoena of a witness is relevant on any issue, it should be granted as mandated by the due process clause of U.S. Const., amend. 5 and the compulsory process provision of U.S. Const., amend. 6. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Compulsory process applies to relevant and material witnesses, and nonfrivolous request should be granted. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Neither cumulativeness of testimony nor inconvenience grounds for denial of compulsory process. — The right of a defendant to have compulsory process may not be sidestepped merely because of inconvenience, or because the court considers the witness' testimony cumulative. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

For circumstances indicating relevancy of witness' testimony, thus entitling defendant to have them subpoenaed. — See *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Technical violations of procedure should not be allowed to emasculate the efficacy of constitutionally required compulsory process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Defense need not always comply with every technical procedural requirement before

being entitled to compulsory process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Generalized assertion of privilege yields to a demonstrated, specific need for evidence in a pending criminal trial. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Right to independent drug analysis. — A defendant in a drug prosecution has a due process right to have an expert of the defendant's choosing perform an independent analysis on the seized substance. *United States v. Nabors*, 707 F.2d 1294 (11th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S. Ct. 1271, 79 L. Ed. 2d 677 (1984); *United States v. Lockett*, 867 F. Supp. 1044 (M.D. Ga. 1994), aff'd, 70 F.3d 126 (11th Cir. 1995).

Effect of government's destruction of materials seized in drug case. — The mistaken destruction of material seized in a drug case, so that the defendant cannot examine it, does not per se require the exclusion of testimony as to the nature of the material by the government witness who tested it. *United States v. Nabors*, 707 F.2d 1294 (11th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S. Ct. 1271, 79 L. Ed. 2d 677 (1984); *United States v. Lockett*, 867 F. Supp. 1044 (M.D. Ga. 1994), aff'd, 70 F.3d 126 (11th Cir. 1995).

Without discounting the right of defendants in a drug prosecution to examine the material they are charged with possessing, the material has been destroyed in spite of the government's good faith attempt to preserve it, testimony as to the nature of the material need not be suppressed absent some showing that the testing of the material by another expert would have been reasonably likely to produce evidence favorable to the defendant. *United States v. Nabors*, 707 F.2d 1294 (11th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S. Ct. 1271, 79 L. Ed. 2d 677 (1984); *United States v. Lockett*, 867 F. Supp. 1044 (M.D. Ga. 1994), aff'd, 70 F.3d 126 (11th Cir. 1995).

Failure to hold in camera inspection not error where no request filed. — The trial court did not err in not requiring that the state present for inspection its entire file

following defendant's motion and in not conducting an in camera inspection of the state's file prior to trial, where defendant did not file a separate request for in camera inspection. *Swann v. State*, 256 Ga. 254, 347 S.E.2d 555 (1986).

Evidence of a tape recording in which the victim had called a telephone operator after an attack, and that the operator had in turn called the police was relevant to illustrate the time span between discovery of the crime and police arrival on the scene. This fact was material, because it bore on the issue of whether or not the perpetrator had an opportunity to leave the scene. *Catchings v. State*, 256 Ga. 241, 347 S.E.2d 572 (1986).

Defendant's due process rights are not violated when district judge refers motion to suppress to a magistrate, reviews the record of the hearing before the magistrate, and adopts the magistrate's recommendations. *United States v. Elsoffer*, 644 F.2d 357 (5th Cir. 1981).

Government may not invoke privilege as to anything material to defense. — Since the government which prosecutes an accused also has the duty to protect the defendant's constitutional rights, it may not undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to the accused's defense. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Limits on exercise of presidential privilege of confidentiality. — The assertion of presidential privilege must yield to the need for evidence in a pending criminal trial and the fundamental demands of due process of law in the fair administration of justice. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

There is no presidential privilege to withhold evidence that is demonstrably relevant in a criminal trial because of the guarantee of due process of law and the necessity to protect the basic function of the courts. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the right under U.S. Const., amend. 6, to compulsory process and the right under U.S. Const., amend. 5 to due process of law require the presidential privilege as to confidential communications to give way where the district court determines after in-camera inspection that the material is relevant and admissible in a criminal trial. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Limits on exercise of legislative privilege of confidentiality. — The legislative branch is not entitled to invoke the privilege of confidentiality at the expense of the individual accused's right to evidence at the accused's criminal trial. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

In-court identification. — Even assuming that the pre-trial identification procedures were improperly suggestive, a victim's and a witness's in-court identifications were admissible because they were based on their independent recollections of the incident since the victim testified in court that the victim was 100 percent certain the defendant was the robber and that the victim's identification of the defendant was based on recognizing the defendant from the incident and the witness testified that the witness was certain the defendant was the person running with the gun on the day of the incident. *Boatwright v. State*, 281 Ga. App. 560, 636 S.E.2d 719 (2006).

8. Appeals and Habeas Corpus

There is no constitutional right to an appeal. *Brown v. State*, 177 Ga. App. 146, 338 S.E.2d 718 (1985) (but see *Chapman v. United States*, 469 F.2d 634 (5th Cir. 1972)).

Impeachment evidence involving evidence from codefendant. — State death row inmate's federal habeas petition was denied because the prosecutor did not fail to disclose under Giglio that the prosecutor had promised a codefendant to write a favorable letter to the parole board as part of a plea agreement because the prosecutor did not decide to do so until after the codefendant testified. *Ford v. Schofield*, F. Supp. 2d , 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

Due Process (Cont'd)**8. Appeals and Habeas Corpus (Cont'd)**

Appeal from a district court's judgment of conviction in a criminal case is a matter of right, and abridgement of this right is incompatible with the most basic concept of due process. *Chapman v. United States*, 469 F.2d 634 (5th Cir. 1972).

Waiver of right to appeal criminal conviction not assumed unless the facts clearly support such an assumption. *Chapman v. United States*, 469 F.2d 634 (5th Cir. 1972).

Indigent may not be denied appellate review for want of transcript. — Equal protection and due process require that an indigent defendant, unable to pay the cost of recording and transcribing the proceedings, may not be denied adequate and effective appellate review accorded to all who have the money to pay these costs. Harm arises when, due to the absence of a transcript or an effective alternative, an enumeration of error raised by an indigent defendant cannot be adequately and effectively reviewed by the appellate courts. *Sales v. State*, 152 Ga. App. 635, 263 S.E.2d 519 (1979).

Availability and purchase of transcript for indigent. — The purchase of a complete court reporter's transcript for indigent defendants is not required in all instances, but the burden which rests upon the state is to afford the indigent defendant a record of sufficient completeness to permit proper consideration of the contentions of error. *Sales v. State*, 152 Ga. App. 635, 263 S.E.2d 519 (1979).

Delay in filing transcript. — Defendant was not deprived of defendant's due process rights by a seven-month delay in the filing of the transcript as defendant did not show that the delay impacted defendant's ability to adequately present defendant's appeal or impaired any defense that defendant might have had. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Standard for evaluation of evidence on appeal. — The standard by which the evidence in a state criminal trial must be evaluated on appeal to determine whether petitioner has been accorded constitutional due process has been formulated by the Supreme Court of the United States to require, instead of determining whether or not there is "any evidence" to support petitioner's

conviction, that a court on appeal must go further and satisfy itself that the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt. The question, therefore, is not a question of the presence of evidence in the record but of the sufficiency of that evidence. *Holloway v. McElroy*, 474 F. Supp. 1363 (M.D. Ga. 1979), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, *Baker v. Montgomery*, 811 F.2d 55 (11th Cir. 1987).

When federal review of jury charge appropriate. — Federal review of a jury charge is appropriate only where it operates in an oppressive and arbitrary manner so as to render the trial fundamentally unfair. *Bassett v. Smith*, 464 F.2d 347 (5th Cir. 1972), cert. denied, 410 U.S. 991, 93 S. Ct. 1509, 36 L. Ed. 2d 190 (1973).

Proof of jury prejudice. — General rule is that a defendant has the burden on appeal of proving actual jury prejudice if a conviction is to be reversed on grounds of prejudicial publicity. The requirement of showing actual prejudice may not be necessary in extreme circumstances where there has been inherently prejudicial publicity such as to make the possibility of prejudice highly likely or almost unavoidable. *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Detailed explanations of the consequences of failure to proceed with an administrative appeal are not required with regard to notice of the right to appeal after criminal convictions, nor after prison disciplinary proceedings. *Lane v. Hanberry*, 593 F.2d 648 (5th Cir. 1979).

Notice and hearing as to revocation of appeal bail bond. — Due process requirements of U.S. Const., amends. 5 and 14, mandate notice and an evidentiary hearing upon the trial court's decision to revoke an appeal bail bond. *Riggins v. State*, 134 Ga. App. 941, 216 S.E.2d 723 (1975).

Sole function of habeas corpus is to provide relief from unlawful imprisonment or custody, and it cannot be used for any other purpose. *Cook v. Hanberry*, 592 F.2d 248 (5th Cir.), supplementary opinion, 596 F.2d 658 (5th Cir.), cert. denied, 442 U.S. 932, 99 S. Ct. 2866, 61 L. Ed. 2d 301 (1979).

Habeas corpus not available to prisoners complaining only of mistreatment during their legal incarceration. — The relief from such unconstitutional practices, if proved, is in the form of equitably imposed restraint, not freedom from otherwise lawful incarceration. *Cook v. Hanberry*, 592 F.2d 248 (5th Cir.), supplementary opinion, 596 F.2d 658 (5th Cir.), cert. denied, 442 U.S. 932, 99 S. Ct. 2866, 61 L. Ed. 2d 301 (1979).

No right to habeas corpus for denial of jury trial, where jury not demanded. — A person in custody under a sentence in a misdemeanor case is not entitled to be discharged on writ of habeas corpus on the ground that the person was denied the right to be tried by a jury, merely because the trial judge determined the case without a jury. The act governing the procedure of the court in which the person was tried containing a provision that a jury trial be had when demanded by the accused, but no demand therefor having been made. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Reliance on record in habeas corpus proceeding. — A federal habeas court may rely on the record in the state court in lieu of an independent hearing if the state court proceedings were full and fair. *Farmer v. Caldwell*, 476 F.2d 22 (5th Cir.), cert. denied, 414 U.S. 868, 94 S. Ct. 178, 38 L. Ed. 2d 117 (1973).

Inference of deliberate by-pass of state remedies. — The dismissal of an appeal to the Georgia Supreme Court from the denial of a petition for habeas corpus for failure to comply with the Supreme Court's rules does not in and of itself support an inference of a deliberate by-pass of state remedies. *Johnson v. Smith*, 449 F.2d 127 (5th Cir. 1971).

Burden of proof as to by-pass of state remedies. — In a federal habeas corpus action the burden of establishing the absence of a deliberate by-pass of state remedies is on the prisoner. *Bonaparte v. Smith*, 448 F.2d 385 (5th Cir. 1971).

Denial of a motion of *autrefois acquit* is directly appealable, unless found to be frivolous. *Lewis v. State*, 179 Ga. App. 121, 346 S.E.2d 70 (1986).

A post-trial declaration by a state witness that the witness' former testimony was false is not cause for a new trial. *Pryor v. State*, 179 Ga. App. 293, 346 S.E.2d 104 (1986).

Trial court's amendment of a sentence to clarify that the sentence is to run consecu-

tively with a prior life sentence constitutes a denial of the defendant's double jeopardy rights, where O.C.G.A. § 17-10-10 provides that sentences are presumed to run concurrently with preexisting sentences and the defendant has already begun serving the latest sentence prior to the court's amendment of the sentence. *Schamber v. Newsome*, 696 F. Supp. 1506 (N.D. Ga. 1988).

9. Probation and Parole

Due process applies to revocations of probation, since revocation of probation results in loss of liberty. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), cert. denied, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Probationer is entitled to notice and hearing when petition filed to revoke probation. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), cert. denied, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Notice and hearing required before revocation or suspension of probation. — To deprive a defendant of liberty upon the theory that the defendant violated any of the rules and regulations prescribed in a suspended or probated sentence without giving the defendant notice and opportunity to be heard upon the question of whether or not the defendant violated such rules and regulations, would be to violate one of the fundamentals of jurisprudence that a person shall not be deprived of liberty without due process of law, which includes notice and opportunity to be heard. *Lester v. Foster*, 207 Ga. 596, 63 S.E.2d 402 (1951).

Notice and opportunity for hearing required before probation period extended. — District courts shall provide notice to probationers of proposed extensions and advise probationers that they have a right to a hearing before the court acts. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), cert. denied, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Notice of substantive aspects of sentencing laws not required. — The constitution does not require the sentencing court or the probation department to inform a defendant of the substantive aspects of the sentencing laws. *United States v. Simpson*, 904 F.2d 607 (11th Cir. 1990).

Defendant was not denied due process

Due Process (Cont'd)**9. Probation and Parole (Cont'd)**

under the fifth amendment when neither the district court nor the probation officer informed the defendant that sentence might be favorably adjusted under federal sentencing guidelines for the defendant's acceptance of responsibility. *United States v. Simpson*, 904 F.2d 607 (11th Cir. 1990).

Effect of grand jury findings on revocation of probation. — Even if grand jury entered a "No Bill" as to charge against a defendant of criminal damage to property in the second degree (the trial judge in the hearing as to the revocation of probation finding "criminal trespass"), there is no violation of the due process guarantee bestowed upon defendant by U.S. Const., amend. 5 or U.S. Const., amend. 14, or Ga. Const. 1976, Art. I, Sec. I, Para. I (see Ga. Const. 1983, Art. I, Sec. I, Para. I). *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Condition of probation which invades right to personal self-expression and which is not related directly to rehabilitation, cannot meet the test of reasonableness. *Inman v. State*, 124 Ga. App. 190, 183 S.E.2d 413 (1971).

Condition precluding contact between perpetrator of sexual crime and victim. — Imposition as a condition of probation that the defendant, who was convicted of aggravated child molestation, have no direct or indirect contact with the defendant's seven-year-old child until the child reaches the age of majority, was within the discretion of the court and was not a violation of the defendant's constitutional rights. *Tuttle v. State*, 215 Ga. App. 396, 450 S.E.2d 863 (1994).

Requiring the defendant to wear a short haircut as a condition of probation is violative of U.S. Const., amend. 5. *Inman v. State*, 124 Ga. App. 190, 183 S.E.2d 413 (1971).

Special parole term provision of the federal comprehensive Drug Abuse Prevention and Control Act does not violate the due process clause of U.S. Const., amend. 5. *United States v. Lockley*, 590 F. Supp. 1215 (N.D. Ga. 1984).

Requirement that a probationer submit to psychological stress evaluation examinations does not violate the probationer's fifth

amendment rights since the main function of such evaluation appears to be the added psychological factor that, if the probationer fails to tell the truth, the probationer will be detected. Such a function is permissible. *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982).

Denial or revocation of parole to detained aliens constitutes part of the admission process and, therefore, does not involve any constitutional rights. *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984).

Revocation of probation, premised upon failure to timely pay court-ordered restitution, does not violate due process and equal protection. *Wilson v. State*, 155 Ga. App. 825, 273 S.E.2d 210 (1980).

"Slight evidence" rule in probation revocation proceedings. — Where the defendant receives written notice of the claimed violation of probation, the disclosure of the evidence against the defendant, an opportunity to be heard in person and to present witnesses and document evidence, the right to confront and cross-examine adverse witnesses, heard by a neutral and detached judicial officer with a written statement by the fact-finder as to the evidence relied on and reasons for revoking probation, application of the "slight evidence" rule does not deny the defendant due process and equal protection. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Due process requires that an individual on parole be afforded a hearing before the parole is revoked. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), cert. denied, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Parole revocations do not require full panoply of defendant's rights. — Revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980); *Christian v. State*, 164 Ga. App. 612, 298 S.E.2d 325 (1982).

No violation for refusal of application, interview. — Defendant's due process rights were not violated by parole board's refusal to

consider the defendant's application or to grant a personal interview where such decisions were in accord with then-existing common law (pre-*Akins*) and parole regulations. *Lemley v. Bowers*, 813 F. Supp. 814 (N.D. Ga. 1992).

No liberty interest in parole. — The current Georgia parole system does not give rise to a liberty interest. Accordingly, there is no right to procedural due process. *Greene v. Georgia Pardons & Parole Bd.*, 807 F. Supp. 748 (N.D. Ga. 1992).

Prisoner is not entitled to statement of reasons for denial of parole under U.S. Const., amend. 5. *Mitchell v. Sigler*, 389 F. Supp. 1012 (N.D. Ga. 1975).

Refusal of parole board to allow inmate to examine the inmate's file does not assume the proportions of a deprivation of the inmate's rights under the Constitution or the laws of the United States. *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979).

Traffic violation not grounds for revocation without hearing. — Failure to hold a hearing prior to revocation of parole after forfeiture of bond arising from a traffic violation, which under former Code 1933, § 24-310a (see O.C.G.A. § 40-13-58) is construed as an admission of guilt, is a denial of due process of law, since under former Code 1933, § 24-312a (see O.C.G.A. § 40-13-60) traffic violations are not misdemeanors, and therefore do not fall within the exceptions under former Code 1933, § 77-591 (see O.C.G.A. § 42-9-51) to the requirement of a hearing before revocation. *Duncan v. Ricketts*, 232 Ga. 89, 205 S.E.2d 274 (1974).

When delay in obtaining parole revocation hearing merits release. — There must be a showing of both unreasonable delay and prejudice before a person is entitled to release from custody because of a delay in obtaining a final parole revocation hearing. *Beck v. Wilkes*, 589 F.2d 901 (5th Cir.), cert. denied, 444 U.S. 845, 100 S. Ct. 90, 62 L. Ed. 2d 58 (1979).

Proof beyond a reasonable doubt not required for parole revocation. — The benefit and protection afforded under the due process and equal protection clauses of the state and federal Constitutions are not in anywise violated by the fact that the establishment of a defendant's guilt beyond a reasonable doubt is not necessary to justify the revocation of a sentence of probation. *Mingo v.*

State, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

10. Prisoners

Prisoner who receives a harsher sentence than other prisoners of the class may be the subject of unconstitutional discrimination, but if the prisoner is treated as any other military prisoner who is confined in a federal prison, being subject to the advantages and disadvantages of the civilian prison, there is no violation of the due process clause of U.S. Const., amend. 5. *Bates v. Wilkinson*, 267 F.2d 779 (5th Cir. 1959).

Designation as a "special offender". — Where there appears to be a profound and adverse change in a prisoner's status, both with regard to the conditions of the prisoner's confinement and with regard to the prisoner's chances for parole, as a result of being designated a "special offender," a prisoner is entitled to the basic elements of rudimentary due process before being so designated. *Stassi v. Hogan*, 395 F. Supp. 141 (N.D. Ga. 1975), overruled on other grounds, *Mayo v. Sigler*, 428 F. Supp. 1343 (N.D. Ga. 1977).

Deliberate indifference to prisoner's health care needs. — Sheriff's knowledge of prisoner's need for medical care and the intentional refusal to provide that care constituted "deliberate indifference," and the sheriff lost the entitlement to qualified immunity to suit under 42 U.S.C. § 1983 for violating the prisoner's fifth, eighth and fourteenth amendment rights. *Harris v. Coweta County*, 21 F.3d 388 (11th Cir. 1994).

Advice of counsel during interrogation while incarcerated. — If a defendant has been confined in a cell for nearly three months and interrogation is directed at obtaining evidence to be used in prosecuting the defendant, this is a time when legal advice is critical to the defendant and there is, therefore, a duty of the interrogators to determine if the defendant has counsel and whether the defendant wants counsel present during the interrogation. Breach of this duty violates U.S. Const., amends. 5 and 6. *Clifton v. United States*, 341 F.2d 649 (5th Cir. 1965).

Regulations prohibiting inmate assistance in drafting pro se legal papers. — Prison regulation prohibiting inmate assistance in the drafting of pro se legal papers consti-

Due Process (Cont'd)
10. Prisoners (Cont'd)

tuted a deprivation of due process of law, where no reasonable alternative was available to furnish legal advice. *Williams v. United States Dep't of Justice*, 433 F.2d 958 (5th Cir. 1970).

Visitation privileges. — The language of prison visitation regulations did not create a protected liberty interest in visitation privileges under the fifth amendment right to due process. *Caraballo-Sandoval v. Honsted*, 35 F.3d 521 (11th Cir. 1994).

Denial of right to make outgoing telephone calls. — Due process is not denied if a defendant is prohibited from making outgoing telephone calls after conviction, if the defendant is granted the right to a hearing upon the ruling and if the defendant has failed to show in what manner access to counsel is unduly restricted, or to show any harm flowing from the alleged restriction. *Wilson v. State*, 151 Ga. App. 501, 260 S.E.2d 527 (1979).

Depriving a prisoner of the use of certain of the prisoner's belongings for a week and one pair of the prisoner's shoes permanently did not amount to an independent constitutional tort, depriving the prisoner of substantive due process. *Vincent v. Lynch*, 626 F. Supp. 801 (N.D. Ga. 1985).

Right to written statement as to discipline of prisoner. — Constitutional due process requires state prison authorities to provide to a prisoner a written statement by the fact-finders as to evidence relied on and reasons for disciplinary action taken against a prisoner by prison authorities. *Mitchell v. Sigler*, 389 F. Supp. 1012 (N.D. Ga. 1975).

Delay in extradition. — A U.S. citizen accused of committing a crime in another nation has no due process right under the United States Constitution to a speedy extradition, such that a foreign government's delay of over 17 years in seeking extradition on charges of criminal negligence causing death and leaving the scene of an accident was not constitutionally offensive. *Martin v. Warden, Atlanta Pen*, 993 F.2d 824 (11th Cir. 1993).

Due process clause does not protect a duly convicted prisoner against transfer to another institution within a state prison system. *Atkinson v. Hanberry*, 589 F.2d 917 (5th Cir. 1979).

Transfer of prisoner to less desirable institution. — Absent a right or justifiable expectation created by state law, transfer of a state prisoner to a less desirable institution within the state prison system does not amount to a deprivation of liberty within the meaning of the due process clause, since whatever expectation a prisoner may have in remaining at a particular prison so long as the prisoner behaves is too ephemeral and insubstantial to trigger procedural due process protections, as long as prison officials have discretion to transfer the prisoner for whatever reason or for no reason at all. *Atkinson v. Hanberry*, 589 F.2d 917 (5th Cir. 1979).

Pretrial detainees. — Whether a pretrial detainee may press a claim of excessive force under the fourth amendment remains open. It is clear, however, that the due process clause protects a pretrial detainee from the use of excessive force that amounts to punishment. *Wright v. Whiddon*, 951 F.2d 297 (11th Cir. 1992).

11. Immunized Testimony

What nontestimonial evidence not protected generally. See *Coquillian v. State*, 169 Ga. App. 390, 313 S.E.2d 126 (1984).

Taking of Private Property for Public Use

1. In General

Only U.S. Const., amend. 5 limits the federal power of eminent domain. *Georgia Power Co. v. 54.20 Acres of Land*, 563 F.2d 1178 (5th Cir. 1977), cert. denied, 440 U.S. 907, 99 S. Ct. 1213, 59 L. Ed. 2d 454 (1979), overruled on other grounds, *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 936, 101 S. Ct. 1403, 67 L. Ed. 2d 372 (1981).

Limits on sovereign's rights in property of citizens. — The right of the sovereign in the property of the citizen is hedged by two fundamental safeguards: the taking must be for a public purpose and it must be attended by just and adequate compensation. This includes every species of property in which the individual has a right of ownership, whether real or personal, corporeal or incorporeal. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Factors in takings inquiry. — The United States Supreme Court has identified three factors that have particular significance in a taking inquiry: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Resolution Trust Corp. v. Ford Motor Credit Corp.*, 30 F.3d 1384 (11th Cir. 1994).

Character of invasion, not resultant damage, determines whether there is a taking. — It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. *Cheves v. Whitehead*, 1 F. Supp. 321 (S.D. Ga. 1932), rev'd on other grounds, 67 F.2d 316 (5th Cir.), cert. denied, 290 U.S. 704, 54 S. Ct. 371, 78 L. Ed. 605 (1933).

Invasion “compatible” with other occupations allowed by owner. — Congress does not have the constitutional power to authorize a permanent physical occupation of an owner's private property for which the owner need not be compensated, even when the property owner has privately allowed other occupations which are “compatible” with a government-sanctioned invasion. *Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir.), cert. denied, 506 U.S. 862, 113 S. Ct. 182, 121 L. Ed. 2d 127 (1992).

Predeprivation procedures. — The due process clause mandates provision of a predeprivation notice and hearing even when the seizure of real property is not physically intrusive. *United States v. 408 Peyton Rd.*, 162 F.3d 644 (11th Cir. 1998), cert. denied, 526 U.S. 1089, 119 S. Ct. 1500, 143 L. Ed. 2d 654 (1999).

When the government has failed to provide a predeprivation notice and hearing in connection with the seizure of real property that does not involve physical control, but the property is found to be subject to forfeiture after the process due has been afforded, the proper remedy is that the government should return any rents received or other proceeds realized from the property during the period of illegal seizure. *United States v. 408 Peyton Rd.*, 162 F.3d 644 (11th Cir. 1998), cert. denied, 526 U.S. 1089, 119 S. Ct. 1500, 143 L. Ed. 2d 654 (1999).

Any situation concerning a deprivation must be viewed in context with the goals of the deprivation, the necessity of the deprivation, the onerous nature of the deprivation, or lack thereof, and the overall equities involved. *Joyner v. Golden Dome Inv. Co.*, 7 Bankr. 596 (Bankr. M.D. Ga. 1980).

That a liberty cannot be inhibited without due process does not mean that it can under no circumstances be inhibited, which can be said of a deprivation of property. *Joyner v. Golden Dome Inv. Co.*, 7 Bankr. 596 (Bankr. M.D. Ga. 1980).

Taking must be by a legally authorized body in order to be compensable. — While private property shall not be taken or damaged for public use without just compensation, the taking or damaging referred to must be by some authority empowered by law to do those acts. Before recovery can be had against a county for taking or damaging private property, it must be shown that the proper authorities of the county were responsible for the taking or damaging, or that they ratified it after the property was so taken or damaged. *Watkins v. Cobb County Comm'n*, 135 Ga. App. 324, 217 S.E.2d 298 (1975).

Where no property obtained, federal civil rights conspiracy action cannot be maintained. — To maintain successfully a conspiracy action to take property without just compensation under 42 U.S.C. § 1983, there must have been an actual denial of due process. Where no property is obtained at all, the civil rights conspiracy is not complete. Also, where no property is taken, there is no issue respecting the rights attendant to “pre” or “post” deprivation hearings. *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D. Ga. 1983), aff'd, 746 F.2d 761 (11th Cir. 1984).

What is unconstitutional taking. — Definitionally, the concept of an unconstitutional taking does not turn on which public agency deprived a private party of the use of the party's property, but rather, turns on the fact of deprivation for public use. *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982).

Punitive damages law. — Paragraph (e)(2) of O.C.G.A. § 51-12-5.1, requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury, does not constitute a “taking” un-

Taking of Private Property for Public**Use (Cont'd)****1. In General (Cont'd)**

der the fifth and fourteenth amendments to the United States Constitution. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993); *State v. Moseley*, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994).

In determining whether procedures used in deprivation of property comport with due process, the court must consider: the private interest affected by the government's action; the risk of an erroneous deprivation of such interest through the procedures used; and, the government's interest, including the function involved and the administrative and fiscal burdens that the additional procedural requirement would entail. *Roadway Express, Inc. v. Brock*, 624 F. Supp. 197 (N.D. Ga. 1985), modified on other grounds, 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987).

As long as the procedure used to take a condemnee's property is in accordance with the law the condemnee has no ground of complaint because another procedure, also authorized by law, was not used. *Collins v. Metropolitan Atlanta Rapid Transit Auth.*, 163 Ga. App. 168, 291 S.E.2d 742 (1982).

Exhausting state procedures as prerequisite to § 1983 action. — So long as the state provides an adequate procedure for obtaining just compensation, the aggrieved landowner may not claim a denial of just compensation until he/she has exhausted the state procedures for compensation. The nature of the constitutional right, therefore, requires that a property owner first utilize procedures under state law for obtaining compensation before he/she can bring a 42 U.S.C. § 1983 action. *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 662 F. Supp. 1465 (M.D. Ga. 1987), aff'd, 896 F.2d 1264 (11th Cir. 1989).

Federal district court properly dismissed property owners' due process and taking claims regarding a landfill permit as "not ripe," where the owners had not exhausted the process leading toward "just compensation" because they failed to seek compensation through state law procedures. *East-Bibb*

Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1989).

Exhausting state procedures as prerequisite to fifth amendment claim. — Where plaintiff failed to file an inverse condemnation claim in the state court and, where the federal court had not ruled on the inverse condemnation claim plaintiff filed therein, plaintiff's fifth amendment takings claim was not ripe for adjudication. *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994).

Landowner's just compensation claims based upon adverse zoning and land use decisions made by county officials were not ripe for review where landowners had not exhausted state procedures in seeking compensation, including the remedy of inverse condemnation. *James Emory, Inc. v. Twiggs County*, 883 F. Supp. 1546 (M.D. Ga. 1995).

Excessive damages. — In an action against a truck manufacturer, a punitive damages award of \$2 million was not so excessive as to violate the due process clauses of the Georgia and United States Constitutions, the eighth amendment of the United States Constitution, and the excessive fines clause of the Ga. Const. 1983, Art. I, Sec. I, Para. XVII. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993).

Inverse condemnation suit as remedy. — If official authorities act on behalf of the state so as to take private property for public use without just compensation, even if they are acting outside of the scope of their official powers, they have violated the fifth and fourteenth amendments and are subject to an inverse condemnation suit. *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982).

Normally, an official taking of private property occurs when a governmental body exercises its eminent domain power in a condemnation proceeding. The state can, however, deprive an individual of the individual's property without instituting formal condemnation proceedings to force the transfer of title, and in those instances the party deprived of the property may bring an inverse condemnation action to compel payment of just compensation for the property seized or impaired. *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982).

If validity of legislative classification for zoning purposes is fairly debatable, legisla-

tive judgment must be allowed to control. *DeKalb County v. Chamblee Dunwoody Hotel Partnership*, 248 Ga. 186, 281 S.E.2d 525 (1981).

Effect of proof of more profitable use. — Proof that developer is simply being deprived of more profitable use of property is not enough to declare zoning unconstitutional. *Ohoopee Land Dev. Corp. v. Mayor of Wrightsville*, 248 Ga. 96, 281 S.E.2d 529 (1981).

Fact that property currently has no economic return to owners is immaterial in determining constitutionality of zoning. By definition, undeveloped property never offers owners any economic return. But landowners may not decline to develop land in permissible manner and concurrently use fact that land is undeveloped to show that permitted use is unconstitutional. *DeKalb County v. Chamblee Dunwoody Hotel Partnership*, 248 Ga. 186, 281 S.E.2d 525 (1981).

Claim of attempt to depress value of land. — Landowner's claim that prospective condemnors deprived the landowner of just compensation when they publicized their interest in the land in an attempt to depress its value failed to state a claim for violation of fifth amendment rights. *Saffold v. Carter*, 739 F. Supp. 1541 (S.D. Ga. 1990).

Contractual right of employer under collective bargaining agreement to discharge an employee for cause constituted a property interest protected by the fifth amendment. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987).

Bankruptcy. — Although the United States Constitution grants Congress the power to establish bankruptcy laws, U.S. Const., art. I, sec. VIII, cl. 4, that power is subject to the fifth amendment, which proscribes taking private property for public use without just compensation. *GMAC v. Johnson*, 145 Bankr. 108 (Bankr. S.D. Ga. 1992), rev'd on other grounds, 165 Bankr. 524 (S.D. Ga. 1994).

Security interests are property rights within the protection of the fifth amendment. *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960), and the bankruptcy system is a "public use" within the ambit of the fifth amendment. *GMAC v. Johnson*, 145 Bankr. 108 (Bankr. S.D. Ga. 1992), rev'd on other grounds, 165 Bankr. 524 (S.D. Ga. 1994).

Valuation of secured creditor's collateral as of the date of confirmation rather than as of the date of the bankruptcy petition did not constitute an unconstitutional taking caused by depreciation of the secured creditor's collateral since the creditor is entitled to a priority expense claim, a "super-priority" payable ahead of all other administrative expense claims to the extent of the failure of adequate protection. *GMAC v. Johnson*, 145 Bankr. 108 (Bankr. S.D. Ga. 1992), rev'd on other grounds, 165 Bankr. 524 (S.D. Ga. 1994).

Inapplicable to bankruptcies. — Since 11 U.S.C. § 101 et seq. does not contemplate the taking of an interest for use by the public, it does not fit within the final clause of U.S. Const., amend. 5 prohibiting the taking of private property for public use without just compensation. *Joyner v. Golden Dome Inv. Co.*, 7 Bankr. 596 (Bankr. M.D. Ga. 1980).

The impairment or modification of contract rights under the bankruptcy power granted under U.S. Const., art. I, sec. VIII, cl. 4 is not prohibited by U.S. Const., amend. 5. *In re Bullington*, 80 Bankr. 590 (Bankr. M.D. Ga. 1987), aff'd, 89 Bankr. 1010 (M.D. Ga. 1988), 878 F.2d 354 (11th Cir. 1989).

The application of 11 U.S.C. § 522(f), as to avoidance of liens impairing exempt property, to debtor's contract with creditor is not an unconstitutional taking of property violative of the fifth amendment. *Caruthers v. Fleet Fin., Inc.*, 87 Bankr. 723 (Bankr. N.D. Ga. 1988).

Although the Supreme Court has indicated that 11 U.S.C. § 522(f)(2) may not be applied retroactively to destroy property rights that existed before the Bankruptcy Code was enacted, § 522 may be applied to a security interest on a loan made prior to the enactment of the Bankruptcy Code if a new security interest is created by a novation after the enactment date. *South Atl. Prod. Credit Ass'n v. Jones*, 87 Bankr. 738 (Bankr. M.D. Ga. 1988).

Chapter 12 of the Bankruptcy Code (11 U.S.C. § 1201 et seq.), designed specifically for farmers and intended to meet a perceived crisis in the agricultural community, does not, on its face, violate the taking and due process clauses of the fifth amendment and, therefore, does not exceed the bankruptcy powers of Congress. *Travelers Ins. Co.*

Taking of Private Property for Public Use (Cont'd)

1. In General (Cont'd)

v. Bullington, 89 Bankr. 1010 (M.D. Ga. 1988), *aff'd*, 878 F.2d 354 (11th Cir. 1989).

Chapter 12 of the federal bankruptcy code, which was enacted to provide special relief for family farmers, does not operate as an unconstitutional taking of a secured creditor's property. *Travelers Ins. Co. v. Bullington*, 878 F.2d 354 (11th Cir. 1989).

Extent of protection afforded to secured creditor. — The takings clause of the fifth amendment protects the secured creditor only to the extent of the value of the collateral. *Travelers Ins. Co. v. Bullington*, 878 F.2d 354 (11th Cir. 1989).

Waiver of right to just compensation. — Under the fifth provision of U.S. Const., amend. 5, "nor shall private property be taken for public use, without just compensation;" one may give one's property for public use and waive the provision. *Barkman v. Sanford*, 162 F.2d 592 (5th Cir.), *cert. denied*, 332 U.S. 816, 68 S. Ct. 155, 92 L. Ed. 393 (1947).

Defendant must show a taking without opportunity to be heard. — In order to show a violation of the procedural aspect of U.S. Const., amend. 5, the defendant must establish that its property interest has been invaded by the government without a meaningful opportunity for it to voice its objection or show the invalidity of the justification of the invasion. *Joyner v. Golden Dome Inv. Co.*, 7 Bankr. 596 (Bankr. M.D. Ga. 1980).

Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).

Evidence considered by superior court on appeal in rate cases. — Where a public utility has followed all administrative procedures to obtain a rate increase, and a final order is entered against the utility for which no appeal is provided, and where the case, filed in superior court as *de novo* proceedings, raises the constitutional question of confiscation, the trial court is authorized to consider all evidence bearing on the question. *Georgia Pub. Serv. Comm'n v. General Tel. Co.*, 227 Ga. 727, 182 S.E.2d 793 (1971).

Claims dismissed where owners failed to use state procedures. — Property owners' due process and taking claims were properly dismissed, where the owners had not sought compensation through the procedures the state has provided for doing so. The fifth amendment does not proscribe the taking of property; it proscribes taking without just compensation. *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989).

Ripeness of claim. — A fifth amendment claim for just compensation is not ripe until the plaintiff has sought compensation through available state law channels. *Saffold v. Carter*, 739 F. Supp. 1541 (S.D. Ga. 1990).

Since, when a tort recovery was obtained by recipients of Medicaid benefits, the assignment in favor of the health department had already been made, the property of the recipient to that extent was not "taken" for purposes of the fifth amendment. *Richards v. Ga. Dep't of Cmty. Health*, 278 Ga. 757, 604 S.E.2d 815 (2004).

Criminal forfeiture proceedings. — The fifth amendment generally prohibits the deprivation of property without a prior hearing, but one exception to the need for a prior hearing exists when the government seizes items subject to forfeiture. *United States v. Bissell*, 866 F.2d 1343 (11th Cir.), *cert. denied*, 493 U.S. 849, 110 S. Ct. 146, 107 L. Ed. 2d 104, 493 U.S. 876, 110 S. Ct. 213, 107 L. Ed. 2d 166 (1989).

Delay of a post-restraint hearing in a criminal forfeiture case until trial was reasonable, where probable cause determinations provided a significant check on the government's power to restrain legitimate, nonindicted assets. *United States v. Bissell*, 866 F.2d 1343 (11th Cir.), *cert. denied*, 493 U.S. 849, 110 S. Ct. 146, 107 L. Ed. 2d 104, 493 U.S. 876, 110 S. Ct. 213, 107 L. Ed. 2d 166 (1989).

Transfer of excess reserves in guaranteed student loan program. — The 1987 amendments to the federal Higher Education Act of 1965, which required the transfer of excess reserves held by guarantors participating in the guaranteed student loan program to the United States Department of Education, did not amount to a "taking" of a state-created guaranty agency's contractual rights nor violate the equal protection component of the fourteenth amendment. *Geor-*

gia Student Fin. Comm'n v. Cavazos, 741 F. Supp. 899 (N.D. Ga. 1990).

Statute regulating political contributions constitutional. — O.C.G.A. § 21-5-30.1(b) does not work an unconstitutional privation of property where regulated insurer could disseminate information for nonpolitical purposes and its employees could contribute freely in their own private, individual capacities. Gwinn v. State Ethics Comm'n, 262 Ga. 855, 426 S.E.2d 890 (1993).

Declaratory relief proper where refusal to allow entry constituted breach of peace. — Power company was properly granted declaratory relief and an injunction was properly granted against the property owners who would not permit the power company access to their land to conduct surveys for a planned electrical transmission line because the power company, as the condemning body, had the right to survey and the property owners' express refusal to allow access presented an actual risk of a breach of the peace that was alleviated by the entry of the declaratory judgment. Bearden v. Ga. Power Co., 262 Ga. App. 550, 586 S.E.2d 10 (2003).

2. Compensable Takings

Inconvenience or damage suffered must become extensive or oppressive before a taking, compensable under U.S. Const., amend. 5, will be found. Scarlett v. City of Atlanta, 306 F. Supp. 1049 (N.D. Ga. 1969).

Attack on reputation and community standing. — A liberty interest within the meaning of the fifth amendment can be lost when one's "good name, reputation, honor, and community standing" are falsely attacked. Painter v. FBI, 537 F. Supp. 232 (N.D. Ga.), aff'd, 694 F.2d 255 (11th Cir. 1982).

Assertion by plaintiff that "mere firing" has damaged the plaintiff's reputation and has foreclosed employment opportunities is not sufficient to establish a liberty interest triggering the requirements of due process. Painter v. FBI, 537 F. Supp. 232 (N.D. Ga.), aff'd, 694 F.2d 255 (11th Cir. 1982).

Acts which constitute taking. — Acquisition of title is not essential to taking, nor is total destruction of value essential. Impairment of value is sufficient. Cheves v. Whitehead, 1 F. Supp. 321 (S.D. Ga. 1932), rev'd on other grounds, 67 F.2d 316 (5th Cir.), cert. denied, 290 U.S. 704, 54 S. Ct. 371, 78 L. Ed. 605 (1933).

Denial of future profits does not amount to the permanent appropriation of a lessee's assets for the government's use. Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384 (11th Cir. 1994).

Economic impact. — Where, after the Resolution Trust Corporation's repudiation of failed bank's equipment lease, lessee's leased property was returned to lessee the repudiation of the lease deprived lessee only of its future rents, any economic impact on lessee of limiting damages to accrued rent would not be of the nature protected by the takings clause. Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384 (11th Cir. 1994).

Investment-backed expectations. — Where lessee could not reasonably have formed an expectation that it would be entitled to all future rent payments contemplated under the leases regardless of the fortunes of the lessor bank, which ultimately failed, no reasonable investment-backed expectation was affected by the Resolution Trust Corporation's repudiation of the leases upon taking over the bank. Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384 (11th Cir. 1994).

Subsequent loss in property value may be an essential factor in determination of a taking. Scarlett v. City of Atlanta, 306 F. Supp. 1049 (N.D. Ga. 1969).

When taking by interference compensable. — In an action in which a taking by interference is asserted, the issue for decision is whether or not the interference with plaintiff's property is so substantial as to be a taking, and thus compensable under U.S. Const., amend. 5, or of such a lesser character as to make the interference only a consequential damage. Scarlett v. City of Atlanta, 306 F. Supp. 1049 (N.D. Ga. 1969).

In an action in which a taking by interference is asserted, a court will look to the evidence to see the extent of the interference, and if it is so great as to constitute a wholly unreasonable and substantially destructive interference with the property involved, a taking will be found. Scarlett v. City of Atlanta, 306 F. Supp. 1049 (N.D. Ga. 1969).

Impairment shared by general public. — Reconstruction of a highway which reduced visibility of landowner's billboard to traffic

Taking of Private Property for Public

Use (Cont'd)

2. Compensable Takings (Cont'd)

did not constitute an unconstitutional taking of property because the impairment was shared by the public in general and was not compensable. *Moreton Rolleston, Jr. Living Trust v. DOT*, 242 Ga. App. 835, 531 S.E.2d 719 (2000).

Destruction or loss of a business being operated upon the condemned property requires compensation where the land is shown to be unique. *Hinson v. Department of Transp.*, 135 Ga. App. 258, 217 S.E.2d 606 (1975).

Whether the land is unique and requires compensation under U.S. Const., amend. 5 is a jury question. *Hinson v. Department of Transp.*, 135 Ga. App. 258, 217 S.E.2d 606 (1975).

Condemnor taking a right of flowage acquires only an easement in the land flowed. *Cheves v. Whitehead*, 1 F. Supp. 321 (S.D. Ga. 1932), rev'd on other grounds, 67 F.2d 316 (5th Cir.), cert. denied, 290 U.S. 704, 54 S. Ct. 371, 78 L. Ed. 605 (1933).

Exercise of federal regulatory authority over lands below ordinary high water mark is not an invasion of compensable property rights, since the flow of a navigable stream is in no sense private property. Thus, there is "no taking" in such a case. *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973).

Low altitude flights, under certain circumstances, may constitute a taking. *Scarlett v. City of Atlanta*, 306 F. Supp. 1049 (N.D. Ga. 1969).

The interference by low altitude flights with the use and enjoyment of the land must be direct, immediate, and substantial, not merely consequential, and this is a matter of degree. *Scarlett v. City of Atlanta*, 306 F. Supp. 1049 (N.D. Ga. 1969).

No property right that could be accorded protection under U.S. Const., amend. 5 exists in the maintenance of a certain school in a certain location. The location of public schools is a matter in which no citizen has a personal right any more than the citizen would in the location of any other public facility. *Wallis v. Blue*, 263 F. Supp. 965 (N.D. Ga. 1967).

Operation of a laundry and dry-cleaning service at reduced prices in an educational

institution for the benefit of students and persons connected with the school, by the Board of Regents of the University System, does not constitute the taking, by the state, of private property without due process of law, in violation of Ga. Const. 1945, Art. I, Sec. I, Para. I (see Ga. Const. 1983, Art. I, Sec. II, Para. I) and U.S. Const., amend. 5. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948).

Retroactive application of a federal statute that applied only to the Federal Deposit Insurance Corporation in its corporate capacity, and that was amended in 1989 to extend its applicability to "a receiver of any insured depository institution," did not constitute a taking prohibited by the fifth amendment, since the statute promotes the common good and the owner failed to safeguard the owner's interests. *Muller v. Resolution Trust Corp.*, 148 Bankr. 650 (S.D. Ga. 1992), aff'd, 7 F.3d 241 (11th Cir. 1993).

Outdoor Advertising Control Act is a proper exercise of the police powers, as it provides for compensation for property rights in signs which were lawfully in existence on its effective date. *DOT v. Shiflett*, 251 Ga. 873, 310 S.E.2d 509 (1984).

County issuance of building permit for land unable to support septic system not taking. — The issuance of a building permit by the county for land it either knew or should have known would not support a septic system may have given rise to an action under state law, but was not a "taking" under the fifth amendment, nor was it such an abuse of governmental power sufficient to raise the tort alleged to the stature of a substantive due process violation. Since the county could have been sued for this type of injury, a claim of denial of procedural due process was foreclosed. *Rymer v. Douglas County*, 764 F.2d 796 (11th Cir. 1985).

Preventing acceleration of note upon default. — That Congress allows a court to prevent a creditor from taking advantage of a provision in a note allowing acceleration upon default does not create a "taking" within the meaning of the fifth amendment where, by a cure and reinstatement, the parties are returned to their original, predefault status and the provision remains part of the contract. *In re Rainbow Forest Apts.*, 33 Bankr. 576 (Bankr. N.D. Ga. 1983).

Release of state lien not compensable. — The state began proceedings to condemn certain property, pursuant to the provisions of the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act (O.C.G.A. § 16-14-7), but subsequently filed a release of its RICO lien. There was no cognizable claim under the theory that private property was taken or damaged for public purposes without just and adequate compensation being first paid. The state did not apply any of the property to public use during the period it was in the state's possession and, even assuming arguendo that the seizure resulted in a violation of state and/or federal constitutional rights, there was no basis upon which the state itself, as opposed to its officers, could be held liable for monetary damages on the basis of it. *Kelleher v. State*, 187 Ga. App. 64, 369 S.E.2d 341 (1988).

Inverse condemnation claims for money damages. — The recent Supreme Court case of *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), requires that the state recognize an inverse condemnation claim for money damages because a zoning regulation amounts to a taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 662 F. Supp. 1465 (M.D. Ga. 1987), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

No compensable temporary taking. — Since property owner was not deprived of all use of property, the property owner did not suffer a compensable temporary taking under the fifth amendment to the United States Constitution. *Powell v. City of Snellville*, 275 Ga. 207, 563 S.E.2d 860 (2002).

3. Scope of Taking

There must be an appropriation by the government of an interest in property. — For the taking of property to come within U.S. Const., amend. 5, it must be the direct or indirect result of an actual appropriation of tangible property by the government for public use, in some way depriving the owner of a monetizable interest in the property.

Joyner v. Golden Dome Inv. Co., 7 Bankr. 596 (Bankr. M.D. Ga. 1980).

Partial taking includes only that which is fairly necessary. — If less than the whole has been taken and paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking. *Cheves v. Whitehead*, 1 F. Supp. 321 (S.D. Ga. 1932), *rev'd* on other grounds, 67 F.2d 316 (5th Cir.), *cert. denied*, 290 U.S. 704, 54 S. Ct. 371, 78 L. Ed. 605 (1933).

Where the interest to be taken is not expressly stated, the condemnor is presumed to take no greater interest than an easement, where an easement is sufficient to satisfy the purposes of the taking. *Cheves v. Whitehead*, 1 F. Supp. 321 (S.D. Ga. 1932), *rev'd* on other grounds, 67 F.2d 316 (5th Cir.), *cert. denied*, 290 U.S. 704, 54 S. Ct. 371, 78 L. Ed. 605 (1933).

Regulatory repeal of artificial value. — The application of the Negotiated Rates Act of 1993, Pub.L. 103-180, does not take a property right of a trucking company in violation of the due process clause of U.S. Const., amend. 5. Unlike the case in which a regulation reduces the utility of property to such an extent that it is rendered valueless, the repeal of a regulation that imposed an artificial value does not violate this regulation. *Allen v. National Enquirer, Inc.* (In re TSC Express Co.), 187 Bankr. 29 (Bankr. N.D. Ga. 1995).

Regulatory taking of property without just compensation was not shown since the development associations, who made a facial challenge to the tree ordinance, failed to show that they were deprived of all economically viable use of their land. *Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 277 Ga. 295, 588 S.E.2d 694 (2003).

4. Compensation

Condemnee also entitled to damages and expenses caused by proceedings. — The just compensation provision is susceptible to no construction except that the condemnnee is entitled to be compensated for all damages to the condemnnee's property and expense caused by the condemnation proceedings. Such damages and expenses are separate and distinct items from the amount which the condemnnee was entitled to recover as the actual value of the condemnnee's build-

Taking of Private Property for Public

Use (Cont'd)

4. Compensation (Cont'd)

ing. *Luther v. DeKalb County*, 131 Ga. App. 25, 205 S.E.2d 70 (1974).

Evidence of expected damage. — Condemnee may not introduce evidence of expected damage to its business as part of its claim for consequential damages. *Richmond County v. 0.153 Acres of Land*, 208 Ga. App. 208, 430 S.E.2d 47 (1993).

Lessee recovery for partial loss. — A lessee-operator of a business upon the condemned property may be entitled to an award for partial loss of business, separate from the award to the owner for consequential damage to the real property. *Richmond County v. 0.153 Acres of Land*, 208 Ga. App. 208, 430 S.E.2d 47 (1993).

Valuation date for purposes of just and adequate compensation. — When private property is condemned for public use, the owner is entitled to receive just and adequate compensation as of the date of the taking, not as of the date of the announcement of the taking, and the value of the property should be fixed at the time of its taking. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

A jury is not free to determine on the evidence that some date prior to the initiation of condemnation proceedings, but after the announcement of the intent to condemn, is the date of taking for the purposes of just and adequate compensation. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Market value not just compensation where business will not survive taking. — If the property must be duplicated for the business to survive, and if there is no substantially comparable property within the area, then the loss of the forced seller is such that market value does not represent just and adequate compensation to him. *Hinson v. DOT*, 135 Ga. App. 258, 217 S.E.2d 606 (1975).

Appeal from excess award. — Under the mandate of the Constitution, that private property cannot be taken or damaged for public use without first paying just and adequate compensation to the owner, the payment of the amount of a jury verdict in

excess of the prior appraisal by assessors, or special master, is a condition precedent to a valid appeal from such verdict and the judgment based thereon. *City of Gainesville v. Loggins*, 224 Ga. 114, 160 S.E.2d 374 (1968).

5. Exercise of Police Power

Constitutional considerations which hedge in government's right of eminent domain do not apply to police power, and the citizen whose property is taken or destroyed is helpless before it. However, the authorization of government by its police power to take the property of its citizens without compensation can be invoked only in the face of compelling necessity, and it extends no further than the emergency which creates it. *Horne v. City of Cordele*, 140 Ga. App. 127, 230 S.E.2d 333 (1976).

Destruction of private property pursuant to exercise of police power is not compensable. — Laws enacted in pursuance of police power to benefit the health of the public, which may result in the destruction of private property, and which do not provide for any payment therefor to the owner, are not violative of the constitutional inhibition against taking private property for a public use without compensation. *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

Uncompensated destruction of property which exceeds the immediate necessity of the occasion is an unconstitutional exercise of police power. *Horne v. City of Cordele*, 140 Ga. App. 127, 230 S.E.2d 333 (1976).

Ordinance permitting demolition of dilapidated structure posing health or safety hazard. — An ordinance that permits destruction of property within the boundaries of the municipality, without just compensation to the owner and without giving the owner an opportunity to repair it and thus bring it up to minimum standards, merely on the ground that its dilapidation makes it a health or safety hazard, is unconstitutional and void. *Horne v. City of Cordele*, 140 Ga. App. 127, 230 S.E.2d 333 (1976).

Ordinance permitting demolition of structure where cost of repair exceeds its value. — Any ordinance which authorizes demolition of a structure within the city without compensation to the owner merely because the cost of repair exceeds the value of the structure or any percentage thereof, without

first allowing opportunity to repair (and, if necessary, providing for discovery of the criteria which must be met to bring the structure up to a minimum standard) is unconstitutional and void. *Horne v. City of Cordele*, 140 Ga. App. 127, 230 S.E.2d 333 (1976).

6. Zoning

Zoning is subject to the constitutional prohibition against taking private property without just compensation. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

It suffices to void the zoning that the damage to the owner is significant and is not justified by the benefit to the public. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

It is not necessary that the property be totally useless for the purposes classified in order for unlawful confiscation to occur, requiring that the zoning be voided. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

Balance between right to use property and police power in zoning. — As the individual's right to the unfettered use of one's property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable. As these critical interests are balanced, if the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

Under police powers, state may zone to prevent certain future use, without compensation. — The police power of the state to zone property to prevent its use for certain purposes in the future, as distinguished from the taking or damaging in respect to a use already in existence, is not open to question, and does not require the payment of any compensation. *National Adv. Co. v. State Hwy. Dep't*, 230 Ga. 119, 195 S.E.2d 895 (1973).

Denial of an application to rezone a lot from residential use to commercial use is not an unconstitutional taking of property.

Westbrook v. Board of Adjustment, 245 Ga. 15, 262 S.E.2d 785 (1980).

A county board's refusal to rezone property from residential to commercial use did not constitute a taking, where the plaintiff had no legitimate expectation that the property would be rezoned for office development as sought. *Habersham at Northridge v. Fulton County*, 632 F. Supp. 815 (N.D. Ga. 1985), *aff'd*, 791 F.2d 170 (11th Cir.), *cert. dismissed*, 478 U.S. 1044, 107 S. Ct. 17, 92 L. Ed. 2d 783 (1986).

Where landowner's property had been rezoned, the landowner did not suffer a taking that deprived the landowner of all use of the property when the board of commissioners refused to grant the landowner's application for rezoning, and the taking was not compensable. The landowner still had possession and use of the land where the landowner could have built in accordance with the existing zoning or applied for a different type of zoning. *Cobb County v. McColister*, 261 Ga. 876, 413 S.E.2d 441 (1992).

Regulation of use of property. — A zoning ordinance does not exceed the police power simply because it restricts the use of property, diminishes the value of property, or imposes costs in connection with the property. *Parking Ass'n v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. denied*, 515 U.S. 1116, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995).

A zoning ordinance requiring curbs, landscaping, and trees in surface parking lots did not constitute a per se taking by another, but merely regulated the use of the property. *Parking Ass'n v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. denied*, 515 U.S. 1116, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995).

Appearance before local zoning board prerequisite. — When a landowner alleged having a vested right in the manner in which the owner's property had been zoned, which would have allowed the owner to build the owner's proposed project, the owner was obligated to bring that claim before the local zoning authority before a trial court had jurisdiction to consider it. Since the owner had not brought that claim before the zoning authority, the owner's petition for a writ of mandamus to compel that authority to issue the owner the permit desired was prop-

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Use (Cont'd)

6. Zoning (Cont'd)

erly dismissed. *Cooper v. Unified Gov't of Athens-Clarke County*, 277 Ga. 360, 589 S.E.2d 105 (2003).

Plaintiff has burden of showing that the zoning is unconstitutional. — The plaintiff has the burden of showing that the zoning under attack is so detrimental to the plaintiff, and so insubstantially related to the public health, safety, morality and welfare, as to amount to an unconstitutional taking, that is, an arbitrary confiscation of the property without compensation by the governing

authority. *Hubert Realty Co. v. Cobb County Bd. of Comm'rs*, 245 Ga. 236, 264 S.E.2d 179 (1980); *City of Atlanta Bd. of Zoning Adjustment v. Midtown N., Ltd.*, 257 Ga. 496, 360 S.E.2d 569 (1987); *Jones v. City of Atlanta*, 257 Ga. 727, 363 S.E.2d 254 (1988).

Ripeness of claim that zoning effects taking. — A claim that a zoning regulation effects a taking of property is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue. *Calibre Spring Hill, Ltd. v. Cobb County*, 715 F. Supp. 1577 (N.D. Ga. 1989).

OPINIONS OF THE ATTORNEY GENERAL

Constitutionality of fingerprint requirement. — Requiring applicants for driver's license or identification card to submit fingerprints does not violate constitutional rights. 1997 Op. Att'y Gen. No. U97-7.

Prosecution of non-included offenses under municipal and state law arising from same incident not barred. — An accused arrested for separate non-included offenses arising out of a single transaction, which

violate municipal ordinances and state law respectively, may be prosecuted first in the recorder's court for the municipal ordinance violations, and then transferred to the superior court to be prosecuted for the separate state violations, without violating statutory or constitutional double jeopardy prohibitions. 1986 Op. Att'y Gen. No. U86-32.

RESEARCH REFERENCES

ALR. — Depreciation of property by the erection of a hospital by a municipality as a "taking" or "damaging" within the constitutional provision, 4 ALR 1012.

Occurrences during a view as warranting the jury's discharge without letting in plea of former jeopardy upon subsequent trial, 4 ALR 1266.

Constitutionality and applicability of curative provisions of taxing statutes where sale is irregular, 5 ALR 164.

Constitutionality of statute or ordinance providing for destruction of animals, 8 ALR 67.

Constitutionality of statute requiring railroad to construct and maintain private crossing, 12 ALR 227.

Plea of former jeopardy or of former conviction or acquittal where jury was not sworn, 12 ALR 1006.

Right to recover property held by public authorities as evidence for use in a criminal trial, 13 ALR 1168.

Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination, 18 ALR 749.

Conviction or acquittal of larceny as bar to prosecution for burglary, 19 ALR 626.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of same property, 19 ALR 636.

Exercise of eminent domain to control the use or improvement of property not taken, 23 ALR 876.

Constitutionality of statute for cumulative penalty for delay in paying claim, 26 ALR 1200.

Constitutionality of statute regulating the time of payment of wages, 26 ALR 1396.

Substitution of juror after completion of panel as sustaining plea of double jeopardy, 28 ALR 849; 33 ALR 142.

Right to interest in condemnation pro-

ceedings during owner's retention of possession, 32 ALR 98.

Constitutionality of statutes relating to insurance contracts made and to be performed out of state, upon property or life within state, 32 ALR 636.

Substitution of juror after completion of panel as sustaining plea of former jeopardy, 33 ALR 142.

Forgery of names of several individuals to the same instrument as more than one offense, 33 ALR 562.

Damage to property from proximity of cemetery as "damage" within constitutional provision against taking or damaging property without compensation, 36 ALR 527.

Inclusion in assessment for public improvement of amount to cover delinquencies as contrary to constitutional guaranties, 40 ALR 1352; 42 ALR 1185.

Plea of privilege by the woman concerned in violation of White Slave Act, 48 ALR 991.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 51 ALR 1139; 86 ALR 179; 162 ALR 495.

Power to impose tax on estate in respect to property transferred in contemplation of death or by a conveyance intended to take effect in possession or enjoyment at death, 52 ALR 1091.

Validity of statute or ordinance in relation to doors, 53 ALR 920.

Constitutionality of provisions of workmen's compensation law applicable to public officers or employees, 53 ALR 1290.

Constitutionality of statute fixing minimum rate of speed at which carrier may transport special kinds of freight, 55 ALR 1296.

Necessity that hearing be allowed before imposition of punishment for contempt, 57 ALR 545.

Privilege against self-incrimination as extending to danger of prosecution in other state or country, 59 ALR 895; 82 ALR 1380.

Extraterritorial effect of confiscation of property and nationalization of corporations, 65 ALR 1494; 139 ALR 1209.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Right to and measure of compensation for animals or trees destroyed to prevent spread of disease or infection, 67 ALR 208.

Tax on automobile, or on its use, for cost of road or street construction, improvement, or maintenance, 68 ALR 200.

Constitutionality of statute which permits consideration of enhanced value of lands not taken, in fixing compensation for property taken or damaged in exercise of eminent domain, 68 ALR 784.

What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 ALR 1108.

Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 ALR 1503.

Constitutionality of provisions as to tribunal which shall fix the amount of compensation for taking of property in eminent domain, otherwise than objections that a trial by jury is necessary, 74 ALR 569.

Plea of double jeopardy where jury was discharged because of inability of the prosecution to present testimony, 74 ALR 803.

Constitutionality, construction, and applicability of statutes relating to service of process on unincorporated association, 79 ALR 305.

Rights and responsibilities, civil or criminal, of police officers in respect of examination of persons under arrest ("third degree"), 79 ALR 457.

Necessity in indictment charging violation of statute regarding wages, or hours, of naming particular employees, 81 ALR 76.

Conviction or acquittal under charge of assault with intent to rob as bar to prosecution for assault with intent to kill based on the same transaction or on closely connected transactions, 81 ALR 701.

Power to condemn, or authorize the condemnation of, capital stock of a public utility, 81 ALR 1071.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 82 ALR 345; 116 ALR 209; 132 ALR 91; 139 ALR 673.

Constitutionality of statute relating to taxation of state banks or stock therein as affected by inapplicability of statute to national banks or national bank stock, 82 ALR 874; 83 ALR 1441.

Privilege against self-incrimination as extending to danger of prosecution in another jurisdiction, 82 ALR 1380.

Constitutionality, construction, and effect of statute relating specifically to rights, remedies, and obligations of parties to sale of farm machinery, 87 ALR 290.

Constitutionality, construction, application, and effect of statute requiring judicial approval before issuance or sale of municipal or county bonds or obligations, 87 ALR 706; 102 ALR 90.

Waiver of immunity from testifying and constitutional provision against self-incrimination, by accomplice testifying for prosecution, 87 ALR 882.

Comment by court suggesting that jury may take into consideration failure of accused person to testify, 94 ALR 701.

Discharge on habeas corpus after conviction as affecting claim or plea of former jeopardy, 97 ALR 160.

Constitutionality of statute changing rights of withdrawing members of building and loan association, 98 ALR 82; 133 ALR 1493.

Constitutionality of statutes providing for refund of taxes illegally or erroneously exacted, 98 ALR 284.

Constitutionality of statutes and validity of regulations relating to optometry, 98 ALR 905; 22 ALR2d 939.

Validity of statute or ordinance regulating barbers, 98 ALR 1088.

Power to remove public officer without notice and hearing, 99 ALR 336.

Power of state to extend its taxing power by its definition of residence or its declared policy of domesticating foreign corporations, 100 ALR 1216.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 ALR 389.

Constitutionality, construction, and effect of statutes in relation to conduct of driver of automobile after happening of accident, 101 ALR 911.

Effect of unauthorized amendment of criminal information or indictment, 101 ALR 1254.

Calling upon accused in the presence of jury to produce document in his possession as violation of privilege against self-incrimination, 110 ALR 101.

Validity of license statute or ordinance which discriminates against nonresidents, 112 ALR 63.

Identity, as regards former jeopardy, of offenses charged in different indictments or informations for conspiracy, 112 ALR 983.

Conviction or acquittal upon charge of murder of, or assault upon, one person as bar to prosecution for like offenses against other person at the same time, 113 ALR 222.

Constitutionality of statute permitting appeal by state in criminal case, 113 ALR 636; 157 ALR 1065.

Constitutionality of crop insurance statutes, 113 ALR 739.

Constitutionality of statutory provisions relating to current taxes on tax delinquent property, 113 ALR 1092.

Plea of former jeopardy as affected by declaration of mistrial after impaneling and swearing of jury on original trial because of errors, or supposed errors, regarding examination or challenging of jurors, 113 ALR 1428.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 116 ALR 209; 132 ALR 91; 139 ALR 673.

Former jeopardy as regards successive prosecutions for perjury charged to have been committed in the same action or proceeding, 120 ALR 1171.

Taxation in same state of real property and debt secured by mortgage or other lien thereon as double taxation, 122 ALR 742.

Plea of former jeopardy where jury is discharged because of illness or insanity of juror, 125 ALR 694.

Obstruction or diversion of, or other interference with, flow of surface water as taking or damaging property within constitutional provision against taking or damaging without compensation, 128 ALR 1195.

Constitutionality, construction, and application of statutes or governmental projects for improvement of housing conditions (slum clearance), 130 ALR 1069; 172 ALR 966.

Constitutionality, construction and application of statute authorizing condemnation of property by cross action, 130 ALR 1226.

Substituted service, service by publication, or service out of state in action in personam against resident or domestic corporation, as contrary due to process of law, 132 ALR 1361.

Constitutionality, construction, and application of statutes designed to prevent or limit control of retail liquor dealers by manufacturers, wholesalers, or importers, 136 ALR 1238.

Right of privacy, 138 ALR 22; 57 ALR3d 16.

Extraterritorial effect of confiscation of property and nationalization of corporations, 139 ALR 1209.

Disclosure by witness of fact or transaction as a waiver of his privilege against self-incrimination in respect of details and particulars which will elucidate it, 147 ALR 255.

Constitutionality of provisions of workmen's compensation acts which are limited to residents of state, 147 ALR 925.

Power of juvenile court to require children to testify, 151 ALR 1229.

Retrospective statute subjecting interests of trust beneficiaries to claims of creditors, 151 ALR 1417.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 ALR 1208.

Validity of provision of statute or ordinance that requires vacation of premises which do not comply with building or sanitary regulations, upon notice to that effect, without judicial proceeding, 153 ALR 849.

Constitutionality, construction, and application of statute or contract regarding deduction from, or adjustment of, wages in respect of defective workmanship, 153 ALR 866.

Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, a admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

Double jeopardy where jury is discharged before termination of trial because of illness of accused, 159 ALR 750.

Competency of juror as affected by his participation in a case of similar character, but not involving the party making the objection, 160 ALR 753.

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Failure of state prosecutor to disclose pre-trial statement made by crime victim as violating due process, 102 ALR5th 327.

Application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to state death penalty proceedings, 110 ALR5th 1.

Failure of state prosecutor to disclose existence of plea bargain or other deals with witness as violating due process, 12 ALR6th 267.

Adoption and application of "tainted" approach or "dual motivation" analysis in determining whether existence of single discriminatory reason for peremptory strike results in automatic Batson violation when neutral reasons also have been articulated, 15 ALR6th 319.

Federal constitutional right to bear arms, 37 ALR Fed. 696.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records — modern status, 87 ALR Fed. 177.

Discovery of, or compelled access to, records of foreign bank accounts, in federal criminal proceeding or investigation, 87 ALR Fed. 676.

Effect of federal prosecutor's failure to warn grand jury witness of status as target or subject of grand jury investigation upon subsequent prosecution of witness for perjury based on testimony before grand jury, 89 ALR Fed. 498.

Necessity and sufficiency, in federal prosecution, of hearing and proof with respect to

accused's violation of plea bargain permitting prosecution on bargained charges, 89 ALR Fed. 753.

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Adequacy of counsel's representation of alien in exclusion proceedings, 92 ALR Fed. 656.

Artist's speech and due process rights in artistic production which has been sold to another, 93 ALR Fed. 912.

Application, to drug or narcotic records maintained by druggist or physician, of "required records" exception to privilege against self-incrimination, 96 ALR Fed. 868.

What conduct of federal law enforcement authorities in inducing or co-operating in criminal offense raises due process defense distinct from entrapment, 97 ALR Fed. 273.

Validity, construction, and application of § 504 of Labor-Management Reporting and Disclosure Act (29 USCS § 504), precluding certain convicted persons from serving in union office for specified period, 98 ALR Fed. 481.

Liability of Federal Government or government officials for action taken under Federal Witness Protection Program (18 USCS §§ 3521-3528 Supp. IV 1986), 98 ALR Fed. 545.

Waiver of minor's right to counsel in deportation proceedings, 98 ALR Fed. 879.

Validity, construction, and application of 18 USCS § 2251, penalizing sexual exploitation of children, 99 ALR Fed. 643.

Immunity of federal tax agent from suit based upon agent's effort to enforce or collect tax, 99 ALR Fed. 700.

Use of peremptory challenges to exclude ethnic and racial groups, other than black americans, from criminal jury — post-Batson federal cases, 110 ALR Fed. 690.

Seeking of variance as prerequisite for ripeness of challenge to zoning ordinance under due process clause of federal constitution's fifth and fourteenth amendments — post-Williamson cases, 111 ALR Fed. 483.

Validity and construction of provision of Cable Communications Policy Act (47 USC § 541(a)(2)) allowing cable companies access to utility easements on private property, 113 ALR Fed. 523.

Substitution, under Rule 24c of Federal Rules of Criminal Procedure, of alternate juror for regular juror before jury retires to consider verdict in federal criminal case, 115 ALR Fed. 381.

Construction and application of 18 USCS § 922(e), prohibiting delivery of firearms to common carrier, 125 ALR Fed. 613.

Stranger's alleged communication with juror, other than threat of violence, as prejudicial in federal criminal prosecution, 131 ALR Fed. 465.

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What constitutes taking of property requiring compensation under takings clause of Fifth Amendment to United States Constitution — Supreme Court cases, 10 ALR Fed. 2d 231.

Construction and application of "public use" restriction in Fifth Amendment's Takings Clause — United States Supreme Court Cases, 10 ALR Fed. 2d 407.

[AMENDMENT VI]

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Cross references. — Rights under amendment generally, Ga. Const. 1983, Art. I, Sec. I, Paras. XI, XIV. Criminal trial venue, Ga. Const. 1983, Art. VI, Sec. II, Paras. VI, VIII, §§ 17-2-2, 17-7-150 et seq. Juries generally, Ga. Const. 1983, Art. I, Sec. I, Para. XI and Ch. 12, T. 15. Assistance of counsel, §§ 15-11-30, 17-4-1, 17-12-2, 17-12-4, 17-12-7, 38-2-432. Compulsory process, §§ 15-11-31, 24-10-20 through 24-10-28, 24-10-94, 38-2-440. Notice, § 17-7-110. Speedy trial, §§ 17-7-170, 17-8-33. Confrontation of witnesses, § 24-9-64.

Editor's notes. — The United States Supreme Court has declared that the due process clause of U.S. Const., amend. 14 protects the rights specified in U.S. Const., amend. 6 in state, as well as federal, criminal proceedings. See *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (public trial); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) (impartial jury); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A.L.R. 1045 (1921) (notice of charges); *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (jury trial); *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (confrontation of accusers); *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (compulsory process); and *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (assistance of counsel).

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Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 ALR2d 733 (1963), holding right to counsel is extended to noncapital felonies in the state courts, see 26 Ga. B.J. 186 (1963). For comment criticizing *Lovett v. State*, 108 Ga. App. 478, 133 S.E.2d 595 (1963), as to right of accused to assistance of counsel in making an unsworn statement, see 15 Mercer L. Rev. 512 (1964). For comment discussing admissibility of voluntary statements made after indictment and release on bail in absence of retained counsel, in light of *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), see 16 Mercer L. Rev. 343 (1964). For comment on *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965), see 2 Ga. St. B.J. 504 (1966). For comment on *Weiner v. Fulton Co.*, 113 Ga. App. 343, 148 S.E.2d 143 (1966), see 18 Mercer L. Rev. 477 (1967). For comment criticizing *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967) in its application of the sixth amendment speedy trial guarantee to the states as an encroachment upon states rights, see 18 Mercer L. Rev. 497 (1967). For comment discussing *Miranda* warnings in criminal tax prosecutions, see 18 Mercer L. Rev. 502 (1967). For comment criticizing use of detainer by state to effectively thwart the right to speedy trial of federal defendants in state court, in light of *State v. Evans*, 432 P.2d 175 (Ore. 1967), cert. denied, 390 U.S. 971, 88 S. Ct. 1093, 19 L. Ed. 2d 1182 (1968), see 17 J. of Pub. L. 431 (1968). For comment discussing constitutionality of disqualification of jurors in murder trial for general objection to death penalty in light of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), see 3 Ga. L. Rev. 234 (1968). For comment on *State v. Rand*, 20 Ohio Misc. 98, 247 N.E.2d 342 (Com. Pleas 1969), holding criminal defendant competent to stand trial under properly administered tranquilizing drugs, see 18 J. of Pub. L. 503 (1969). For comment discussing the right of an accused to court-appointed counsel when charged with "petty" offense in light of *James v. Headley*, 410 F.2d 325 (5th Cir. 1969), see 3 Ga. L. Rev. 750 (1969). For comment discussing limits on the military's jurisdiction and the constitutional rights of servicemen in light of *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), see 21 Mercer

L. Rev. 311 (1969). For comment on *Anderson v. Laird*, 316 F. Supp. 1081 (D.D.C. 1970), as to religious regulations at military academies, see 5 Ga. L. Rev. 400 (1971). For comment on *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) regarding constitutionality under this amendment's confrontation clause of expulsion of defendant from the courtroom for misconduct, see 22 Mercer L. Rev. 467 (1971). For comment on *Freeman v. Wilcox*, 119 Ga. App. 325, 167 S.E.2d 163 (1969) and a juvenile's right to counsel at pre-adjudicatory stages of juvenile proceedings, see 22 Mercer L. Rev. 597 (1971). For comment on *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), as to acceptability of guilty pleas made while claiming innocence, see 22 Mercer L. Rev. 785 (1971). For comment on *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) and Georgia's coconspirator exception to the hearsay rule, see 22 Mercer L. Rev. 791 (1971). For comment on *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), establishing an indigent's right to appointed counsel in nonfelony criminal cases, see 22 J. of Pub. L. 191 (1973). For comment discussing constitutionality of conviction upon less-than-unanimous jury vote, see 7 Ga. L. Rev. 339 (1973). For comment on extension of "The Right to Counsel to Petty Offenses Involving Actual Loss of Liberty," in light of *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), see 24 Mercer L. Rev. 497 (1973). For comment on *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), as to probationer's rights at probation revocation, see 23 Emory L.J. 617 (1974). For comment criticizing *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), permitting imposition of increased sentence by jury after retrial, see 23 Emory L.J. 879 (1974). For comment on *Lynn v. State*, 231 Ga. 559, 203 S.E.2d 221 (1974), appearing below, see 8 Ga. L. Rev. 973 (1974). For comment criticizing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), holding petitioner's right to confrontation was preeminent to state policy protecting anonymity of juvenile offenders, see 26 Mercer L. Rev. 343 (1974). For comment on *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct.

1029, 43 L. Ed. 2d 328 (1975), appearing below, see 9 Ga. L. Rev. 963 (1975). For comment criticizing *Mercer v. Hopper*, 233 Ga. 620, 212 S.E.2d 799 (1975), see 27 *Mercer L. Rev.* 325 (1975). For comment on *United States v. Whitesel*, 543 F.2d 1176 (6th Cir. 1976), holding denial of defendant's request to be represented at trial by a nonattorney not violative of sixth amendment, see 26 *Emory L.J.* 457 (1977). For comment, "The Right to a Speedy Trial," see 13 Ga. St. B.J. 197 (1977). For comment on *United States v. Grayson*, 438 U.S. 41, 98 S. Ct. 2610, 57 L. Ed. 2d 582 (1978), regarding consideration by sentencing judge of his belief that defendant falsely testified during trial, see 28 *Emory L.J.* 159 (1979). For comment on *Bonds v. Wainwright*, 579 F.2d 317 (5th Cir. 1978), see 30 *Mercer L. Rev.* 1059 (1979). For comment on *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 *Mercer L. Rev.* 349 (1979). For comment on *Hoback v. Alabama*, 607 F.2d 680 (5th Cir. 1979), discussing an indigent defendant's rights to expert witnesses, see 31 *Mercer L. Rev.* 1103 (1980). For comment discussing the forcible medication of involuntarily committed mental patients with antipsychotic drugs in light of *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), see 15 Ga. L. Rev. 739 (1981). For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 *Emory L.J.* 777 (1985). For comment discussing *Miranda v. Arizona* ambiguous requests for counsel, see 20 Ga. L.

Rev. 221 (1985). For comment, "*Batson v. Kentucky*: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges," see 37 *Emory L.J.* 755 (1988). For comment, "Child Sexual Abuse: A New Decade for the Protection of Our Children?," see 39 *Emory L.J.* 581 (1990). For comment, "Compulsory Acceptance of Court Appointments: *Mallard v. United States District Court for the Southern District of Iowa*," see 7 Ga. St. U.L. Rev. 69 (1990). For comment, "*Maryland v. Craig*: The Constitutionality of Closed Circuit Testimony in Child Sexual Abuse Cases," see 25 Ga. L. Rev. 167 (1990). For comment, "*McNeil v. Wisconsin*: Invocation of Right to Counsel Under Sixth Amendment by Accused at Judicial Proceeding Does Not Constitute Invocation of *Miranda* Right to Counsel for Unrelated Charge," see 26 Ga. L. Rev. 1049 (1992). For comment, "*Ramseur v. Beyer*: The Third Circuit Upholds Race-Based Treatment of Prospective Grand Jurors," see 27 Ga. L. Rev. 621 (1993). For comment, "The Reporter's Privilege in Georgia: 'Qualified' to Do the Job?," see 9 Ga. St. U.L. Rev. 495 (1993). For comment on the right to counsel in post-conviction proceedings, see 47 *Emory L.J.* 1079 (1998). For comment, "*Apprendi v. New Jersey*: Should Any Factual Determination Authorizing an Increase in a Criminal Defendant's Sentence Be Proven to a Jury Beyond a Reasonable Doubt?," see 52 *Mercer L. Rev.* 1531 (2001). For comment, "*A Deep Breath Before the Plunge: Undoing Miranda's Failure Before It's Too Late*," see 55 *Mercer L. Rev.* 1375 (2004).

JUDICIAL DECISIONS

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General Consideration

Rights under U.S. Const., amend. 6 to counsel, compulsory process, and jury trial are fundamental rights that the courts should safeguard with meticulous care and award to the accused, whether requested or not, unless waived by the accused in a manner showing accused's express and intelligent consent. *Bridwell v. Aderhold*, 13 F. Supp. 253 (N.D. Ga. 1935), *aff'd sub nom. Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937), *rev'd on other grounds, Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 ALR 357 (1938), *overruled on other grounds, Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

Rights under U.S. Const., amend. 6 are not limited to cases involving capital offenses. — Rights to assistance of counsel, compulsory process for obtaining witnesses and trial by jury are not limited to cases where the accused is charged with a capital offense. *Bridwell v. Aderhold*, 13 F. Supp. 253 (N.D. Ga. 1935), *aff'd sub nom. Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937), *rev'd on other grounds, Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 ALR 357 (1938), *overruled on other grounds, Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

No federal question raised by dismissed federal employee's Bivens theory claim. — Where plaintiff, a dismissed federal employee, asserted various fourth, fifth, and sixth amendment claims against the plaintiff's superiors under the Bivens theory (see *Bivens v. 6 Unknown Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)), the court found no federal question because Congress had established elaborate remedial scheme for dismissed federal employees. *Metz v. McKinley*, 583 F. Supp. 683 (S.D. Ga.), *aff'd*, 747 F.2d 709 (11th Cir. 1984).

Rights guaranteed under U.S. Const., amend. 6 and U.S. Const., amend. 5 are

personal. *Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981), *cert. denied*, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983).

Determination of harm based on United States Supreme Court standards. — The determination of harm caused by a violation of a federal constitutional right has to be made based on United States Supreme Court standards and not state standards. *Alexander v. State*, 236 Ga. App. 142, 511 S.E.2d 249 (1999).

Duty of appellate courts to protect constitutional rights. — U.S. Const., amend. 6 combines with Ga. Const. 1976, Art. I, Sec. I, Para. XI (see Ga. Const. 1983, Art. I, Sec. I, Para. XI) to assure that every person charged with offending the laws of this state shall have a public and speedy trial by an impartial jury and appellate courts must independently review the relevant trial court record in each case to ensure compliance with these constitutional dictates. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), *vacated in part on other grounds*, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Violation of U.S. Const., amend. 6 stands as a jurisdictional bar to a valid conviction and sentence. *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, *Calley v. Hoffmann*, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Remedies should be tailored to the injury suffered from the constitutional violation alleged and should not unnecessarily result in dismissal of the indictment where the criminal proceeding can proceed with full recognition of defendant's right to a fair trial. *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

Requirements of jury trial generally. — Trial by jury in a criminal case requires, at the very least, that the evidence developed against a defendant comes from the witness stand in a public courtroom where there is

General Consideration (Cont'd)

full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Trial in alternative location. — Defendant's right to an impartial trial and jury was not violated because the trial was held at a county law enforcement center rather than the county courthouse. *Drake v. State*, 231 Ga. App. 776, 501 S.E.2d 14 (1998).

Right of accused to be present at trial. — On a trial for a capital offense, it is the right of the accused to be present at all stages of the proceeding, and it is the duty of the court to see that the accused is present when any charge is delivered to the jury. If the defendant is absent without knowledge of a charge or recharge to the jury, and without any consent or waiver with reference thereto, such procedure requires a new trial. The presence of the counsel is no substitute for that of the accused on trial. *Rider v. State*, 195 Ga. 656, 25 S.E.2d 304 (1943).

The general right of one accused of a felony to be present during the course of the trial does not extend to postverdict procedures such as a motion for new trial, at which only questions of law, not questions of fact, are determined. *Dobbs v. State*, 245 Ga. 208, 264 S.E.2d 18, cert. denied, 446 U.S. 913, 100 S. Ct. 1845, 64 L. Ed. 2d 267 (1980).

Physical restraints on prisoner during trial. — When physical restraints are necessary and are observed by the jury in a criminal case, the trial court must instruct the jury that the use of physical restraints on the defendant has no bearing on the defendant's guilt or innocence and should not be considered by them during their deliberations. *Allen v. State*, 248 Ga. App. 79, 545 S.E.2d 629 (2001).

Determination of waiver generally. — In the context of U.S. Const. amend. 6 waiver must be determined by applying federal constitutional law. *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Determination of voluntariness of waiver. — While the Constitution requires that the record indicate the voluntariness of any waiver of the rights of jury trial, confronta-

tion, and against self-incrimination, it does not require that a district judge go beyond these constitutional minima to ask the specific questions that F.R.Cr.P. 11(c)(3) imposes as a prophylactic procedure. *United States v. Caston*, 615 F.2d 1111 (5th Cir.), cert. denied, 449 U.S. 831, 101 S. Ct. 99, 66 L. Ed. 2d 36 (1980).

Intoxication affecting voluntariness of waiver of Miranda rights. — Defendant's claim that defendant's waiver of Miranda rights was involuntary because defendant was intoxicated was rejected; an officer testified that defendant did not appear to be intoxicated, that defendant seemed to understand the officer's questions, and that defendant's answers were responsive to the officer's questions, and the trial court was entitled to believe this testimony. *Smith v. State*, 269 Ga. App. 17, 602 S.E.2d 921 (2004).

Mental disability affecting voluntariness of waiver of Miranda rights. — Defendant's claim that defendant's waiver of defendant's Miranda rights was involuntary because defendant had a mental disability and had only an eighth grade education was rejected, as an officer testified that defendant said defendant understood defendant's rights, that defendant seemed to understand the officer's questions, and that defendant answered the questions appropriately. *Smith v. State*, 269 Ga. App. 17, 602 S.E.2d 921 (2004).

Factors bearing on waiver of constitutional rights. — Mental deficiency, age, and lack of familiarity with the criminal process are important factors to be considered in determining whether there has been a waiver of constitutional rights. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972).

Limits on investigative powers of Congress. — While the power of Congress to investigate for legislative purposes is inherent, it is not unlimited, and is always subject to the limitations imposed by the individual guarantees of the Bill of Rights. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Judge is not a mere moderator, and the judge has an obligation and duty to question witnesses and comment on the evidence when necessary. *United States v. Bartlett*, 633 F.2d 1184 (5th Cir.), cert. denied, 454 U.S. 820, 102 S. Ct. 101, 70 L. Ed. 2d 91 (1981).

A trial judge may elicit facts not yet adduced or clarify those previously presented and the judge may maintain the pace of the trial by interrupting and curtailing counsel's examinations as a matter of discretion. *United States v. Bartlett*, 633 F.2d 1184 (5th Cir.), cert. denied, 454 U.S. 820, 102 S. Ct. 101, 70 L. Ed. 2d 91 (1981).

Only when a judge's conduct strays from neutrality is a defendant thereby denied a fair trial as required by the Constitution. *United States v. Bartlett*, 633 F.2d 1184 (5th Cir.), cert. denied, 454 U.S. 820, 102 S. Ct. 101, 70 L. Ed. 2d 91 (1981).

Duty of judge and prosecutor to provide fair trial. — Trial judges and prosecutors have the responsibility to see that the defendant receives a fair trial. *Dean v. State*, 247 Ga. 724, 279 S.E.2d 217 (1981).

A judge's comments must be studied in the context of the entire proceeding and only if, taken as a whole, those comments are so prejudicial as to amount to a denial of a fair trial will the Constitution require a new trial. *Allen v. Montgomery*, 728 F.2d 1409 (11th Cir. 1984).

Substitution of judges. — Holding that midtrial substitution of judges is an error subject to harmless error analysis and not a structural defect is not contrary to clearly established federal law as determined by the U.S. Supreme Court. *McIntyre v. Williams*, 216 F.3d 1254 (11th Cir. 2000).

Miranda warnings need not be given in advance of general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process in order for answers to those questions to be admissible as evidence. *Brown v. State*, 140 Ga. App. 160, 230 S.E.2d 128 (1976), cert. denied, 434 U.S. 819, 98 S. Ct. 58, 54 L. Ed. 2d 75 (1977).

Card from which rights read. — There is no requirement that the state introduce the card from which Miranda rights are read by the officers to the defendant. *James v. State*, 230 Ga. 29, 195 S.E.2d 448 (1973).

Waiver of Miranda rights. — Where there was evidence which could have authorized the exclusion of defendant's statement based on lack of a knowing and understanding waiver of defendant's Miranda rights, and where the trial court failed to make specific findings on issue, a remand was necessary for the entry of findings on this

issue. *Livingston v. State*, 267 Ga. App. 875, 600 S.E.2d 817 (2004).

Obtaining sample of defendant's handwriting. — Use of personal history forms which defendant is instructed to complete following arrest as handwriting exemplars violates none of the defendant's rights under U.S. Const., amend. 6 or U.S. Const., amend. 5. *United States v. Walker*, 453 F.2d 1205 (5th Cir.), cert. denied, 407 U.S. 910, 92 S. Ct. 2432, 32 L. Ed. 2d 683 (1972).

While defense needs for independent analysis of drugs used as evidence and expert testimony about the accuracy of tests made on such drugs may be a constitutionally protected right in other jurisdictions, there is no authority in this state or under the federal Constitution for such a rule. *Butler v. State*, 134 Ga. App. 131, 213 S.E.2d 490 (1975).

Habeas corpus case is not a criminal prosecution and, thus, does not fit under U.S. Const., amend. 6. *Croker v. Smith*, 225 Ga. 529, 169 S.E.2d 787 (1969).

Military jurisdiction narrowly limited. — Although trial by a military tribunal deprives one of trial by jury and other constitutional rights, it is not unconstitutional. However, military jurisdiction is restricted to the narrowest limits consistent with the power granted Congress in U.S. Const., Art. I, Sec. 8, Cl. 14. *Torres v. Connor*, 329 F. Supp. 1025 (N.D. Ga. 1970).

Burden of showing constitutional error harmless upon state. — Regarding constitutional errors, the burden of showing that the error was harmless beyond a reasonable doubt is upon the state. *Henderson v. State*, 251 Ga. 398, 306 S.E.2d 645 (1983).

Defense counsel cannot invoke defendant's rights without consulting defendant. — Defense counsel, acting on counsel's own and without having consulted the defendant, is not empowered to invoke the defendant's personal rights under the fifth and sixth amendments. *Edwards v. State*, 167 Ga. App. 681, 307 S.E.2d 264 (1983).

Requirement that a warrant be issued by an impartial magistrate was not violated when a search warrant, otherwise proper, was issued by a magistrate who was of feeble mind and memory. *Daitch v. State*, 168 Ga. App. 830, 310 S.E.2d 703 (1983).

U.S. Const., amend. 6 does not require preliminary showing of relevance or need

General Consideration (Cont'd)

before enforcement of grand jury subpoena to testify. In re Grand Jury Investigation, 769 F.2d 1485 (11th Cir. 1985).

Right of accused to be present at trial. — Because the defendant's own conduct made the progress of the trial practically impossible in the defendant's continued presence, it was not an abuse of the court's discretion to remove the defendant from the courtroom. *Simmons v. State*, 161 Ga. App. 527, 288 S.E.2d 868 (1982).

Because the basis of the right to be present at trial is the constitutional mandate to provide an opportunity to defend oneself, due process requires that the defendant be personally present to the extent that a fair and just hearing would be thwarted by the defendant's absence, and to that extent only. *Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

A criminal defendant's constitutional right to be present at trial does not include a concomitant right of absence. *Tilley v. State*, 201 Ga. App. 360, 411 S.E.2d 100 (1991).

Where the defendant voluntarily is absent from trial, the trial court may direct that a plea of not guilty be entered and proceed with the trial. *Croy v. State*, 168 Ga. App. 241, 308 S.E.2d 568 (1983).

Trial court is empowered to order a criminal defendant's personal appearance when it is necessary to properly conduct the trial. This is especially true where identification of the defendant by a witness is contemplated by the prosecution. *Tilley v. State*, 201 Ga. App. 360, 411 S.E.2d 100 (1991).

Alibi defense notice. — Defendant, whose evidence was the sole evidence in support of an alibi defense, was required to file an intention to offer said defense under O.C.G.A. § 17-16-5(a), even when the state was aware that the defendant claimed to be elsewhere on the day of the crime, and such did not affect the defendant's right to testify under the sixth amendment; moreover, any prejudice to the state was irrelevant, because the statute provided no exception for such prior knowledge, and because common sense dictated that the mere claim to be elsewhere when confronted by authorities

was a far cry from intending to present the legal defense of alibi. *State v. Charbonneau*, 281 Ga. 46, 635 S.E.2d 759 (2006).

Preference for resolving cases on nonconstitutional grounds. — Courts should not decide a case on constitutional grounds when it can be resolved on statutory and general law grounds. *United States v. Northside Realty Assocs.*, 510 F. Supp. 668 (N.D. Ga.), rev'd on other grounds, *United States v. Bearden*, 659 F.2d 590 (5th Cir. 1981), cert. denied, 456 U.S. 936, 102 S. Ct. 1993, 72 L. Ed. 2d 456 (1982).

Form of waiver of trial unimportant. — Defendant's consent to waive the right to trial need not be in a particular, ritualistic form, since form is unimportant. *Griggs v. State*, 159 Ga. App. 219, 283 S.E.2d 77 (1981).

Failure to voice objection. — The refusal to grant a mistrial, on the grounds that the state's cross-examination of a witness was improper, is not an abuse of discretion where the defendant failed to voice an objection during the questioning. *Kirk v. State*, 168 Ga. App. 226, 308 S.E.2d 592 (1983), aff'd, 252 Ga. 133, 311 S.E.2d 821 (1984).

An arrest scene identification was justified where the police were in "hot pursuit" of suspects and needed to quickly ascertain if the persons apprehended were the actual perpetrators. *McGhee v. State*, 253 Ga. 278, 319 S.E.2d 836 (1984).

Requiring defendant to testify as to sound of the defendant's name. — Defendant's fifth and sixth amendment rights were not violated by requiring the defendant to testify about the sound of the defendant's name. *Werts v. State*, 196 Ga. App. 452, 395 S.E.2d 922 (1990).

Refusal to allow evidence of defendant's mental faculties. — Where a defendant had suffered organic brain damage as a result of an auto accident, the defendant was not deprived of the defendant's sixth amendment right to defend oneself and develop substantive evidence at trial by the court's refusal to allow the defense to present evidence pertaining to the defendant's mental faculties, relevant to the issue of intent and the defenses of entrapment and coercion, and by a charge to the jury on guilty but mentally ill. *Holder v. State*, 194 Ga. App. 790, 391 S.E.2d 808 (1990).

Conspiracy indictment. — In a prosecution for conspiracy to possess with intent to

distribute cocaine, defendant's sixth amendment right was not violated by holding the defendant accountable for the overall measure of drugs, not simply the quantity submitted into evidence. *United States v. Lockett*, 867 F. Supp. 1044 (M.D. Ga. 1994), *aff'd*, 70 F.3d 126 (11th Cir. 1995).

Statements made after arrest. — State death row inmate's federal habeas petition was denied because the inmate's right against self-incrimination was not abridged during custodial interrogation by police; under the federal constitutional standards applicable at the time of trial, the state courts properly found that the inmate had reinitiated the inmate's in-custody conversation with police after equivocally requesting an attorney. *Ford v. Schofield*, ___ F. Supp. 2d ___, 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

Waiver of right to be present at trial. — Defendant waived the constitutional right to be present during portion of voir dire and on the second day of the trial where the defendant was free on bail and failed to make sufficient arrangements to attend. *Winfield v. State*, 210 Ga. App. 849, 437 S.E.2d 849 (1993).

Prosecutor's conduct. — Defendant was not denied defendant's sixth amendment right to a fair trial because of prosecutorial misconduct where an investigator testified that the investigator found a shotgun in defendant's apartment, the prosecutor produced the shotgun and asked the deputy to secure it; defense counsel requested no further relief and never raised the issue of prosecutorial misconduct in the trial court. *Fairclough v. State*, 276 Ga. 602, 581 S.E.2d 3 (2003).

Improper restrictive pretrial publicity order. — Ga. St. Bar R. 4-102(d):3.6 required a finding that extrajudicial statements to media members would have had a substantial likelihood of materially prejudicing the trial; where, in restricting the extrajudicial statements to the media members by the non-lawyers, the parties, experts, witnesses, and investigators involved in a criminal trial, a trial court failed to find, based on evidence in the record, that the extrajudicial statements would have had a substantial likelihood of materially prejudicing the trial, and to the extent the order contravened Ga. St. Bar R. 4-102(d):3.6, it was overbroad, and

was reversed. *Atlanta Journal-Constitution v. State*, 266 Ga. App. 168, 596 S.E.2d 694 (2004).

Cited in *Reynolds v. Brosnan*, 170 Ga. 773, 154 S.E. 264 (1930); *Waugh v. Aderhold*, 52 F.2d 702 (N.D. Ga. 1931); *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932); *Hurt v. Zerbst*, 97 F.2d 519 (5th Cir. 1938); *Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938); *Saylor v. Sanford*, 99 F.2d 605 (5th Cir. 1938); *Burns v. State*, 191 Ga. 60, 11 S.E.2d 350 (1940); *Morton v. Henderson*, 123 F.2d 48 (5th Cir. 1941); *Walker v. State*, 194 Ga. 727, 22 S.E.2d 462 (1942); *Williams v. State*, 199 Ga. 504, 34 S.E.2d 854 (1945); *Morris v. Peacock*, 202 Ga. 524, 43 S.E.2d 531 (1947); *Boyett v. State*, 205 Ga. 370, 53 S.E.2d 919 (1949); *Sweeney v. Hiatt*, 89 F. Supp. 416 (N.D. Ga. 1949); *Wallace v. Foster*, 206 Ga. 561, 57 S.E.2d 920 (1950); *McLendon v. Balkcom*, 207 Ga. 100, 60 S.E.2d 753 (1950); *Harris v. State*, 84 Ga. App. 1, 65 S.E.2d 267 (1951); *Gordon v. United States*, 216 F.2d 495 (5th Cir. 1954); *Abbott v. State*, 91 Ga. App. 380, 85 S.E.2d 615 (1955); *Bibb County v. Hancock*, 211 Ga. 429, 86 S.E.2d 511 (1955); *Krull v. United States*, 240 F.2d 122 (5th Cir. 1957); *Rushing v. Wilkinson*, 272 F.2d 633 (5th Cir. 1959); *Ledford v. State*, 215 Ga. 799, 113 S.E.2d 628 (1960); *Atlanta Newspapers, Inc. v. State*, 101 Ga. App. 105, 113 S.E.2d 148 (1960); *Cadle v. State*, 101 Ga. App. 175, 113 S.E.2d 180 (1960); *Josey v. State*, 102 Ga. App. 707, 117 S.E.2d 641 (1960); *Backer v. Commissioner*, 275 F.2d 141 (5th Cir. 1960); *Ferguson v. Georgia*, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961); *Ferguson v. State*, 219 Ga. 33, 131 S.E.2d 538 (1963); *Roberts v. United States*, 325 F.2d 290 (5th Cir. 1963); *Hunsucker v. Balkcom*, 220 Ga. 73, 137 S.E.2d 43 (1964); *Brandeis v. Broome*, 220 Ga. 190, 137 S.E.2d 628 (1964); *Temple v. United States*, 330 F.2d 724 (5th Cir. 1964); *Shelton v. State*, 220 Ga. 610, 140 S.E.2d 839 (1965); *Chatterton v. State*, 221 Ga. 424, 144 S.E.2d 726 (1965); *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir. 1965); *Blevins v. State*, 113 Ga. App. 413, 148 S.E.2d 192 (1966); *Moore v. State*, 113 Ga. App. 738, 149 S.E.2d 492 (1966); *Woods v. State*, 222 Ga. 321, 149 S.E.2d 674 (1966); *Givens v. Dutton*, 222 Ga. 756, 152 S.E.2d 358 (1966); *Sullivan v. State*, 222 Ga. 691, 152 S.E.2d 382 (1966); *Moore v. State*, 222 Ga. 748, 152 S.E.2d 570 (1966); *Carmichael*

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v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966); White v. McHan, 223 Ga. 136, 153 S.E.2d 705 (1967); Abrams v. State, 223 Ga. 216, 154 S.E.2d 443 (1967); Berta v. State, 223 Ga. 267, 154 S.E.2d 594 (1967); Gunter v. State, 223 Ga. 290, 154 S.E.2d 608 (1967); Arkwright v. State, 223 Ga. 768, 158 S.E.2d 370 (1967); Hurst v. United States, 370 F.2d 161 (5th Cir. 1967); Franklin v. United States, 384 F.2d 377 (5th Cir. 1967); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1 (1968); Mayes v. State Bd. of Cors., 224 Ga. 454, 162 S.E.2d 344 (1968); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); Holmes v. State, 224 Ga. 553, 163 S.E.2d 803 (1968); Peters v. Rutledge, 397 F.2d 731 (5th Cir. 1968); Wilson v. United States, 398 F.2d 331 (5th Cir. 1968); Robinson v. State, 225 Ga. 167, 167 S.E.2d 158 (1969); Hakala v. State, 225 Ga. 629, 170 S.E.2d 406 (1969); Cato v. Georgia, 302 F. Supp. 1143 (N.D. Ga. 1969); Sellers v. Smith, 412 F.2d 1002 (5th Cir. 1969); Kemp v. United States, 415 F.2d 1185 (5th Cir. 1969); Washington v. Smith, 417 F.2d 301 (5th Cir. 1969); Robinson v. State, 226 Ga. 461, 175 S.E.2d 505 (1970); Little v. State, 121 Ga. App. 792, 175 S.E.2d 922 (1970); Blackmon v. Smith, 226 Ga. 849, 178 S.E.2d 176 (1970); Campbell v. Smith, 308 F. Supp. 796 (S.D. Ga. 1970); United States v. Adkins, 426 F.2d 298 (5th Cir. 1970); Robinson v. State, 123 Ga. App. 243, 180 S.E.2d 258 (1971); Willis v. Smith, 227 Ga. 589, 182 S.E.2d 94 (1971); Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971); United States v. Reese, 331 F. Supp. 1088 (N.D. Ga. 1971); Cooley v. Endictor, 340 F. Supp. 15 (N.D. Ga. 1971); United States v. Sinclair, 438 F.2d 50 (5th Cir. 1971); United States v. Bullock, 441 F.2d 59 (5th Cir. 1971); Wynn v. Smith, 446 F.2d 341 (5th Cir. 1971); Poole v. Stewart, 228 Ga. 548, 186 S.E.2d 864 (1972); Fryer v. Stynchcombe, 228 Ga. 576, 186 S.E.2d 885 (1972); Yeomans v. State, 229 Ga. 488, 192 S.E.2d 362 (1972); Wallace v. Ault, 229 Ga. 717, 194 S.E.2d 88 (1972); Starr v. State, 229 Ga. 181, 190 S.E.2d 58 (1972); United States v. Doolittle, 341 F. Supp. 163 (M.D. Ga. 1972); United States v. Jones, 352 F. Supp. 369 (S.D. Ga. 1972); Pollard v. State, 128 Ga. App. 470, 197 S.E.2d 158 (1973); McKenzie v. State, 231 Ga. 513, 202 S.E.2d 417 (1973); Ansley v. Stynchcombe, 480 F.2d 437 (5th Cir. 1973); United States v. Clark, 480 F.2d 1249 (5th Cir. 1973); Shouse v. State, 231 Ga. 716, 203 S.E.2d 537 (1974); Marshall v. State, 130 Ga. App. 572, 203 S.E.2d 885 (1974); Payne v. State, 231 Ga. 755, 204 S.E.2d 128 (1974); Freeman v. State, 130 Ga. App. 718, 204 S.E.2d 445 (1974); Emmett v. State, 232 Ga. 110, 205 S.E.2d 231 (1974); Spaulding v. State, 232 Ga. 411, 207 S.E.2d 43 (1974); Haralson County Economic Dev. Corp. v. Hammock, 233 Ga. 381, 211 S.E.2d 278 (1974); Hall v. United States, 489 F.2d 427 (5th Cir. 1974); United States v. Strickland, 493 F.2d 182 (5th Cir. 1974); Treadwell v. State, 233 Ga. 468, 211 S.E.2d 760 (1975); Copeland v. State, 133 Ga. App. 713, 213 S.E.2d 17 (1975); Gilstrap v. Wilder, 233 Ga. 968, 213 S.E.2d 895 (1975); Carney v. State, 134 Ga. App. 816, 216 S.E.2d 617 (1975); State v. King, 137 Ga. App. 26, 222 S.E.2d 859 (1975); Long v. Powell, 388 F. Supp. 422 (N.D. Ga. 1975); Clark v. Hendrix, 397 F. Supp. 966 (N.D. Ga. 1975); Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975); United States v. Pollard, 509 F.2d 601 (5th Cir. 1975); United States v. Crockett, 514 F.2d 64 (5th Cir. 1975); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990 (5th Cir. 1975); Casey v. United States, 522 F.2d 206 (5th Cir. 1975); Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976); Johnston v. State, 236 Ga. 370, 223 S.E.2d 808 (1976); Wallis v. State, 137 Ga. App. 457, 224 S.E.2d 91 (1976); Porterfield v. State, 137 Ga. App. 449, 224 S.E.2d 94 (1976); Dodd v. State, 236 Ga. 572, 224 S.E.2d 408 (1976); Hightower v. State, 137 Ga. App. 790, 224 S.E.2d 842 (1976); Reid v. State, 237 Ga. 106, 227 S.E.2d 24 (1976); Ballew v. State, 138 Ga. App. 530, 227 S.E.2d 65 (1976); Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976); Garrett v. Department of Pub. Safety, 237 Ga. 413, 228 S.E.2d 812 (1976); State v. Cox, 140 Ga. App. 30, 230 S.E.2d 87 (1976); Brown v. State, 238 Ga. 98, 231 S.E.2d 65 (1976); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977); Bell v. State, 239 Ga. 146, 236 S.E.2d 47 (1977); Fouts v. State, 240 Ga. 39, 239 S.E.2d 366 (1977); Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977); Bailey v. State, 240 Ga. 112, 239 S.E.2d 521 (1977); Brown v. State, 240 Ga. 274, 240 S.E.2d 63

(1977); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Freedman v. United States*, 437 F. Supp. 1252 (N.D. Ga. 1977); *United States v. Wyers*, 546 F.2d 599 (5th Cir. 1977); *Mason v. Pulliam*, 557 F.2d 426 (5th Cir. 1977); *United States v. Hegwood*, 562 F.2d 946 (5th Cir. 1977); *United States v. Morgan*, 562 F.2d 1001 (5th Cir. 1977); *Ervin v. State*, 144 Ga. App. 504, 241 S.E.2d 650 (1978); *Simpson v. State*, 144 Ga. App. 657, 242 S.E.2d 265 (1978); *Hannah v. State*, 144 Ga. App. 677, 242 S.E.2d 334 (1978); *Aguilar v. State*, 240 Ga. 830, 242 S.E.2d 620 (1978); *Tyson v. State*, 145 Ga. App. 21, 243 S.E.2d 314 (1978); *Kelly v. State*, 241 Ga. 190, 243 S.E.2d 857 (1978); *Thornton v. State*, 145 Ga. App. 793, 245 S.E.2d 22 (1978); *Raymond v. State*, 146 Ga. App. 452, 246 S.E.2d 461 (1978); *Amoson v. State*, 146 Ga. App. 510, 246 S.E.2d 502 (1978); *Davis v. State*, 241 Ga. 376, 247 S.E.2d 45 (1978); *Tanner v. State*, 242 Ga. 437, 249 S.E.2d 238 (1978); *Reaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978); *Elkins v. State*, 147 Ga. App. 837, 250 S.E.2d 535 (1978); *United States v. Davis*, 571 F.2d 1354 (5th Cir. 1978); *United States v. Swanson*, 572 F.2d 523 (5th Cir. 1978); *Gibson v. Jackson*, 578 F.2d 1045 (5th Cir. 1978); *Anderson v. State*, 148 Ga. App. 683, 252 S.E.2d 187 (1979); *Andrews v. State*, 148 Ga. App. 709, 252 S.E.2d 210 (1979); *Spain v. State*, 243 Ga. 15, 252 S.E.2d 436 (1979); *Corn v. Hopper*, 244 Ga. 28, 257 S.E.2d 533 (1979); *United States v. Thevis*, 474 F. Supp. 117 (N.D. Ga. 1979); *United States v. Brown*, 587 F.2d 187 (5th Cir. 1979); *United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979); *Odum v. State*, 156 Ga. App. 119, 274 S.E.2d 117 (1980); *Smith v. State*, 156 Ga. App. 563, 275 S.E.2d 140 (1980); *United States v. Luttrell*, 609 F.2d 1190 (5th Cir. 1980); *Gantt v. First Ala. Bank*, 7 Bankr. 13 (Bankr. N.D. Ga. 1980); *ITT Indus. Credit Corp. v. Scarboro*, 7 Bankr. 609 (Bankr. M.D. Ga. 1980), *aff'd* in part and vacated in part, 13 Bankr. 439 (M.D. Ga. 1981); *Messer v. State*, 247 Ga. 316, 276 S.E.2d 15 (1981); *Walker v. State*, 247 Ga. 484, 277 S.E.2d 242 (1981); *Covington v. State*, 157 Ga. App. 371, 277 S.E.2d 744 (1981); *Hamrick v. State*, 158 Ga. App. 444, 280 S.E.2d 868 (1981); *Harkness v. State*, 158 Ga. App. 515, 281 S.E.2d 281 (1981); *McMeans v. State*, 160 Ga. App. 286, 287 S.E.2d 280 (1981); *Foster v. State*, 160 Ga. App. 326, 287 S.E.2d 323

(1981); *United States v. Bartlett*, 633 F.2d 1184 (5th Cir. 1981); *Shaw v. Stone*, 506 F. Supp. 571 (M.D. Ga. 1981); *Smith v. State*, 161 Ga. App. 512, 288 S.E.2d 754 (1982); *Johnson v. Zant*, 249 Ga. 812, 295 S.E.2d 63 (1982); *Brown v. State*, 164 Ga. App. 505, 296 S.E.2d 215 (1982); *Jones v. Kemp*, 678 F.2d 929 (11th Cir. 1982); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982); *State v. King*, 165 Ga. App. 81, 298 S.E.2d 586 (1982); *Strickland v. State*, 250 Ga. 624, 300 S.E.2d 156 (1983); *High v. Zant*, 250 Ga. 693, 300 S.E.2d 654 (1983); *Glass v. State*, 250 Ga. 736, 300 S.E.2d 812 (1983); *Newberry v. State*, 250 Ga. 819, 301 S.E.2d 282 (1983); *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983); *Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983); *Hagen v. State*, 169 Ga. App. 259, 312 S.E.2d 357 (1983); *Shaw v. Boney*, 695 F.2d 528 (11th Cir. 1983); *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983); *Sellers v. United States*, 709 F.2d 1469 (11th Cir. 1983); *In re Bizzard*, 559 F. Supp. 507 (S.D. Ga. 1983); *Dodd v. Williams*, 560 F. Supp. 372 (N.D. Ga. 1983); *Villafranco v. State*, 252 Ga. 188, 313 S.E.2d 469 (1984); *Birt v. Montgomery*, 725 F.2d 587 (11th Cir. 1984); *Code v. Montgomery*, 725 F.2d 1316 (11th Cir. 1984); *Collins v. Francis*, 728 F.2d 1322 (11th Cir. 1984); *United States v. DiJames*, 731 F.2d 758 (11th Cir. 1984); *United States v. Burke*, 738 F.2d 1225 (11th Cir. 1984); *United States v. Perry*, 740 F.2d 854 (11th Cir. 1984); *United States v. Lewis*, 743 F.2d 859 (11th Cir. 1984); *Dix v. Newsome*, 584 F. Supp. 1052 (N.D. Ga. 1984); *Greene v. United States*, 589 F. Supp. 834 (N.D. Ga. 1984); *Hall v. State*, 255 Ga. 267, 336 S.E.2d 812 (1985); *United States v. Suggs*, 755 F.2d 1538 (11th Cir. 1985); *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985); *Stevenson v. Newsome*, 774 F.2d 1558 (11th Cir. 1985); *Tucker v. Kemp*, 776 F.2d 1487 (11th Cir. 1985); *Moore v. State*, 176 Ga. App. 882, 339 S.E.2d 271 (1985); *Davis v. State*, 255 Ga. 598, 340 S.E.2d 869 (1986); *Johnson v. State*, 255 Ga. 552, 341 S.E.2d 220 (1986); *Rogers v. State*, 256 Ga. 139, 344 S.E.2d 644 (1986); *Short v. State*, 256 Ga. 172, 345 S.E.2d 344 (1986); *Wright v. State*, 179 Ga. App. 325, 346 S.E.2d 361 (1986); *Hood v. State*, 179 Ga. App. 387, 346 S.E.2d 867 (1986); *Tutton v. State*, 179 Ga. App. 462, 346 S.E.2d 898 (1986); *Oldham v. State*, 179 Ga. App. 730, 347 S.E.2d 698 (1986);

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LeGallienne v. State, 180 Ga. App. 108, 348 S.E.2d 471 (1986); Parker v. Mooneyham, 256 Ga. 334, 349 S.E.2d 182 (1986); Graves v. State, 180 Ga. App. 446, 349 S.E.2d 519 (1986); Parker v. State, 256 Ga. 543, 350 S.E.2d 570 (1986); Collins v. Kemp, 792 F.2d 987 (11th Cir. 1986); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986); Edwards v. United States, 795 F.2d 958 (11th Cir. 1986); Fleming v. Kemp, 637 F. Supp. 1547 (M.D. Ga. 1986); Anglin v. Green, 639 F. Supp. 490 (S.D. Ga. 1986); Wilson v. State, 181 Ga. App. 435, 352 S.E.2d 618 (1987); Henderson v. State, 182 Ga. App. 513, 356 S.E.2d 241 (1987); Tucker v. Kemp, 818 F.2d 749 (11th Cir. 1987); Mitchell v. Kemp, 827 F.2d 1433 (11th Cir. 1987); Brand v. State, 258 Ga. 378, 369 S.E.2d 896 (1988); Seymore v. Alabama, 846 F.2d 1355 (11th Cir. 1988); United States v. Elliott, 849 F.2d 554 (11th Cir. 1988); Hanson v. State, 258 Ga. 564, 372 S.E.2d 436 (1988); Williams v. State, 188 Ga. App. 332, 373 S.E.2d 40 (1988); Burroughs v. State, 190 Ga. App. 467, 379 S.E.2d 175 (1989); Holmes v. United States, 876 F.2d 1545 (11th Cir. 1989); United States v. Henry, 883 F.2d 1010 (11th Cir. 1989); Frost v. State, 200 Ga. App. 267, 407 S.E.2d 765 (1991); Stevens v. Zant, 968 F.2d 1076 (11th Cir. 1992), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 695 (1993); Ledbetter v. State, 262 Ga. 370, 418 S.E.2d 57 (1992); McBride v. Gaither, 203 Ga. App. 885, 418 S.E.2d 67 (1992); Walton v. State, 203 Ga. App. 888, 418 S.E.2d 148 (1992); Greenwood v. State, 203 Ga. App. 901, 418 S.E.2d 160 (1992); United States v. Martin, 824 F. Supp. 208 (M.D. Ga. 1993); Griggs v. State, 262 Ga. 766, 425 S.E.2d 644 (1993); Hayes v. State, 262 Ga. 881, 426 S.E.2d 886 (1993); Thurman v. State, 207 Ga. App. 96, 427 S.E.2d 69 (1993); Parrott v. State, 206 Ga. App. 829, 427 S.E.2d 276 (1993); Williams v. State, 207 Ga. App. 418, 427 S.E.2d 787 (1993); Allen v. State, 263 Ga. 60, 428 S.E.2d 73 (1993); Pittman v. State, 208 Ga. App. 211, 430 S.E.2d 141 (1993); Lajara v. State, 263 Ga. 438, 435 S.E.2d 600 (1993); Gentry v. State, 235 Ga. App. 328, 508 S.E.2d 671 (1998); Copeland v. State, 248 Ga. App. 346, 546 S.E.2d 351 (2001); Farrier v. State, 273 Ga. 302, 540 S.E.2d 596 (2001).

Speedy and Public Trial

1. In General

Speedy trial standards are the same under federal and state constitutions. — The same standards for deciding claims of denial of a speedy trial are used whether the claim is based on U.S. Const., amend. 6 or Ga. Const. 1976, Art. I, Sec. I, Para. XI (see Ga. Const. 1983, Art. I, Sec. I, Para. XI). Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977).

All defendants are entitled to the fundamental right to a speedy trial. United States v. Dyson, 469 F.2d 735 (5th Cir. 1972).

Speedy trial is a fundamental constitutional right, not a privilege. Blevins v. State, 113 Ga. App. 702, 149 S.E.2d 423 (1966); Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Right to speedy trial is a fundamental right that applies to the states through U.S. Const., amend. 14. Harris v. Hopper, 236 Ga. 389, 224 S.E.2d 1 (1976).

Essential ingredient of the right to speedy trial is orderly expedition and not mere speed. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Right to a speedy trial is intended to avoid oppression and prevent delay by imposing on the courts and on the prosecution an obligation to proceed with reasonable dispatch. Blevins v. State, 113 Ga. App. 702, 149 S.E.2d 423 (1966).

Right to a speedy trial secures rights to a defendant, but does not preclude the rights of public justice. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

It is a unique right endemic to both the government and the accused. United States v. Dyson, 469 F.2d 735 (5th Cir. 1972).

Unlike other constitutional rights, both society and the defendant have a potential interest in either having a speedy trial or delaying any trial. State v. Lively, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Accused's interests in speedy trial. — The interests of an accused protected by the right to speedy trial are: to prevent oppressive pretrial incarceration; to minimize anxiety and concern of the accused; and to limit the possibility that the defense will be impaired. Blevins v. State, 113 Ga. App. 702, 149 S.E.2d 423 (1966); Reid v. State, 116 Ga. App. 640,

158 S.E.2d 461 (1967); *Sanders v. State*, 132 Ga. App. 580, 208 S.E.2d 597 (1974); *State v. Fields*, 137 Ga. App. 726, 224 S.E.2d 829 (1976); *Simpson v. State*, 150 Ga. App. 814, 258 S.E.2d 634 (1979); *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980).

Defendant's speedy trial interests do not per se outweigh those of society. — Under the analysis made by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), it cannot be said that the ultimate responsibility of the state to provide a speedy trial is such that the state's unexcused failure to provide it creates a presumption of deprivation of the right or a burden on the state to prove otherwise. To the contrary, the plain tenor of *Barker* seems to be that society's interest in bringing the criminal defendant to trial is not per se out-weighted by the individual's right to speedy trial. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Factors to be considered in speedy trial determinations. — In determining whether the right to speedy trial has been violated, a court is required to consider four factors: length of the delay, the reasons for the delay, the accused's assertion of the accused's right, and prejudice to the accused. *Sullivan v. State*, 225 Ga. 301, 168 S.E.2d 133 (1969); *Johnson v. Smith*, 227 Ga. 611, 182 S.E.2d 101 (1971); *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972); *Mays v. State*, 229 Ga. 609, 193 S.E.2d 825 (1972); *United States v. Dyson*, 469 F.2d 735 (5th Cir. 1972); *Hall v. State*, 131 Ga. App. 786, 206 S.E.2d 644 (1974); *Sanders v. State*, 132 Ga. App. 580, 208 S.E.2d 597 (1974); *Boyd v. State*, 133 Ga. App. 395, 211 S.E.2d 22 (1974); *United States v. Smith*, 65 F.R.D. 464 (N.D. Ga. 1974); *State v. King*, 137 Ga. App. 26, 222 S.E.2d 859 (1975); *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976); *State v. Fields*, 137 Ga. App. 726, 224 S.E.2d 829 (1976); *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976); *United States v. Duke*, 527 F.2d 386 (5th Cir.), cert. denied, 426 U.S. 952, 96 S. Ct. 3177, 49 L. Ed. 2d 1190 (1976); *United States v. Campbell*, 531 F.2d 1333 (5th Cir. 1976), cert. denied, 434 U.S. 851, 98 S. Ct. 164, 54 L. Ed. 2d 121 (1977); *United States v. Palmer*, 537 F.2d 1287 (5th Cir. 1976), cert. denied, 434 U.S. 1018, 98 S. Ct. 738, 54 L. Ed. 2d 764 (1978); *Fleming v. State*, 240 Ga.

142, 240 S.E.2d 37 (1977); *Powell v. State*, 143 Ga. App. 684, 239 S.E.2d 560 (1977); *Arnold v. State*, 239 Ga. 752, 238 S.E.2d 876 (1977); *Cravey v. State*, 147 Ga. App. 29, 248 S.E.2d 13 (1978); *Natson v. State*, 242 Ga. 618, 250 S.E.2d 420 (1978), cert. denied, 441 U.S. 925, 99 S. Ct. 2036, 60 L. Ed. 2d 399 (1979); *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978); *Haisman v. State*, 242 Ga. 896, 252 S.E.2d 397 (1979); *Simpson v. State*, 150 Ga. App. 814, 258 S.E.2d 634 (1979); *Garrett v. Arrington*, 245 Ga. 47, 262 S.E.2d 808 (1980); *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980); *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980); *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980); *United States v. Hill*, 622 F.2d 900 (5th Cir. 1980); *Nelson v. State*, 247 Ga. 172, 274 S.E.2d 317, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981); *Glidewell v. Burden*, 822 F.2d 1027 (11th Cir. 1987), cert. denied, 484 U.S. 1018, 108 S. Ct. 727, 98 L. Ed. 2d 676 (1988); *United States v. Burke*, 673 F. Supp. 1574 (N.D. Ga. 1986), aff'd, 856 F.2d 1492 (11th Cir. 1988), cert. denied, 492 U.S. 908, 109 S. Ct. 3222, 106 L. Ed. 2d 571 (1989); *McClanahan v. State*, 196 Ga. App. 737, 397 S.E.2d 24 (1990), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003); *Redd v. State*, 261 Ga. 300, 404 S.E.2d 264 (1991), cert. denied, 505 U.S. 1218, 112 S. Ct. 3025, 120 L. Ed. 2d 897 (1992); *Hall v. State*, 201 Ga. App. 133, 410 S.E.2d 448 (1991); *United States v. Hayes*, 40 F.3d 362 (11th Cir. 1994), cert. denied, 516 U.S. 812, 116 S. Ct. 62, 133 L. Ed. 2d 24 (1995).

The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. *Ayers v. State*, 181 Ga. App. 244, 351 S.E.2d 692 (1986); *McClanahan v. State*, 196 Ga. App. 737, 397 S.E.2d 24 (1990), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003).

It is necessary for the trial court to consider and weigh each of these factors in determining the speedy trial issue. *State v.*

Speedy and Public Trial (Cont'd)**1. In General (Cont'd)**

Fields, 137 Ga. App. 726, 224 S.E.2d 829 (1976).

Defendant's conduct must be balanced against prosecution's. — Whether a defendant has been denied the right to a speedy trial is determined by a balancing test, weighing the conduct of the prosecution with that of the defendant. *Boyd v. State*, 133 Ga. App. 395, 211 S.E.2d 22 (1974); *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

Court did not err in denying motion to dismiss on speedy trial grounds because, although the initial delay was attributable to the state, after the indictment was filed the state moved with reasonable promptness, and defendant filed a defense motion only weeks before the trial date. *Chappell v. State*, 272 Ga. App. 1, 611 S.E.2d 157 (2005).

Balancing test is a delicate, sensitive process, and each case must rely upon its own circumstances. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Premature demand for speedy trial. — Although defendant filed a speedy trial demand prematurely, defendant nonetheless placed all parties on notice that a speedy trial was wanted and, in considering defendant's motion for discharge and acquittal on constitutional grounds, the trial court weighed this factor in defendant's favor. *State v. Bazemore*, 249 Ga. App. 584, 549 S.E.2d 426 (2001).

Given defendant's premature speedy trial demand, made after defendant's arrest, but before the grand jury indictment was filed, the trial court properly denied defendant's motion for discharge and acquittal. *Roberts v. State*, 263 Ga. App. 472, 588 S.E.2d 242 (2003).

Relevant time period for measuring delay. — The relevant period of time in determining the right to a speedy trial is that between the indictment, or institution of prosecution, and the trial. *United States v. Durham*, 413 F.2d 1003 (5th Cir.), cert. denied, 396 U.S. 839, 90 S. Ct. 100, 24 L. Ed. 2d 89 (1969).

Unless the defendant has been held in custody by the state, the relevant period of time in measuring the length of delay as a

denial of the right to a speedy trial is that between the indictment or institution of prosecution by information, etc., and the trial, not the preindictment delay. *Sanders v. State*, 132 Ga. App. 580, 208 S.E.2d 597 (1974).

Delay in trying a case is to be determined from the date of arrest or of indictment, whichever comes first. *Cravey v. State*, 147 Ga. App. 29, 248 S.E.2d 13 (1978).

Delay measured from time of arrest. — For purposes of speedy trial the Supreme Court begins to count from the date of arrest, if that precedes indictment. The time from arrest to indictment is added to time from indictment to trial. *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976).

Delay measured from date of indictment if no prior arrest. — Under U.S. Const., amend. 6, the clock begins to tick upon indictment, when no prior arrest on the alleged offense is involved. In particular, the date of the indictment is the crucial date for a prisoner already incarcerated on a prior offense. *United States v. Hill*, 622 F.2d 900 (5th Cir. 1980).

Effect of state delay on federal prosecution. — The fifth, sixth, and fourteenth amendments did not bar a federal prosecution because any arguably improper or unconstitutional delay in the prosecution was occasioned solely by Georgia authorities; there was no basis here for imputing Georgia's dilatory conduct to the United States or to the federal prosecution. *United States v. Boone*, 959 F.2d 1550 (11th Cir. 1992).

Right to speedy trial applies to a person who is at large on bail, since, in addition to protecting an accused against prolonged incarceration, the right also serves other purposes which are applicable whether the defendant is on bail or not. *Blevins v. State*, 113 Ga. App. 702, 149 S.E.2d 423 (1966).

Right to a speedy trial has no application to delays resulting from a finding of incompetency. *Gibbs v. State*, 235 Ga. 480, 220 S.E.2d 254 (1975), cert. denied, 424 U.S. 924, 96 S. Ct. 1134, 47 L. Ed. 2d 333 (1976).

Delay in ruling on new trial motion. — Trial judge's delay in ruling on the new trial motion after conviction of the accused is not a denial of the constitutional right to a speedy trial where the delay does not deprive the accused of the opportunity to serve the sentence concurrently with another sen-

tence imposed in a separate trial. *Herring v. Ault*, 230 Ga. 398, 197 S.E.2d 354 (1973).

Delay in sentencing may violate speedy trial protections. — Unreasonable delay in sentencing may constitute a violation of a defendant's right under U.S. Const., amend. 6 to a speedy trial. *United States v. Campbell*, 531 F.2d 1333 (5th Cir. 1976), cert. denied, 434 U.S. 851, 98 S. Ct. 164, 54 L. Ed. 2d 121 (1977).

Accused entitled to speedy sentence where formal trial waived. — The accused who wishes to waive a formal trial is entitled also to secure, if the accused desires, a speedy sentence, in which situation the Federal Rules of Criminal Procedure will implement or augment U.S. Const., amend. 6 in providing for a speedy trial to an accused who seeks, by way of a trial, nothing more than the prompt imposition of such sentence as the court deems appropriate to the offense. *Barkman v. Sanford*, 162 F.2d 592 (5th Cir.), cert. denied, 332 U.S. 816, 68 S. Ct. 155, 92 L. Ed. 393 (1947).

Right to a speedy trial does not apply in probation revocation proceedings, since they are not criminal proceedings. *United States v. Jackson*, 590 F.2d 121 (5th Cir.), cert. denied, 441 U.S. 912, 99 S. Ct. 2012, 60 L. Ed. 2d 385 (1979).

Right to a speedy trial does not apply to parole revocation. — The right to a speedy trial is not applicable to parole revocation proceedings. *Moultrie v. Georgia*, 464 F.2d 551 (5th Cir. 1972).

Delay of parole revocation hearing pending incarceration in another state. — Although Georgia law requires a parole revocation hearing (see O.C.G.A. § 42-9-5), where a person has committed a crime in another state, has been convicted, and is incarcerated in that state, it is not unconstitutional to delay the parole revocation hearing until expiration of that later sentence. *Moultrie v. Georgia*, 464 F.2d 551 (5th Cir. 1972).

Speedy trial rights not forfeited by incarceration for another offense. — Merely because an individual charged with a criminal offense is serving a prison term for another offense does not mean that the individual forfeits the right to a speedy trial for the pending charge. *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967); *United States v. Duke*, 527 F.2d 386 (5th Cir.), cert. denied,

426 U.S. 952, 96 S. Ct. 3177, 49 L. Ed. 2d 1190 (1976).

Incarceration for a separate offense pending trial does not, ipso facto, show that the delay is unoppressive but it may where no anxiety or prejudice is shown. *State v. Fields*, 137 Ga. App. 726, 224 S.E.2d 829 (1976).

Trial court has no power to consider a claim of denial of speedy trial as to warrants issued in other judicial circuits. *Garrett v. Arrington*, 245 Ga. 47, 262 S.E.2d 808, cert. denied, 446 U.S. 968, 100 S. Ct. 2948, 64 L. Ed. 2d 828 (1980).

Differing terms of court. — O.C.G.A. §§ 15-6-3(15.1) and 17-7-171 did not combine to deprive a criminal defendant of equal protection of the law by permitting the county of the defendant's adjudication to operate with only two terms of court, while other similar-sized counties operate with more terms of court. Although the defendant may have had to wait months longer for the trial than similarly situated defendants in other counties, the presumptive validity of the statutes stood. *Henry v. State*, 263 Ga. 417, 434 S.E.2d 469 (1993).

Same considerations which require a speedy trial for an unincarcerated person apply to one imprisoned by another sovereign. *Lawrence v. Blackwell*, 298 F. Supp. 708 (N.D. Ga. 1969).

That a defendant is confined in another jurisdiction, or another state, is not dispositive of a speedy trial issue. *Sassoon v. State*, 138 Ga. App. 172, 225 S.E.2d 732 (1976).

Claim by incarcerated defendant of denial of speedy trial by another jurisdiction. — A defendant who is being held by one jurisdiction cannot force the officials of another judicial circuit in which the defendant is wanted to travel to the jurisdiction in which the defendant is incarcerated to test the continuing validity of their charges against the defendant by raising the claim that the defendant is being denied a speedy trial. *Garrett v. Arrington*, 245 Ga. 47, 262 S.E.2d 808, cert. denied, 446 U.S. 968, 100 S. Ct. 2948, 64 L. Ed. 2d 828 (1980).

Speedy indictment claim waived by entry of guilty plea. — A speedy indictment claim, like other nonjurisdictional defects in pre-trial proceedings, is waived by the entry of a voluntary and intelligent guilty plea. *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976).

Speedy and Public Trial (Cont'd)**1. In General (Cont'd)****Guilty plea waives speedy trial defense. —**

Having fully and voluntarily entered a plea of guilty, a criminal defendant cannot raise as a defense the right to a speedy and public trial because in the case of a plea of guilty, a guilty plea waives any defense known and unknown. *Mason v. Banks*, 242 Ga. 292, 248 S.E.2d 664 (1978).

Appeal from denial of motion for speedy trial. — The refusal by a superior court to grant to a defendant in a criminal case not affecting the defendant's life a written motion for a speedy trial pursuant to the defendant's constitutional right thereto is a judgment appealable to the Court of Appeals under former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34). *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Defendant may not raise the issue of speedy trial on appeal, unless such issue was first raised at trial. *Moore v. State*, 141 Ga. App. 245, 233 S.E.2d 236 (1977).

Remedy for violations of right. — In light of the policies which underlie the right to a speedy trial, dismissal must remain the only possible remedy. *Hall v. State*, 131 Ga. App. 786, 206 S.E.2d 644 (1974); *R.A.S. v. State*, 156 Ga. App. 366, 274 S.E.2d 752 (1980), overruled on other grounds, *In re R.D.F.*, 66 Ga. 294, 466 S.E.2d 572 (1996).

Constitutional speedy trial questions involve issues of fact that should be resolved by a court having jurisdiction of the criminal prosecution. *Garrett v. Arrington*, 245 Ga. 47, 262 S.E.2d 808, cert. denied, 446 U.S. 968, 100 S. Ct. 2948, 64 L. Ed. 2d 828 (1980).

Right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Each case involving the right to a speedy trial must be analyzed on an ad hoc basis, upon its own particular facts and circumstances. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Delay due to mental health issues. — Trial court abused its discretion in granting defendant's motion to dismiss as there was no evidence that the state caused any delay and defendant's speedy trial right was not violated where defendant was indicted more than one year after the incident, but was not

arrested until a year after the incident, defendant was out on bond, so defendant's indictment four months after defendant's arrest was timely, defendant had legal counsel two months after the indictment, defendant's protestations of innocence were not a basis for finding a speedy trial violation, and the state's acquiescence in defendant's attempt for a mental health placement and the resultant delay did not constitute a speedy trial violation. *State v. Byrd*, 266 Ga. App. 121, 596 S.E.2d 426 (2004).

Defendant's right to speedy trial was not violated under the following facts: (1) The length in delay in the case, from the time of arrest, was only six weeks, due to a crime lab analysis of the substance seized, which eventually produced exculpatory evidence; and (2) the defendant did not assert the defendant's rights, and the defendant was clearly not prejudiced, since the net effect of the delay was dismissal of the charges. *Lambert v. McFarland*, 612 F. Supp. 1252 (N.D. Ga. 1984).

Defendant's right to a speedy trial was not violated by a 21-month delay between the defendant's indictment and trial because: (1) the defendant was convicted on other indictments during this period and was being held under those convictions pending the defendant's appeals; and (2) a period of only eight days elapsed between the defendant's assertion of the defendant's right and the trial. *Mincey v. State*, 257 Ga. 500, 360 S.E.2d 578 (1987).

A two-year delay between commission of the crime and the beginning of trial is not unconstitutional where some of the delay was due to separate trials of co-defendants, the defendant did not assert the defendant's speedy trial right until just before trial, and the only prejudice due to the delay was to the state. *Harrison v. State*, 257 Ga. 528, 361 S.E.2d 149 (1987), cert. denied, 485 U.S. 982, 108 S. Ct. 1281, 99 L. Ed. 2d 492 (1988).

Notwithstanding the fact that there was a delay of 22 months and that defense counsel attempted to have the defendant brought to the county for purposes of entering a guilty plea, because the defendant and the defendant's competent counsel did not assert a right to a speedy trial, especially in the time period from the defendant's release from incarceration until the case was on the trial calendar, and further because the defendant

was not prejudiced by the failure to bring the case to trial, the defendant's motion to acquit was denied. *Coggins v. State*, 188 Ga. App. 455, 373 S.E.2d 269 (1988).

A delay of nearly one year between remittitur of defendant's case to the trial court and defendant's trial did not violate speedy trial rights. *Chambers v. State*, 213 Ga. App. 414, 444 S.E.2d 820 (1994).

Even though a five-year delay in defendant's trial was partially attributable to the state, the complex nature of the crime and the defendant's own failure to assert the defendant's rights also contributed significantly to the delay; thus, the delay did not impair the defendant's ability to defend against the charges. *Daughenbaugh v. State*, 225 Ga. App. 7, 482 S.E.2d 517 (1997).

A one year delay in trial following filing of demand for speedy trial did not violate defendant's rights. *Boone v. State*, 229 Ga. App. 379, 494 S.E.2d 100 (1997).

A 22-month delay in the defendant's trial did not violate the defendant's rights based on the absence of the state's primary witness for several months, the defendant's refusal to cooperate with counsel, the defendant's request for a continuance, and the defendant's failure to show that the defendant was prejudiced. *Jackson v. State*, 231 Ga. App. 187, 498 S.E.2d 780 (1998).

Defendant's right to speedy trial was not violated notwithstanding that the defendant was arrested in April 1992 and not tried until September 1996, and the defendant was incarcerated while awaiting trial, because (1) the record revealed that much of the delay was attributable to the defense in that the defendant repeatedly announced that the defendant's experts were not ready for scheduled hearings or trial, and the defendant asked for a delay in the proceedings so that plea negotiations could be conducted; (2) the defendant did not assert the defendant's constitutional right to a speedy trial until May 1996, and the defendant never asserted the defendant's statutory right to a speedy trial; and (3) the defendant did not bring forth evidence that the delay impaired the defendant's defense. *Pruitt v. State*, 270 Ga. 745, 514 S.E.2d 639 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 502, 145 L. Ed. 2d 388 (1999).

Defendant's right to a speedy trial was not violated because defendant did not file a

statutory demand for speedy trial under O.C.G.A. § 17-7-170 and the delay was partially attributable to defendant. *Manning v. State*, 250 Ga. App. 187, 550 S.E.2d 762 (2001).

Trial court did not abuse its discretion in denying defendant's motion for discharge and acquittal based on defendant's claim that the state violated defendant's sixth amendment speedy trial right because any prejudice that defendant suffered from the 14 years it took to bring defendant to trial was caused by defendant; indeed, the sole reason for the lengthy delay was that defendant failed to appear for the trial set for a few weeks after defendant's arrest, even though defendant had notice about when that trial was to take place. *Smith v. State*, 260 Ga. App. 403, 579 S.E.2d 829 (2003).

A delay of six months only, where there is no showing of improper behavior by the state and no comprehensible claim of prejudice to the defendant from the delay, does not constitute a violation of the defendant's constitutional right to a speedy trial. *Lumpkin v. State*, 255 Ga. 363, 338 S.E.2d 431 (1986), overruled on other grounds, *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896 (1998).

An eight-month delay between accusation and arrest and trial is insufficient to merit a sixth amendment speedy trial violation inquiry. A preaccusation delay approaching one year is the point at which courts deem the delay presumptively prejudicial and unreasonable enough to trigger the sixth amendment inquiry. *United States v. Deroose*, 74 F.3d 1177 (11th Cir. 1996).

Nine-month delay. — The Supreme Court determined that defendant was not prejudiced by a seven-year trial delay and the subsequent nine month delay in bringing defendant to trial and the consequential inability to locate witnesses did not justify granting defendant's motion to dismiss since defendant lacked diligence in finding the witnesses and no prejudice resulted. *Brannen v. State*, 262 Ga. App. 719, 586 S.E.2d 383 (2003).

11-month delay. — Defendant's plea in bar, wherein the defendant claimed that the defendant was denied the defendant's constitutional right to a speedy trial, pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XI and U.S. Const., amend. 6, was properly denied

Speedy and Public Trial (Cont'd)**1. In General (Cont'd)**

since the trial court found that the delay of 11 months from the time that the accusation was filed until the parties were ready for trial was not excessive, some of the delay was attributable to the defendant, and the state had provided adequate explanations for its delay, and further, there was no prejudice shown. The court noted that although the state not prossed the charges by accusation just hours before the defendant filed a demand for a speedy trial, such put the state on notice and therefore, it was not significant that the defendant did not file another demand for a speedy trial after charges were filed by grand jury indictment against the defendant. *Shuler v. State*, 263 Ga. App. 124, 587 S.E.2d 269 (2003).

17-month delay. — Trial court did not err in refusing to dismiss defendant's case for a speedy trial violation as: (1) five to six months of the 17-month delay was due to defendant's motion for a continuance; (2) the state gave reasons for the remaining 11 or 12 months of the delay and reasons for the decision to reindict defendant; (3) there was no proof that the state intentionally delayed prosecution to impair the defense; (4) defendant did not file a speedy trial demand until 14 months after defendant's arrest; and (5) defendant did not present any evidence that defendant's defense was impaired due to the delay, nor did defendant show that defendant had to endure some burden beyond those that necessarily attended imprisonment. *Lopez v. State*, 267 Ga. App. 178, 598 S.E.2d 898 (2004).

Seventeen-month delay in the defendant's trial did not violate the defendant's constitutional rights because the defendant failed to assert either the defendant's statutory or constitutional right to a speedy trial and there was no evidence of a lengthy pretrial incarceration. *Jernigan v. State*, 239 Ga. App. 65, 517 S.E.2d 370 (1999).

No undue prejudice shown from 20-month delay. — Defendant's sixth amendment speedy trial rights were not violated as the 20-month delay between defendant's arrest and the assertion of defendant's speedy trial right was not presumptively prejudicial because the case was a multi-defendant prosecution for the murder of a police officer 24

years earlier involving vigorous litigation of a broad range of defense motions, which was less than a complex conspiracy charge, but more than an ordinary street crime further, the reasons for the delay were essentially neutral, the timeliness of the assertion of the right to a speedy trial weighed against defendant, and no undue prejudice associated with the delay was shown. *Jackson v. State*, 279 Ga. 449, 614 S.E.2d 781 (2005).

A 27-month delay did not violate defendant's right to a speedy trial because of defendant's own delay in asserting the right and defendant's failure to show prejudice to the defense. *McKinney v. State*, 250 Ga. App. 22, 549 S.E.2d 164 (2001).

A thirty-month delay in the trial of the defendant's case did not violate the defendant's constitutional right where, even though the delay was partly attributable to the state's negligence, defendant did not assert the defendant's rights until trial was imminent, and failed to show prejudice. *Thomas v. State*, 233 Ga. App. 224, 504 S.E.2d 59 (1998).

Forty-one-month delay. — Denial of defendant's motion to dismiss the indictment against defendant was not an abuse of discretion since defendant suffered no impairment to defendant's defense and defendant waited 41 months before asserting defendant's federal and state constitutional rights to a speedy trial. *Coney v. State*, 259 Ga. App. 525, 578 S.E.2d 193 (2003).

Seven-year delay. — Defendant's speedy trial right was violated by the seven-year delay between arrest and the time the case was called for a final hearing, even though defendant was released on bond at the preliminary hearing and did not assert a speedy trial right until after the case was called for a final plea hearing. *State v. Sutton*, 273 Ga. App. 84, 614 S.E.2d 206 (2005).

Prosecutions following dismissal of original complaint. — Speedy trial guarantees focus only on pending criminal prosecutions and not on prosecutions following the dismissal of the original complaint. *United States v. Puett*, 735 F.2d 1331 (11th Cir. 1984).

Delay in transmitting the record of appeal after the defendant's conviction was not a violation of the defendant's federal and state constitutional rights to a speedy trial. *Crosby v. State*, 188 Ga. App. 191, 372 S.E.2d 471 (1988).

Right to public trial is subject to other considerations. — The right to a public trial has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice. *Lowe v. State*, 141 Ga. App. 433, 233 S.E.2d 807 (1977).

Exclusion of certain persons from courtroom. — Where defendant was charged with, inter alia, child molestation, and the trial court, pursuant to O.C.G.A. § 17-8-54, excluded certain individuals from the courtroom when the victims testified, this was distinguished from a total closure of the courtroom and did not require as rigorous a level of constitutional scrutiny, and defendant's right to a public trial was not violated. *Hunt v. State*, 268 Ga. App. 568, 602 S.E.2d 312 (2004).

Exclusion of spectators because of witnesses' fear of harm. — There is no abuse of discretion of the court in the exclusion of spectators during the testimony of a witness who is in fear of possible harm because of testimony to be given. *Lowe v. State*, 141 Ga. App. 433, 233 S.E.2d 807 (1977).

Right to fair trial versus rights of public to gain access to hearings in criminal cases. See *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982).

Right to fair trial denied. — The evidence below supported the habeas court's findings that (1) in failing to seek a continuance the defendant's counsel rendered ineffective assistance at the defendant's trial; and (2) counsel's ineffectiveness so prejudiced the defendant's case that the defendant was effectively denied the right to a fair trial as guaranteed by the sixth and fourteenth amendments to the United States Constitution. *Turpin v. Bennett*, 272 Ga. 57, 525 S.E.2d 354 (2000).

Closed hearing on motion to suppress. — Sixth amendment right to a public trial was violated where trial court closed entire hearing on motion to suppress and failed both to consider reasonable alternatives to closing the proceedings and to make findings adequate to support the closure. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Effect of court order on resentencing. — The state was not barred from subjecting the

defendant to a second capital sentencing trial approximately one year and eight months after the last judicial activity by the federal district court's 1988 order that "petitioner within 180 days after this order becomes final by failure to appeal or by mandate of the circuit Court of Appeals shall be afforded a new sentencing phase trial, failing which upon motion a writ of habeas corpus discharging [the defendant] from custody shall issue." *Moore v. Zant*, 972 F.2d 318 (11th Cir. 1992), cert. denied, 507 U.S. 1006, 113 S. Ct. 1650, 123 L. Ed. 2d 271 (1993).

2. Attachment of Right

United States Const., amend. 5 applies before arrest or indictment, but U.S. Const., amend. 6 applies afterwards. — Delay that occurs between commission of an offense and arrest or indictment may violate the right to due process under U.S. Const., amend. 5. If, however, the delay occurs between arrest or indictment and trial the controlling constitutional provision is U.S. Const., amend. 6's guarantee of the right to a speedy trial. *United States v. Smith*, 65 F.R.D. 464 (N.D. Ga. 1974).

Due process considerations under U.S. Const., amend. 5 apply to oppressive prearrest and preindictment delay, but the more specific guarantees of U.S. Const., amend. 6 apply to postarrest delay. *United States v. Traylor*, 578 F.2d 108 (5th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S. Ct. 848, 59 L. Ed. 2d 41 (1979).

Where the delay in bringing a defendant to trial occurs in the investigative stage before either arrest or indictment, due process, not sixth amendment, standards apply. *Andrews v. State*, 175 Ga. App. 22, 332 S.E.2d 299 (1985).

Constitutional right attaches upon arrest, while statutory rights attach upon indictment. — Although O.C.G.A. §§ 17-7-170 and 17-7-171 prescribe a means of asserting one's right to a speedy trial after indictment, there is a right to a speedy trial under U.S. Const., amend. 6, which attaches at arrest and can be asserted thereafter. *Haisman v. State*, 242 Ga. 896, 252 S.E.2d 397 (1979); *Glidewell v. State*, 169 Ga. App. 858, 314 S.E.2d 924 (1984).

Over and above the provisions of O.C.G.A. § 17-7-170, the sixth amendment rights to

Speedy and Public Trial (Cont'd)**2. Attachment of Right (Cont'd)**

speedy trial attach upon arrest. *Andrews v. State*, 175 Ga. App. 22, 332 S.E.2d 299 (1985).

Unlike the statutory protections conferred by O.C.G.A. §§ 17-7-170 and 17-7-171 that attach with formal indictment or accusation, the sixth amendment provides constitutional protection over and above the statutory provisions and under that amendment, the right to a speedy trial attaches upon arrest and can be asserted thereafter; a trial court properly denied defendant's statutory speedy trial demand where no indictment was filed, but improperly overlooked or failed to consider defendant's constitutional speedy trial demand, and thus, the trial court's judgment was vacated and the case was remanded with direction to the trial court to address defendant's constitutional claims. *Smith v. State*, 266 Ga. App. 529, 597 S.E.2d 414 (2004).

Former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170) is not regarded as affording guidelines in relation to the federal constitutional provisions guaranteeing the right to a speedy trial, being limited to and in a proper case applicable only to the state right. *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Question of speedy indictment is an aspect of the right to speedy trial. *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976).

Applicability of speedy trial provision. — Speedy trial provision of U.S. Const., amend. 6 has no application until the putative defendant in some ways becomes an accused. *United States v. Duke*, 527 F.2d 386 (5th Cir.), cert. denied, 426 U.S. 952, 96 S. Ct. 3177, 49 L. Ed. 2d 1190 (1976); *Gaylor v. State*, 139 Ga. App. 370, 228 S.E.2d 390 (1976).

Defendant's fifth amendment due process rights and sixth amendment right to a speedy trial were not violated through the bringing of an indictment against the defendant in 1992 for criminal conduct that occurred in 1987. *United States v. Lockett*, 867 F. Supp. 1044 (M.D. Ga. 1994), aff'd, 70 F.3d 126 (11th Cir. 1995).

Defendant's claim of a preindictment and prearrest delay does not invoke the protections of U.S. Const., amend. 6. *Gaylor v.*

State, 139 Ga. App. 370, 228 S.E.2d 390 (1976).

Confinement in administrative segregation is not an arrest or an accusal for purposes of U.S. Const., amend. 6. *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979).

Speedy trial provisions do not require the government to discover, investigate, and accuse any person within any particular period of time. *Gaylor v. State*, 139 Ga. App. 370, 228 S.E.2d 390 (1976).

Preindictment or prearrest delay not a denial of speedy trial. — If the delay to which complaint is made occurred prior to indictment or arrest, there is no denial of the right to a speedy trial. *Armour v. State*, 140 Ga. App. 196, 230 S.E.2d 346 (1976).

Due process standards apply to preindictment delay. — Where a postarrest, preindictment delay occurs in the investigative stage before either arrest or indictment, due process, not U.S. Const., amend. 6, standards apply. *Haisman v. State*, 242 Ga. 896, 252 S.E.2d 397 (1979); *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980).

Statute of limitations is primary protection against preaccusation delay. — The primary guarantee against prosecutorial delay in seeking an indictment being the applicable statute of limitations, the government has no duty to discover, investigate, and accuse any person within any particular period of time. A case can be dismissed for preaccusation delay, but only if the defense shows actual prejudice and demonstrates that the delay was an intentional device by the prosecution to gain a tactical advantage. *United States v. Duke*, 527 F.2d 386 (5th Cir.), cert. denied, 426 U.S. 952, 96 S. Ct. 3177, 49 L. Ed. 2d 1190 (1976).

When speedy trial protections are engaged. — It is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage particular protections of the speedy trial provisions of U.S. Const., amend. 6. *Dillingham v. United States*, 423 U.S. 64, 96 S. Ct. 303, 46 L. Ed. 2d 205 (1975); *Hall v. Hopper*, 234 Ga. 625, 216 S.E.2d 839 (1975); *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976); *Armour v. State*, 140 Ga. App. 196, 230 S.E.2d 346 (1976); *United States v. Duke*, 527 F.2d 386 (5th Cir.), cert. denied, 426 U.S. 952, 96 S. Ct. 3177, 49 L. Ed. 2d 1190 (1976); *United*

States v. Byrum, 540 F.2d 833 (5th Cir. 1976), cert. denied, 429 U.S. 1076, 97 S. Ct. 819, 50 L. Ed. 2d 796 (1977); *United States v. Pitts*, 569 F.2d 343 (5th Cir.), cert. denied, 436 U.S. 959, 98 S. Ct. 3076, 57 L. Ed. 2d 1125 (1978); *Haisman v. State*, 242 Ga. 896, 252 S.E.2d 397 (1979); *Simpson v. State*, 150 Ga. App. 814, 258 S.E.2d 634 (1979); *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979); *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980); *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

For purposes of determining when the right to speedy trial attaches the basis for the arrest is critical. *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

Time is not to be measured from the time of initial arrest but from the time the petitioner is accused of the crime he is challenging. *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

The speedy trial clause does not attach at the time of an earlier arrest simply because the indictment for the present offense arises from the same activities that formed the basis of the earlier arrest. *United States v. Derose*, 74 F.3d 1177 (11th Cir. 1996).

But if crimes for which a defendant is ultimately prosecuted really only gild the charge underlying the defendant's initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses. *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

Dismissal of indictment as tolling speedy trial requirements. — Dismissing an indictment does not toll the speedy trial calendar when the next indictment is for precisely the same offense and the same transaction. *United States v. Nixon*, 634 F.2d 306 (5th Cir.), cert. denied, 454 U.S. 828, 102 S. Ct. 120, 70 L. Ed. 2d 103 (1981).

3. Burden of Requesting and Providing Speedy Trial

Assertion of right is a consideration in determining violation of right to speedy trial. — U.S. Const., amend. 6 is an indepen-

dent guaranty of the right to a speedy trial, and the defendant's assertion or failure to assert the defendant's statutory right under former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170) is simply one of the factors to be considered in determining whether the right under U.S. Const., amend. 6 has been impinged. *Sanders v. State*, 132 Ga. App. 580, 208 S.E.2d 597 (1974).

Former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170) may prescribe a means of asserting one's right to a speedy trial after indictment, the accused has a right under U.S. Const., amend. 6 to a speedy trial, which right attaches at arrest and can be asserted thereafter. Defendant's preindictment failure to assert this right will be weighed against the defendant. *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980).

While an accused has no responsibility to assert the right to a speedy trial, the assertion of or failure to assert that right is a factor to be considered in an inquiry into the deprivation of the right. The defendant's assertion of that right would be entitled to strong evidentiary weight in determining whether the defendant has been deprived of the right. The failure to assert the right to a speedy trial would make it difficult to prove that the defendant was denied that right. *Powell v. State*, 143 Ga. App. 684, 239 S.E.2d 560 (1977).

Although defendant has no duty to bring the case to trial, failure to assert the right will make it difficult for a defendant to prove that the defendant was denied a speedy trial. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

Regardless of the procedures mandated for a statutory demand for speedy trial, under O.C.G.A. § 17-7-170(a), a defendant has the right to assert a constitutional speedy trial demand any time after arrest. *Hester v. State*, 268 Ga. App. 94, 601 S.E.2d 456 (2004).

Accused has some duty to alleviate stress of waiting for trial. — Although it is true that an accused who suffers emotional stress while awaiting the disposition of the charges against the accused is inherently prejudiced, the accused has some obligation to attempt to alleviate this stress by requesting a speedy trial or filing a statutory demand for trial pursuant to § 17-7-170. *Cravey v. State*, 147 Ga. App. 29, 248 S.E.2d 13 (1978).

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3. Burden of Requesting and Providing
Speedy Trial (Cont'd)

In a capital case, where a pro se defendant filed what was claimed to be a statutory speedy trial demand but that actually invoked the sixth amendment speedy trial provisions, the statutory right to a speedy trial under O.C.G.A. § 17-1-170 was not properly asserted. *Bonakies v. State*, 263 Ga. App. 812, 589 S.E.2d 573 (2003).

It is the state's responsibility, not the defendant's, to assure a case is promptly brought to trial. *State v. Fields*, 137 Ga. App. 726, 224 S.E.2d 829 (1976).

Where no reason appears for a delay in bringing an accused to trial, a court must treat the delay as caused by the negligence of the state in bringing the case to trial. *Hester v. State*, 268 Ga. App. 94, 601 S.E.2d 456 (2004).

Duty to provide a speedy trial does not impose a paramount legal burden on the state, but is simply the logical syntactical reconciliation of the two rights: since society has the right to try the defendant and the defendant has the right to be tried quickly, if society tries the defendant, it must do so quickly, particularly if the defendant has asserted the right; but since both parties do stand alike at the beginning, when both parties stand alike in their respective failures to provide and assert the right to speedy trial, then because of the peculiar nature of the individual's right to speedy trial as one whose deprivation can definitely work to the defendant's advantage, the weight of the equities generally lies naturally with society and its right to try the criminal defendant. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Constitutional right of defendant charged with vehicular homicide and hit and run to a speedy trial was violated when defendant was not indicted for three years, without explanation, and two additional years of delay between defendant's indictment and a possible trial were attributable to the state, despite defendant's five-year delay in demanding a speedy trial because defendant's delay was mitigated by the delay in indicting the defendant and by the delay in appointing counsel for the defendant until the statutory time for demanding a speedy trial,

under O.C.G.A. § 17-7-170(a). *Hester v. State*, 268 Ga. App. 94, 601 S.E.2d 456 (2004).

Defendant is held to have some responsibility to assert a speedy trial claim even though it is the state's duty to bring the defendant to trial. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Weighing the state's negligent delay in bringing defendant to trial against defendant's failure to timely assert a sixth amendment right to a speedy trial and defendant's failure to show that the delay impaired the defense, the trial court did not err in denying defendant's motion to dismiss the indictment. *Smith v. State*, 275 Ga. 261, 564 S.E.2d 441 (2002).

Defendant's rights to a speedy trial may be implemented by a written demand for trial under former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170). *Underhill v. State*, 129 Ga. App. 65, 198 S.E.2d 703 (1973).

Noncompliance with statutory procedures for demanding speedy trial. — Where the defendant is not within the purview of the provisions relating to demand for trial by persons serving a term of imprisonment in a Georgia penal institution (see O.C.G.A. § 42-6-3), nor does the record show compliance with former Code 1933, §§ 27-1901, 27-2001, or 27-2002 (see O.C.G.A. §§ 17-7-170, 17-8-21, or 17-8-33), the defendant is not denied the right to a speedy trial within the meaning of Ga. Const. 1945, Art. I, Sec. I, Para. V (see Ga. Const. 1983, Art. I, Sec. I, Para. XI, XIV) or U.S. Const., amend. 6 when the trial is delayed after the defendant withdraws the guilty plea. *Butler v. State*, 126 Ga. App. 22, 189 S.E.2d 870 (1972).

While the burden is on defendant to protect the defendant's statutory rights for a speedy trial, by making a timely demand for trial under former Code 1933, § 27-1901 (see O.C.G.A. § 17-7-170), his failure in doing so does not, of itself, work a waiver of rights under U.S. Const., amend. 6. *Sanders v. State*, 132 Ga. App. 580, 208 S.E.2d 597 (1974).

Defendant's direct appeal from the denial of a speedy trial motion to dismiss lay given the state of Georgia law; however, the motion was properly denied because defendant, who had been incarcerated in the interim period, was equally responsible for the pre-

trial delay, never asserted the right to trial, never requested disposition of the subject offenses, suffered no prejudice, and did not suffer oppressive pretrial incarceration. *Lamar v. State*, 262 Ga. App. 735, 586 S.E.2d 416 (2003).

Motion to dismiss or quash indictment is not assertion of right to speedy trial. — Motion to dismiss or quash indictment for denial of speedy trial, which did not request an immediate trial, is not a demand for trial and is not an assertion of the right to speedy trial. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

State's duty upon assertion of speedy trial right. — There is a duty on the state to make a diligent, good-faith effort to bring the accused before the appropriate state court for trial, provided the accused has made a sufficient demand for a trial, in order not to violate the speedy trial requirement of U.S. Const., amend. 6. *May v. Georgia*, 409 F.2d 203 (5th Cir. 1969).

The state has a duty, under the sixth amendment as made applicable by the fourteenth amendment, to make a diligent, good-faith effort to bring defendants to trial in Georgia notwithstanding trial and incarceration for a federal offense in another state; where the state timely initiated a request for the appellant's release, especially after the date when the appellant filed a demand to dismiss or for immediate trial, the state satisfied its duty. *Obiozor v. State*, 213 Ga. App. 523, 445 S.E.2d 553 (1994).

Length of delay was at least two years but less than three years. — There was no violation of the defendant's speedy trial rights under U.S. Const., amend. 6, where there was a 26-month delay between the defendant's arrest and the defendant's motion to dismiss; the delay was mostly attributable to the defendant; the defendant did not assert the defendant's right to a speedy trial until 26 months after the defendant was arrested, and the defendant failed to make a specific showing that the defense was prejudiced by the delay. *Williams v. State*, 260 Ga. App. 290, 581 S.E.2d 326 (2003).

Insufficient evidence to show denial of speedy trial. — Constitutional right to a speedy trial did not require granting of defendant's motion for discharge and acquittal where, inter alia, all but a couple of months of the time defendant was incarcer-

ated before trial was attributable to service of other sentences, there was no evidence of defendant's anxiety and concern, and there was no evidence that defendant's defense was impaired as none of the witnesses who testified at the first trial were allegedly unavailable. *Weldon v. State*, 262 Ga. App. 782, 586 S.E.2d 452 (2003).

Defendant's motion for a new trial was denied as defendant failed to obtain defendant's lawyer's testimony as to why defendant failed to tender the police report to impeach a detective's testimony; defendant failed to carry the burden of establishing that the purported deficiency in trial counsel's representation was indicative of ineffectiveness and was not an example of a conscious and deliberate trial strategy. *McPetric v. State*, 263 Ga. App. 85, 587 S.E.2d 233 (2003).

Superior court abused its discretion in dismissing an indictment on speedy trial grounds, despite a five-year delay in bringing the defendant to trial, which was held to be excessively long and not to be excused; however, because the delay was caused by the state's negligence or other court-related circumstances which were not to be weighed heavily against the state, given the defendant's failure to assert a speedy trial violation or show prejudice from the same, dismissal of the indictment was reversed. *State v. Giddens*, 280 Ga. App. 586, 634 S.E.2d 526 (2006).

4. Prejudice from Delay

Where no trial demand, only question presented is whether pretrial delay constitutional. — Where the defendant files no demand for trial pursuant to O.C.G.A. § 17-7-170, the only question presented is whether the delay between the defendant's arrest and the commencement of the defendant's trial is a violation of the defendant's sixth amendment right to a speedy trial. *Mullins v. State*, 167 Ga. App. 670, 307 S.E.2d 61 (1983).

Length of the delay is the threshold triggering mechanism. — No inquiry into the other factors is required unless there has been a delay of such length as to be presumptively prejudicial. *United States v. Hill*, 622 F.2d 900 (5th Cir. 1980).

Absence of prejudice does not by itself preclude a finding of a speedy trial violation,

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but balanced against factors that themselves only weakly support a speedy trial violation, the absence of prejudice is dispositive. *Glidewell v. Burden*, 822 F.2d 1027 (11th Cir. 1987), cert. denied, 484 U.S. 1018, 108 S. Ct. 727, 98 L. Ed. 2d 676 (1988).

Mere passage of time is not enough, without more, to constitute a denial of speedy trial due process. *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972); *Sanders v. State*, 132 Ga. App. 580, 208 S.E.2d 597 (1974); *State v. Fields*, 137 Ga. App. 726, 224 S.E.2d 829 (1976); *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976); *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977); *Simpson v. State*, 150 Ga. App. 814, 258 S.E.2d 634 (1979); *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Effect of delay depends on circumstances. — Whether a delay between indictment and trial violates the constitutional right to a speedy trial depends on the circumstances. *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972).

Defendant is required to show more than a mere claim of prejudice in the right to a speedy trial. *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Denial of speedy trial may work to a defendant's advantage, and therefore there is no per se prejudice to a defendant from delay. *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976); *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976); *Natson v. State*, 242 Ga. 618, 250 S.E.2d 420 (1978), cert. denied, 441 U.S. 925, 99 S. Ct. 2036, 60 L. Ed. 2d 399 (1979); *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

There is no specific number of days or months within which a defendant must be tried. *Harris v. Hopper*, 236 Ga. 389, 224 S.E.2d 1 (1976); *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976); *Natson v. State*, 242 Ga. 618, 250 S.E.2d 420 (1978), cert. denied, 441 U.S. 925, 99 S. Ct. 2036, 60 L. Ed. 2d 399 (1979); *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Kinds of prejudice which may result from delay. — A defendant might be prejudiced by a delay in being brought to trial by lengthy pretrial incarceration, by a substantial impairment of the defendant's defense,

and by being subjected to public scorn and personal anxiety. *United States v. Dyson*, 469 F.2d 735 (5th Cir. 1972); *United States v. Hill*, 622 F.2d 900 (5th Cir. 1980).

Constitutional right of defendant charged with vehicular homicide and hit and run to a speedy trial was violated when defendant was not indicted for three years, without explanation, and two additional years of delay between defendant's indictment and a possible trial were attributable to the state, as defendant showed actual prejudice due to the intervening death of an exculpatory witness, and the trial court's ruling that the preservation of this witness's statement in writing eliminated any prejudice ignored the dry impact of such written testimony as compared to a live witness. *Hester v. State*, 268 Ga. App. 94, 601 S.E.2d 456 (2004).

Substantial actual prejudice must be shown as to postarrest, preindictment delay. — While postarrest, preindictment delay is within the scope of the speedy trial guarantee, a substantial showing of actual prejudice is required to establish a violation of U.S. Const., amend. 6. *United States v. Zane*, 489 F.2d 269 (5th Cir. 1973), cert. denied, 416 U.S. 959, 94 S. Ct. 1975, 40 L. Ed. 2d 310 (1974); *United States v. Traylor*, 578 F.2d 108 (5th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S. Ct. 848, 59 L. Ed. 2d 41 (1979).

Delay must be shown to be purposeful, oppressive, or prejudicial. — To sustain a prisoner's contention that there was a violation of the constitutional right to a speedy trial, not only must delay be shown, but that such delay was purposeful, oppressive, or prejudicial. *Johnson v. Smith*, 227 Ga. 611, 182 S.E.2d 101 (1971); *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972); *Crapse v. State*, 180 Ga. App. 321, 349 S.E.2d 190 (1986).

Incarceration during the delay was oppressive and produced debilitating anxiety. — Dismissal of malice murder and arson case for a constitutional speedy trial violation was affirmed because, in the four-year delay in bringing the case to trial after earlier convictions were reversed on appeal, the defendant's eight-month incarceration during the delay was oppressive and produced debilitating anxiety, because two defense witnesses had died during the delay, because another defense witness, the defendant's parent, had developed dementia and other ailments re-

lated to age, because the burned house had been destroyed, and where the defendant's failure to assert the defendant's speedy trial right earlier was due to the representations of the state concerning a new arson expert. *State v. Carr*, 278 Ga. 124, 598 S.E.2d 468 (2004).

Unexcused denial of assertion of speedy trial right is prejudice per se. — Upon defendant's bona fide assertion of the right to a speedy trial, the unexcused denial of it by the state is generally prejudice per se. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Prejudice must be shown. — Since mere delay, even if unexcused, does not alone prejudice the defendant's ability to defend, and since the defendant may be only too delighted to have the trial delayed, before the defendant is held deprived of the right to a speedy trial and there ensues the unsatisfactorily severe remedy of dismissal of the indictment with the serious consequence that a defendant who may be guilty of a serious crime will go free, without having been tried, the defendant must show some actual substantial prejudice to the defendant. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Unexcused delay is prima facie prejudicial. — Where the delay in bringing a defendant to trial is not only excessive, but the result of unexcused inaction or misconduct by the government, it is prima facie prejudicial, and the burden then shifts to the government to demonstrate that defendant has not been prejudiced by the delay. *United States v. Dyson*, 469 F.2d 735 (5th Cir. 1972).

To constitute prejudice, faded memory must affect material fact in issue. — Although faded memory may result in prejudice, in order to prejudice the defense to the extent necessary to constitute a speedy trial violation, the faded memory must substantially relate to a material fact in issue. *United States v. Edwards*, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978).

For one already in custody, the event triggering scrutiny is the indictment. The defendant demonstrates a violation of the right to a speedy trial only if the defendant can show that the delay prior to accusal caused substantial prejudice to the right to a fair trial and that the delay was an inten-

tional device to gain tactical advantage over the accused. *United States v. Manetta*, 551 F.2d 1352 (5th Cir. 1977).

Extraordinary delay, without reason shown by the record, is overcome when no prejudice is shown and the petitioner did not want a speedy trial. *Hall v. Hopper*, 234 Ga. 625, 216 S.E.2d 839 (1975).

Where delay primarily caused by defendant, speedy trial rights not violated. — There is no violation of due process in respect to a speedy trial when substantially all of the delay in bringing the defendant to trial appears to be directly or indirectly attributable to the conduct of the defendant. *Mays v. State*, 229 Ga. 609, 193 S.E.2d 825 (1972).

Delay caused by negligence or overcrowding of courts. — Under U.S. Const., amend. 6, reasons for delay, such as negligence or overcrowded courts, should be weighed less heavily against the government than deliberate delay for the purpose of hampering the defense. *State v. Fields*, 137 Ga. App. 726, 224 S.E.2d 829 (1976).

While a deliberate attempt by the prosecution to delay the trial in order to hamper the defense is weighed heavily against the government, an overcrowded docket is considered to be a more neutral reason although it cannot be overlooked. *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Dead docket device may not be used to delay the trial over the defendant's objection. Where mere lapse of time, less than that set out in the statute of limitations, is involved, and the defendant has not objected to the case being dead docketed, and has made no demand for early trial, it will take a showing of prejudice to the defendant's interests or oppressive and harassing tactics by the government to justify a finding of encroachment on the constitutional right to a speedy trial. Three such interests have been identified: prevention oppressive pre-trial incarceration; minimizing anxiety and concern of the accused; and limiting the possibility that the defense will be impaired. *Underhill v. State*, 129 Ga. App. 65, 198 S.E.2d 703 (1973).

Right to a speedy trial has not been abridged where the delay is not excessive, the delay was not deliberate so as to hamper the defense, defendant did not assert right

Speedy and Public Trial (Cont'd)**4. Prejudice from Delay (Cont'd)**

to a speedy trial during the delay, and where defendant's interest has not been prejudiced. *State v. Weeks*, 136 Ga. App. 637, 222 S.E.2d 117 (1975).

Where the delay is 27 months since arrest and 24 months since indictment, this is too long to amount to a speedy trial. *State v. King*, 137 Ga. App. 26, 222 S.E.2d 859 (1975).

Passage of 16 months after indictment before trial does not represent a denial of speedy trial, absent evidence of prejudice to defendant from delay, and absent any purposeful or oppressive delay on the part of the prosecution, particularly, in the absence of a demand for trial. *Sassoon v. State*, 138 Ga. App. 172, 225 S.E.2d 732 (1976).

A 27-month delay from the time of the defendant's arrest to the motion to dismiss for failure to provide the defendant a speedy trial did not violate the defendant's constitutional rights where the defendant showed no impairment to the defense. *Boseman v. State*, 263 Ga. 730, 438 S.E.2d 626 (1994).

45-month delay. — While a majority of the delay in bringing defendant to trial was attributable to the state, and defendant did not assert any right to a speedy trial until approximately 45 months after the date of arrest, after balancing all four factors set out in *Barker v. Wingo*, any delay in bringing defendant to trial did not violate the right to a speedy trial, no actual anxiety or concern on defendant's part was shown, and the testimony that two alleged material defense witnesses would have presented would have either been cumulative or not material. *Ingram v. State*, 280 Ga. App. 467, 634 S.E.2d 430 (2006).

Where reason for five and one-half year delay in trial is simple prosecutorial neglect, but the only prejudice shown by the defendant is that one of two alibi witnesses, whose testimony would be merely cumulative, has died, and the defendant, although the defendant has filed a motion to dismiss the indictment, never asked for a trial, the defendant is not denied the constitutional right to a speedy trial. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Where the defendant is not in confinement, does not demand trial, has shown no

actual prejudice, and the record does not demonstrate the delay is deliberate or taken for purpose of tactical advantage over the defendant, a delay of approximately 23 months between arrest and indictment did not violate defendant's right to a speedy trial. *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980).

Nine-month delay between arrest and trial cannot be dismissed as trivial, but this length of delay cannot alone constitute a speedy trial violation. *Glidewell v. Burden*, 822 F.2d 1027 (11th Cir. 1987), cert. denied, 484 U.S. 1018, 108 S. Ct. 727, 98 L. Ed. 2d 676 (1988).

The passage of nine months between the date a speeding charge was made and the date of trial was not alone sufficient to establish a violation of the right to a speedy trial where there was no evidence that the state delayed the trial to gain a tactical advantage, five months passed between the charge and the defendant's assertion of the right to a speedy trial, and, since the defendant was not incarcerated, there was no prejudice to the defendant. *Nairon v. State*, 215 Ga. App. 76, 449 S.E.2d 634 (1994).

Ten-month delay between arrest and dismissal of charges. — Ten-month delay between the defendant's arrest for child molestation and the dismissal of the charges, did not violate the defendant's right to a speedy indictment, because the defendant had not filed a demand for a speedy indictment, and did not claim or demonstrate that the defense was impaired by the delay. *State v. Auerswald*, 198 Ga. App. 183, 401 S.E.2d 27 (1990).

A 25-month delay from arrest to trial. — was troubling; however, the prejudice to defendant was not of constitutional magnitude where the defendant failed to show that undue anxiety or concern was suffered attendant to defendant's incarceration and offered no evidence as to the specific manner in which defendant's defense was impaired. *Mullinax v. State*, 273 Ga. 756, 545 S.E.2d 891 (2001).

Sentencing compliant with Sentencing Guidelines. — A defendant's due process rights are violated only when a judge-decided fact actually increases a defendant's sentence beyond the prescribed statutory maximum penalty for the convicted crime and has no application to, or effect on, cases where a defendant's sentence falls

at or below that maximum penalty; thus, there can be no due process violation in connection with either mandatory minimum sentences or Sentencing Guidelines calculations, when in either case the ultimate sentence imposed does not exceed the prescribed statutory maximum penalty. *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001), cert. denied, 535 U.S. 942, 122 S. Ct. 1327, 152 L. Ed. 2d 234 (2002).

A 27-month delay between the defendant's arrest and the date the defendant filed a motion to dismiss did not violate the right to a speedy trial where the state's primary reason for delay was to wait for several significant appellate court decisions, the defendant did not assert the defendant's statutory or constitutional right during the period of the delay, the defendant did not demonstrate any isolated or distinct oppressiveness, anxiety, or concern the defendant suffered due to incarceration, and the sole example of impairment of evidence, the memory lapses of police officers, worked to the defendant's advantage. *Howard v. State*, 215 Ga. App. 343, 450 S.E.2d 824 (1994).

A nearly 5 ½ year delay between indictment and trial was presumptively prejudicial and warranted inquiry into the other factors that go into determining whether a criminal defendant has been deprived of the defendant's right to a speedy trial. *Crapse v. State*, 180 Ga. App. 321, 349 S.E.2d 190 (1986).

Speedy trial right was not violated by seven-year delay between defendant's indictment and trial, after the court weighed a number of factors, including the fact that the defendant had left for India at the time of the indictment and the government did not know of the defendant's location but made reasonable efforts to find the defendant. *United States v. Bagga*, 782 F.2d 1541 (11th Cir. 1986).

Two-year un deliberate delay constitutional where defendant did not assert right and defense unimpaired. — There is no denial of the sixth amendment right to a speedy trial where the length of delay between arrest and trial is almost two years, but the defendant has not shown that the prosecution deliberately delayed the trial for tactical advantage, that the defendant asserted the defendant's statutory right prior to trial, that the defendant asserted the defendant's constitutional right prior to appeal, or that the

defendant's defense was impaired by the delay. *Getz v. State*, 251 Ga. 462, 306 S.E.2d 918 (1983).

Delay attributable to hiring four different counsel. — Defendant's right to a speedy trial was not violated, where although the delay was approximately 22 months, much of that was attributable to the defendant's hiring and discharging four different counsel prior to the final appointment, the defendant did not assert the defendant's demand for trial until almost a year after indictment, and trial commenced ten months thereafter. *Lynott v. State*, 198 Ga. App. 688, 402 S.E.2d 747, cert. denied, 198 Ga. App. 898, 402 S.E.2d 747 (1991).

Indictment sealed beyond limitations period not automatically prejudicial. — The court improperly dismissed the indictment, which was returned against the defendant in October, 1982, but which remained sealed beyond the limitations period, until February 1984, when the defendant was taken into custody. Although the government did not seriously attempt to find the defendant, the defendant was not impaired in asserting the right to a speedy trial and, consequently, had to show actual prejudice. That the indictment was sealed beyond the limitation period could be figured into the prejudice decision, but that fact alone did not dictate a finding of prejudice. *United States v. Mitchell*, 769 F.2d 1544 (11th Cir. 1985), cert. denied, 474 U.S. 1066, 106 S. Ct. 819, 88 L. Ed. 2d 792; 475 U.S. 1028, 106 S. Ct. 1230, 89 L. Ed. 2d 339 (1986).

Fourteen-year delay between arrest and trial for murder did not violate the defendant's right to a speedy trial where the defendant's liberty had not been restrained nor was the defendant's life disrupted, and where case was decided on superseding due process grounds. *Wooten v. State*, 262 Ga. 876, 426 S.E.2d 852, cert. denied, 510 U.S. 853, 114 S. Ct. 156, 126 L. Ed. 2d 117 (1993).

Dismissal of indictment for preindictment delay. — Since an applicable statute of limitations does not fully define accused's rights with respect to the events occurring prior to indictment, due process would require dismissal of the indictment if it were shown at trial that preindictment delay caused substantial prejudice to accused's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the

Speedy and Public Trial (Cont'd)**4. Prejudice from Delay (Cont'd)**

accused. *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980).

Dismissal is required for prearrest or preindictment delay under the due process clause when it is shown that the delay caused actual substantial prejudice to defendant's right to a fair trial and that the delay was an intentional device to gain a tactical advantage. *Hammond v. State*, 157 Ga. App. 647, 278 S.E.2d 188 (1981).

Reason for delay. — Because of extreme delay (seven years) in bringing case to trial, state's lack of any apparent, articulable reason for delay, and consequent impairment of appellant's case, appellant's sixth amendment due process right was violated by deprivation of a speedy trial. *Lett v. State*, 164 Ga. App. 584, 298 S.E.2d 541 (1982).

Defendant was denied the right to counsel of defendant's own choosing and obtained a reversal of defendant's conviction for aggravated assault, aggravated battery, and possession of a firearm, as a result of the trial court judge denying defendant's motion for a continuance, which was grounded on the fact that defendant's retained counsel was hospitalized the trial court failed to make an inquiry as to whether the absence of defense counsel was attributable to defendant and merely stated that because appointed counsel was in the courtroom, defendant was adequately represented. *Turman v. State*, 272 Ga. App. 570, 613 S.E.2d 126 (2005).

When defendant was one of the people indicted in a multiple-murder case in which the state sought capital punishment, defendant did not show that a 38-month delay between defendant's indictment and trial was "presumptively prejudicial," because it was necessary for each co-indictee to be tried separately, and this triggered the state's statutory right, under O.C.G.A. § 17-8-4, to elect which defendant to try first; therefore, when the state elected to try defendant co-indictee first, defendant's case was prosecuted with the promptness customary for death penalty cases involving multiple defendants, and the trial court did not have to balance the factors considered in deciding whether defendant's right to a speedy trial was violated, given the lack of presumptive prejudice. *Wimberly v. State*, 279 Ga. 65, 608 S.E.2d 625 (2005).

When defendant, who was initially indicted for the burglary of victims who died when their house burned down, later admitted involvement in their deaths, resulting in a new indictment for murder, arson, and other offenses, as well as the original burglary, while a 62-month delay after the new indictment was presumptively prejudicial, as was the delay of another year after the original indictment, the lack of the state's deliberate act causing the delay, defendant's withdrawal of defendant's speedy trial demand, and the lack of a showing that defendant's defense was impaired by the delay indicated that it was not error to deny defendant's motion to dismiss the indictments. *Williams v. State*, 279 Ga. 106, 610 S.E.2d 32 (2005).

Prejudice not shown. — Defendant's constitutional right to a speedy trial was not violated even though delay was for two years, three months, and ten days, of which the defendant was incarcerated, where there was no evidence that a deliberate attempt to delay the trial in order to hamper the defense was shown, to a considerable extent the delay was attributable to the defense, the defendant did not assert in the criminal case the constitutional right to a speedy trial, and the defendant's only assertion of prejudice was the death of a character witness. *Perry v. Mitchell*, 253 Ga. 593, 322 S.E.2d 273 (1984).

Vague assertions of faded memory and lost witnesses without connecting the loss to any material fact in issue will not satisfy the requirement that actual prejudice be demonstrated to establish a violation of the right to a speedy trial. *United States v. Burke*, 673 F. Supp. 1574 (N.D. Ga. 1986), *aff'd*, 856 F.2d 1492 (11th Cir. 1988), *cert. denied*, 492 U.S. 908, 109 S. Ct. 3222, 106 L. Ed. 2d 571 (1989).

Denial of defendant's motion to dismiss for an alleged violation of defendant's speedy trial right based on a more than three-year delay after defendant's initial arrest was proper where there was no deliberate attempt to delay the trial to hamper the defense, where defendant was incarcerated for a few days and then released on bond, where defendant's burdens of mental anguish and defendant's claim that the case hurt defendant economically fell short of establishing an unusual showing that bal-

anced this factor significantly in defendant's favor, where, since, in criminal cases, a child was automatically competent to testify as to molestation, defendant showed no prejudice by defendant's assertion that the child victims were more vulnerable to a competency challenge when they were younger, where defendant's speculation that the people who had moved out of state might have been alibi witnesses fell short of "specific evidence" to weight this factor in defendant's favor, and where defendant failed to assert timely speedy trial rights and failed to show that defendant's defense was impaired. *Watkins v. State*, 267 Ga. App. 684, 600 S.E.2d 747 (2004).

Presumption of prejudice raised by the state's 25-month delay in bringing defendant's case to trial was sufficiently rebutted as the loss of a witness did not prevent defendant from asserting an alibi defense and defendant was partially responsible for the loss of the witness as defendant waited 15 months after the indictment to assert defendant's speedy trial rights. *Salahuddin v. State*, 277 Ga. 561, 592 S.E.2d 410 (2004).

Trial court's denial of defendant's motion for discharge and acquittal on constitutional speedy trial grounds was proper because, while the first two Barker factors weighed in favor of defendant, defendant did not assert constitutional rights until trial was imminent, despite ample time to do so, defendant did not show that the defense was impaired by the 29-month delay between arrest and trial, defendant did not show any prejudice from the delay, there was no evidence that the delay was the result of a deliberate attempt by the state to hamper the defense, and defendant had been released on bond on the same day as the arrest. *Nusser v. State*, 275 Ga. App. 896, 622 S.E.2d 105 (2005).

Because the short delay attributable to the state did not have any demonstrable harmful effect on the defense against two murder charges and because defendant was dilatory in formally asserting the right to a speedy trial under the sixth amendment and the Georgia Constitution, the trial court correctly denied defendant's motion to dismiss the indictments. *Scandrett v. State*, 279 Ga. 632, 619 S.E.2d 603 (2005).

Prejudice shown. — Trial court erred in denying defendant's motion to dismiss which alleged a speedy trial violation, as the

delay in bringing defendant to trial was prejudicial, especially when, after an assertion of the right, a trial did not immediately ensue, but an additional seven months had passed before a ruling on the claim, and in the interim, an alleged material defense witness died. *Hardeman v. State*, 280 Ga. App. 168, 633 S.E.2d 595 (2006).

Trial by Jury

1. In General

Impartial jury is the cornerstone of the fairness of trial by jury. *Logue v. State*, 155 Ga. App. 476, 271 S.E.2d 42 (1980).

Statutes for selecting jurors, and drawing and summoning them, form no part of a system to procure an impartial jury to parties but are intended to distribute jury duties among citizens. Obviously, however, a disregard of the essential and substantial provisions of former Code 1933, § 59-112 (see O.C.G.A. § 15-12-1) will have the effect of vitiating the array. *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980).

United States Const., amend. 14, guarantees the right of trial by jury in all state nonpetty criminal cases. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Where right to jury trial attaches. — Right to jury trial attaches where the maximum penalty for an offense exceeds six months imprisonment. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Right to jury trial attaches in both felony and misdemeanor cases. — Only in cases concerning truly petty crimes, where the deprivation of liberty is minimal, does the defendant have no constitutional right to trial by jury. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Cumulation of multiple petty offenses for purpose of gaining right to jury trial. — That the cumulative punishment which can be inflicted upon a defendant is in excess of six months imprisonment and that the defendant is tried at one time on multiple charges does not operate to convert the multiple offenses with which the defendant is charged from multiple petty offenses to one serious offense, thus placing the trial within the constitutional guarantee of the right to a

Trial by Jury (Cont'd)**1. In General (Cont'd)**

jury trial. *Key v. Stewart*, 228 Ga. 516, 186 S.E.2d 739 (1972).

No right to jury trial exists for a contempt proceeding brought for violation of a restraining order. *Sumbry v. Land*, 127 Ga. App. 786, 195 S.E.2d 228 (1972), cert. denied, 414 U.S. 1079, 94 S. Ct. 598, 38 L. Ed. 2d 486 (1973).

Absence of mental retardation is not the functional equivalent of an offense such that determining its absence or presence in a criminal matter requires a jury trial under *Ring v. Arizona*, 536 U.S. 584 (2002), based on constitutional principles under Ga. Const. 1983, Art. I, Sec. I, Para. XI and U.S. Const., amend. 6. *Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613 (2003).

Defendant cannot compel court to try the defendant without a jury. — A defendant who is charged with a felony and who waives the right for a jury trial and demands trial by the court without a jury, cannot compel the court to so try the defendant. It is not error for the court to overrule such demand. *Palmer v. State*, 195 Ga. 661, 25 S.E.2d 295 (1943).

Before a defendant could effectively waive the right to a jury trial and demand a bench trial, the state's consent had to be obtained, in addition to the trial court's agreement to conduct a bench trial pursuant to the defendant's demand. *Zigan v. State*, 281 Ga. 415, 638 S.E.2d 322 (2006).

Purposes which govern size of jury. — U.S. Const., amend. 6 mandates a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross section of the community. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Jury of fewer than six persons deprives a defendant of the right to trial by jury. *Ballew v. State*, 145 Ga. App. 829, 245 S.E.2d 169, cert. denied, 436 U.S. 962, 98 S. Ct. 3083, 57 L. Ed. 2d 1129 (1978).

Requiring only nine votes of a 12-member jury to convict in a felony trial does not violate due process guarantee by diluting the reasonable doubt standard. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Nothing in the federal Constitution requires states to provide a jury of 12 in the trial of criminal cases, though it does require federal courts to have that number. Trial by jury in a federal court means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted. Among those elements was a jury composed of 12 persons, neither more nor less. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), aff'd, 131 F.2d 110 (5th Cir. 1942), cert. denied, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

States have wide leeway in dividing responsibility between judge and jury in criminal cases. — If a state concludes that jury sentencing is preferable, nothing in the due process clause of U.S. Const., amend. 14 intrudes upon that choice. *Chaffin v. Sychcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

Sentencing by court after conviction by jury. — If the jury finds the appellant was guilty of the offense charged, the fact that the trial court fixed the sentence does not deprive the appellant of the right to trial by jury. *Bowman v. State*, 231 Ga. 220, 200 S.E.2d 880 (1973).

Jury is permitted to increase sentence on retrial, although this may force the defendant either to waive a jury trial in the second trial or to plead guilty so that the trial judge could not increase the sentence without violating the right under U.S. Const., amend. 6 to a jury trial. *Chaffin v. Sychcombe*, 455 F.2d 640 (5th Cir. 1972), aff'd, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

Trial by jury in a criminal case may be waived. *Brown v. Zerst*, 99 F.2d 745 (5th Cir. 1938), cert. denied, 305 U.S. 661, 59 S. Ct. 365, 83 L. Ed. 429 (1939).

Constitutional right to a jury trial may be waived by proceeding to trial without demanding a jury. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Defendant in a misdemeanor case can waive trial by jury. — There is no reason why a prisoner in a case of this kind should not have the right to be tried by a conscientious and intelligent judge, if he prefers it, as well as the right to be tried by a jury. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Trial of misdemeanor traffic offenses in municipal court. — The power of municipal courts to try and dispose of misdemeanor traffic offenses is conditioned upon the defendant's waiver of the right to a jury trial. *Kolker v. State*, 260 Ga. 240, 391 S.E.2d 391 (1990).

Defendant's waiver need not be in a particular, ritualistic form. *Little v. Smith*, 347 F. Supp. 427 (N.D. Ga. 1971).

Personal waiver of jury trial. — It is not necessary for the preservation of due process that a defendant personally waive the right to a jury trial. *Little v. Stynchcombe*, 227 Ga. 311, 180 S.E.2d 541 (1971).

Although a jury trial may constitutionally be waived, the defendant must personally and intelligently participate in the waiver. *Griggs v. State*, 159 Ga. App. 219, 283 S.E.2d 77 (1981) (but see *Little v. Stynchcombe*, 227 Ga. 311, 180 S.E.2d 541 (1971)).

Defendant's waiver of the right to trial by jury was knowingly made by the defendant and with the defendant's personal and intelligent participation, where it could be inferred from the joint participation in the waiver by both the defendant and the defendant's counsel that this was a matter that they had discussed. *White v. State*, 197 Ga. App. 162, 398 S.E.2d 35 (1990).

Defendant waived the right to a jury trial, where the defendant consulted with the defendant's attorney and made an intelligent and knowing decision to waive the right and made no objection to the proceeding until after the defendant received an unfavorable verdict. *McCollum v. State*, 201 Ga. App. 493, 411 S.E.2d 328, cert. denied, 201 Ga. App. 904, 411 S.E.2d 328 (1991), 507 U.S. 916, 113 S. Ct. 1271, 122 L. Ed. 2d 666 (1993).

A criminal defendant must personally and intelligently participate in the waiver of the constitutional right to a trial by jury. *Payne v. State*, 217 Ga. App. 386, 460 S.E.2d 297 (1995).

Absence of written assent signed by the defendant and of categorical oral assent will not invalidate waiver. *Little v. Smith*, 347 F. Supp. 427 (N.D. Ga. 1971).

Waiver must be deliberately and understandingly made with the consent of the prosecution and the court. *Irvin v. Zerbst*, 97 F.2d 257 (5th Cir.), cert. denied, 303 U.S. 657, 56 S. Ct. 527, 82 L. Ed. 1098, cert.

denied, 305 U.S. 597, 59 S. Ct. 97, 83 L. Ed. 379 (1938).

Court must decide whether the defendant intelligently agreed to a trial without jury in determining validity of waiver. *Little v. Smith*, 347 F. Supp. 427 (N.D. Ga. 1971).

When the purported waiver of the right is questioned, the state bears the burden of showing the waiver was made both intelligently and knowingly, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made. *Pahnke v. State*, 203 Ga. App. 88, 416 S.E.2d 324 (1992), cert. denied, 203 Ga. App. 907, 416 S.E.2d 324, 506 U.S. 895, 113 S. Ct. 273, 121 L. Ed. 2d 201 (1992).

Defendant's waiver was knowing and intelligent. — Because the record affirmatively showed that the defendant was aware of the right to a jury trial because the defendant personally filed a written pro se demand for trial by jury reciting that right and the trial judge reminded the defendant that the defendant was entitled to a trial by jury and asked the defendant if the defendant wanted a jury or nonjury trial and the defendant elected to have a nonjury trial, the defendant personally made a knowing and intelligent waiver of the right to a jury trial. *Pahnke v. State*, 203 Ga. App. 88, 416 S.E.2d 324 (1992), cert. denied, 203 Ga. App. 907, 416 S.E.2d 324, 506 U.S. 895, 113 S. Ct. 273, 121 L. Ed. 2d 201 (1992).

Evidence supported a trial court's finding that a defendant knowingly and voluntarily waived the defendant's right to a jury trial as the defense counsel testified that: (1) the defense counsel explained to the defendant on several occasions the defendant's right to a jury trial and the ramifications of that right; (2) the counsel explained the difference between a jury trial and a bench trial and recommended that the defendant waive that right in favor of a bench trial and take the defendant's chances with an appeal of the denial of a motion to suppress; and (3) the defendant indicated to the counsel that the defendant understood the defendant's rights and the strategy and affirmatively agreed to go forward with a bench trial. *Fleming v. State*, 282 Ga. App. 373, 638 S.E.2d 769 (2006).

Trial by Jury (Cont'd)**1. In General (Cont'd)**

There is no requirement of an “in court” waiver of right of jury trial. *Wooten v. State*, 162 Ga. App. 719, 293 S.E.2d 11 (1982), *aff'd*, 166 Ga. App. 168, 303 S.E.2d 507 (1983).

Defendant’s right to risk greater sentence in jury trial. — Where the government has not voluntarily reduced the charges, it is unfair to the defendant, who prefers to risk a potentially greater sentence in order to be tried by a jury of peers, to deny the defendant the right to a jury trial. *United States v. O’Connor*, 660 F. Supp. 955 (N.D. Ga. 1987).

Effect of possibility of consecutive sentences. — Where defendant has been charged with “driving under the influence” and “reckless driving,” each of which is a “petty” offense as that term is defined in 18 U.S.C. § 1(3), but, because a magistrate is authorized to impose consecutive sentences pursuant to 18 U.S.C. § 3584(a), the defendant is exposed to a potential penalty of one year’s imprisonment, a \$1,000.00 fine, and two \$25.00 assessments, as the defendant faces a potential sentence of over six months’ imprisonment and over a \$500.00 fine under these circumstances, the defendant has a constitutional right to a jury trial. *United States v. O’Connor*, 660 F. Supp. 955 (N.D. Ga. 1987).

No right to jury trial in equal employment opportunity cases. — There is no right to a jury trial in cases arising under the equal employment opportunity provisions of the Civil Rights Act of 1964. *Mitchell v. Alex Foods, Inc.*, 572 F. Supp. 825 (N.D. Ga. 1983).

No right to jury trial on issues of back pay and lost benefits. — There is no right to a jury trial on the issue of back pay under 42 U.S.C. § 1981 or for the recovery of “lost pension, social security, experience and training opportunities and other lost benefits”; such relief is equitable in nature. *Mitchell v. Alex Foods, Inc.*, 572 F. Supp. 825 (N.D. Ga. 1983).

Probate court. — Probate court did not err by failing to conduct a jury trial on the construction of a decedent’s will as the decedent’s will was unambiguous and no issues of fact remained; further, the corporation challenging the construction was not autho-

rized under Georgia law to serve as a corporate trustee. *Chattowah Open Land Trust, Inc. v. Jones*, 281 Ga. 97, 636 S.E.2d 523 (2006).

Test for fair trial. — To support a finding that the petitioner did not receive a fair trial, the petitioner must show: (1) that setting of trial was inherently prejudicial; or (2) that jury selection process showed actual prejudice to degree that rendered fair trial impossible. *Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982).

Impanelling of fair and impartial jurors, when demonstrated on voir dire, makes it particularly difficult to show that setting of trial was inherently prejudicial. *Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982).

Trial court did not deprive the defendant of a fair and impartial jury pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XI and U.S. Const., amend. 6 in refusing to transfer venue of the murder case due to pretrial publicity; many of the prospective jurors were unaware of the publicity surrounding the crimes due to the 14-year gap between the crimes and trial, and no remaining venire persons expressed a fixed opinion regarding the defendant’s guilt based upon exposure to media coverage. *Denny v. State*, 281 Ga. 114, 636 S.E.2d 500 (2006).

Remand to trial court. — Where record indicated that valid waiver of the right to jury trial may have occurred but did not reflect whether defendant personally, knowingly, voluntarily, and intelligently participated in such waiver, case was remanded to trial court for hearing on that issue. *Wooten v. State*, 162 Ga. App. 719, 293 S.E.2d 11 (1982), *aff'd*, 166 Ga. App. 168, 303 S.E.2d 507 (1983).

Right not violated in death penalty case. — O.C.G.A. § 17-10-30, enumerating the statutory aggravating factors in a death penalty case, was not unconstitutional under U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XI as applied in defendant’s case; the jury found beyond a reasonable doubt the existence of the statutory aggravating circumstances, there was no requirement that the jury find non-statutory aggravating factors beyond a reasonable doubt, and the non-statutory aggravating evidence presented by the state was reliable and admissible. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), *cert. denied*, U.S.

, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

No violation found. — On appeal, the defendant failed to show an entitlement to a new trial based on the actions of a dismissed juror, as the juror did not participate in the verdicts, and the ever-watchful trial judge, by conducting individual voir dire of the jurors who did return the guilty verdicts, properly determined that the dismissed juror had no effect on the jury's deliberations. *Inman v. State*, 281 Ga. 67, 635 S.E.2d 125 (2006).

Unanimous verdict required. — Under U.S. Const., amend. 6 a criminal defendant has a right to a unanimous jury verdict, but there can be a waiver by the defendant of this right. *Glass v. State*, 250 Ga. 736, 300 S.E.2d 812 (1983).

Improper excusal of lone juror holding out for acquittal. — The trial judge's failure to make a reliable determination of whether, in the final moments of jury deliberations, the lone juror to reserve a reasonable doubt as to the defendant's guilt, who was reported by the jury foreman to be "extremely nervous," was actually incapacitated, the judge's failure to ensure that the juror understood the juror's right to adhere to the juror's view that the defendant should be acquitted, and the juror's failure, upon excusing that juror and replacing the juror with an alternate juror, to instruct the reconstituted jury to begin anew deprived the defendant of the constitutional right to a trial by a fair and impartial jury and deprived the defendant of the due process right to a fair trial. *Peek v. Kemp*, 746 F.2d 672 (11th Cir. 1984), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986).

Improper judicial determination in prosecution for failure to file tax return. — In a prosecution for willful failure to file income tax returns, trial court erred in directing the jury that, as a matter of law, the documents filed by the defendant were not returns. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984).

Juror may impeach verdict based on juror misconduct. — One recognized exception to the rule that a juror may not impeach the verdict is juror misconduct where the jurors, in effect, become unsworn witnesses against the defendant in violation of U.S. Const., amend. 6. *Moore v. State*, 179 Ga. App. 125, 345 S.E.2d 631 (1986).

Statutory aggravating circumstances. — Georgia death penalty statutes were not unconstitutional under the sixth amendment, as the jury had to find beyond a reasonable doubt the statutory aggravating circumstances necessary to make a defendant eligible for the death penalty, pursuant to O.C.G.A. § 17-10-30; there was no requirement that non-statutory aggravating evidence be proven beyond a reasonable doubt. *Nance v. State*, 280 Ga. 125, 623 S.E.2d 470 (2005).

2. Selection of Jurors

Constitution requires that grand and petit juries be selected at random from a fair cross section of the community in the district or division wherein the court convenes. *United States v. Rosenthal*, 482 F. Supp. 867 (M.D. Ga. 1979).

Grand jury must be drawn from fair cross section. — The right to trial by an impartial jury includes the right to be indicted by a grand jury composed of members drawn from a source representing a fair cross section of the community. *United States v. Cross*, 516 F. Supp. 700 (M.D. Ga. 1981), rev'd on other grounds, 708 F.2d 631 (11th Cir. 1983), aff'd, 742 F.2d 1279 (11th Cir. 1984), cert. denied, 498 U.S. 849, 111 S. Ct. 138, 112 L. Ed. 2d 105 (1990).

There is no requirement that the jury list include the name of every citizen of the county eligible for jury service. This list must include a fair cross-section of the eligible members of the community, not every eligible member of the community. *Lipham v. State*, 257 Ga. 808, 364 S.E.2d 840, cert. denied, 488 U.S. 873, 109 S. Ct. 191, 102 L. Ed. 2d 160 (1988).

U.S. Const., amend. 6 guarantees a defendant's right to a jury selected from a representative cross-section of the community. This requirement does not, however, extend to petit juries. *United States v. Rodriguez-Cardenas*, 866 F.2d 390 (11th Cir. 1989), cert. denied, 493 U.S. 1069, 110 S. Ct. 1110, 107 L. Ed. 2d 1017 (1990).

Fair cross-section representation requirement not applicable to grand jury foreperson. — Although the composition of a grand jury or petit jury venire may be challenged under the sixth amendment's guarantee of a right to be tried by a group drawn from a source representing a fair

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cross-section of the community, this requirement does not extend to the office of grand jury foreperson because one person alone cannot represent the divergent views, experience, and ideas of the distinct groups which form a community. *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984).

Right to have a jury venire represent a fair cross section of the community is protected by U.S. Const., amend. 6's guarantee of trial by an impartial jury. *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983); *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983), cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed. 2d 706 (1985).

No constitutional guarantee of representative cross-section in particular case. — The fact that the jury panel in a particular case actually contained a lower percentage of black persons is not especially significant. There is no constitutional guarantee that the grand or petit juries impanelled in a particular case will constitute a representative cross-section of the entire community. *Truitt v. State*, 212 Ga. App. 286, 441 S.E.2d 800 (1994).

Failure to show actual under-representation of a claimed cognizable group. — Supreme Court of Georgia found no need to address the trial court's finding regarding whether Hispanic persons were a cognizable group in Cobb County in order to decide the defendant's jury composition claim, because: (1) the defendant failed to show any actual under-representation of Hispanic persons; (2) a slight over-representation of Hispanic persons who were citizens, in comparison to the total county population, was shown by the evidence; and (3) the defendant's own expert belied the defendant's claim of under-representation. *Rice v. State*, 281 Ga. 149, 635 S.E.2d 707 (2006).

Due process limits apply even where jury not constitutionally required. — If a state chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Whether class is identifiable and distinct is threshold question. — A threshold question that must be answered by the defendant is

whether the particular class constitutes an identifiable and distinct class for purposes of a jury challenge based on the U.S. Const., amend. 14. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

State precluded from deliberate and systematic exclusion. — Constitution requires that the state not deliberately and systematically exclude identifiable and distinct groups from its jury lists. *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); 439 U.S. 882, 99 S. Ct. 218, 58 L. Ed. 2d 194 (1978).

Violation requires systematic exclusion or discrimination opportunity. — The defendant's allegations that the venire from which the grand and petit juries were drawn was unconstitutionally composed because both women and African-Americans were under-represented did not establish a prima facie violation of either the sixth amendment or the fourteenth amendment, because there was no showing that the underrepresentation was due to systematic exclusion of the groups in the jury-selection process or that the venire was selected under a practice providing an opportunity for discrimination. *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).

Selection procedures, not actual composition, determine constitutionality. — In determining whether there has been a denial of the defendant's right under U.S. Const., amend. 6 to have jury venires selected from fairly representative cross sections of the community, and in determining whether the defendant's rights under the equal protection clause of U.S. Const., amend. 14 have been violated because members of the defendant's race have been deliberately excluded from the jury lists, the inquiry concerns the procedures for compiling the jury lists and not the actual composition of the grand or traverse jury in a particular case. *Patterson v. Balkcom*, 245 Ga. 563, 266 S.E.2d 179 (1980).

It is the pool of jurors from which the jury sent to be voir dired is drawn that must be representative of the community, not the individual panel sent to a courtroom for voir dire purposes. *Prine v. State*, 237 Ga. App. 679, 515 S.E.2d 425 (1999).

State's challenge of defense counsel's use of peremptory challenges was proper since the trial court was authorized to disbelieve the facially race-neutral reasons for striking

certain jurors, or to conclude that the stated grounds, some being whimsical or fanciful, were not neutrally applied. *McKibbons v. State*, 216 Ga. App. 389, 455 S.E.2d 293 (1995).

Mere geographical imbalance, absent evidence that an identifiable and cognizable segment of the community has been systematically excluded or underrepresented by reason of such imbalance, does not violate the statutory and constitutional requirements that the jury panel represent a fair cross section of the community. *United States v. Rosenthal*, 482 F. Supp. 867 (M.D. Ga. 1979).

Imprecision of jury selection process and other inoffensive factors. — In determining whether a particular discrepancy is substantial or significant, some allowance may be made for the imprecision of the jury selection process and the operation of constitutionally inoffensive factors such as exemptions from jury duty based on occupation. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Defendant entitled to panel of qualified jurors, not panel of preferred jurors. *Smith v. State*, 245 Ga. 205, 264 S.E.2d 15 (1980).

Defendant not constitutionally entitled to venire or jury roll of any particular composition. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977), cert. denied, 439 U.S. 882, 99 S. Ct. 218, 58 L. Ed. 2d 194 (1978); *Mann v. Cox*, 487 F. Supp. 147 (S.D. Ga. 1979).

Deliberate and systematic exclusion not permitted. — Equal protection and due process clauses of U.S. Const., amend. 14 and U.S. Const., amend. 6 require that the state not deliberately and systematically exclude identifiable and distinct groups from their jury lists. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Representative cross section in a particular case not guaranteed. — There is no constitutional guarantee that grand or petit juries, impaneled in a particular case, will constitute a representative cross section of the entire community. *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977), cert. denied, 439 U.S. 882, 99 S. Ct. 218, 58 L. Ed. 2d 194 (1978); *Smith v. State*, 151 Ga. App. 697, 261 S.E.2d 439 (1979).

Representation of defendant's race or other groups not guaranteed. — The propo-

sition that a defendant in a criminal case is entitled to a proportionate number of the defendant's race on the jury that tries the defendant, or that the venire or jury lists accurately reflect the proportionate strength of every identifiable group is not law, since the challenger must establish by satisfactory evidence purposeful racial discrimination, even if the figures are not proportionate. *Talley v. State*, 120 Ga. App. 365, 170 S.E.2d 444 (1969).

Defendant in a criminal case is not constitutionally entitled to demand a proportionate number of the defendant's race on the jury that tries the defendant nor on the venire or jury roll from which petit jurors are drawn, and neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. *United States v. Rosenthal*, 482 F. Supp. 867 (M.D. Ga. 1979).

Gross and unexplained disparity may alone be sufficient to demonstrate discrimination. *Talley v. State*, 120 Ga. App. 365, 170 S.E.2d 444 (1969).

Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. *Julian v. State*, 134 Ga. App. 592, 215 S.E.2d 496 (1975).

State may exclude certain occupational categories from jury service on the bona fide ground that it is for the good of the community that their regular work should not be interrupted. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Use of voter registration lists for jury selection. — Voter registration lists may be used as the sole source of names for jury duty unless it results in the systematic exclusion of a cognizable group or class of qualified citizens. However, those who do not choose to register, such as Jehovah's Witnesses, cannot be considered a cognizable group. *United States v. Dangler*, 422 F.2d 344 (5th Cir. 1970).

Defendant may complain of the exclusion from the jury of a distinct class to which the defendant does not belong. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Exclusion of discernible class from jury service injures not only those defendants who belong to excluded class, but other

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defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Exclusion of blacks from jury service injures not only defendants, but also other members of the excluded class. It denies the class of potential jurors the privilege of participating equally in the administration of justice, and it stigmatizes the whole class, even those who do not wish to participate. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Whatever a criminal defendant's race, the defendant has standing to challenge the system used to select the grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies the defendant due process of law. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

White person has standing to attack the systematic exclusion of black persons from grand and petit jury service. *Gibbs v. State*, 235 Ga. 480, 220 S.E.2d 254 (1975), cert. denied, 424 U.S. 924, 96 S. Ct. 1134, 47 L. Ed. 2d 333 (1976).

Exclusion of women as a class. — It is not tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male. *Zirkle v. State*, 235 Ga. 289, 219 S.E.2d 389 (1975).

Exclusion of women. — In county where by tradition the grand jurors had selected their forepersons, fact that no woman had served as a foreperson of a county grand jury during the preceding ten years did not prove discrimination in selection of grand jurors and forepersons. *Moss v. State*, 250 Ga. 368, 297 S.E.2d 459 (1982).

Underrepresentation of women. — Petitioner established a violation of the sixth amendment's fair-cross-section requirement, notwithstanding jury commissioners' good faith belief that 39.36 percent representation of women on the master jury list "was in the ballpark guidelines that the Supreme Court would allow." *Berryhill v. Zant*, 858 F.2d 633 (11th Cir. 1988).

Underrepresentation of whites. — Because defense counsel put forward no evidence of the racial composition of the population of the county in which the defendant was tried, other than to state, "my client, being white, and we only have one white female juror out of the entire panel, I think it's just not a good cross section and it's not representative," the defendant failed to meet the defendant's burden to establish prima facie that a distinct and identifiable group in the community was substantially under represented on the jury venire being challenged. *Prine v. State*, 237 Ga. App. 679, 515 S.E.2d 425 (1999).

Defendant's use of peremptory strikes to exclude Caucasians. — Trial court's finding that defense counsel's explanation for a prima facie racially discriminatory peremptory strike was pretextual was not clear error based on defense counsel's demeanor while explaining the strike, counsel's misstating what the juror's response was during voir dire, counsel's failure to excuse similarly situated jurors, and counsel's exercise of 11 of 12 strikes against Caucasians. *Nelson v. State*, 271 Ga. App. 870, 611 S.E.2d 147 (2005).

Right to challenge improperly composed jury. — Criminal defendants in state courts have the right to challenge, under U.S. Const., amend. 6, petit juries not selected from a fair cross section of the community. *Wilson v. State*, 250 Ga. 630, 300 S.E.2d 640, cert. denied, 464 U.S. 865, 104 S. Ct. 199, 78 L. Ed. 2d 174 (1983).

Test for an attack on a traverse jury is two-fold: first, the defendant must prove that the group is a cognizable group; and, second, the defendant must show that the group has been consistently under-represented. *Potts v. State*, 259 Ga. 812, 388 S.E.2d 678 (1990).

Reindictment not required for certain grand juries declared unconstitutional. — States do not have to reconstitute grand juries and reindict prisoners who have been indicted by a grand jury drawn prior to *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), which declared that Georgia's "opt-out" law for women rendered its juries unconstitutional. *Young v. Zant*, 727 F.2d 1489 (11th Cir. 1984), cert. denied, 470 U.S. 1009, 105 S. Ct. 1371, 84 L. Ed. 2d 390 (1985).

Exclusion of homemakers with children 14 years of age or under. — Former Code 1933, § 59-112 (see O.C.G.A. § 15-12-1), which authorizes the trial judge to excuse a juror who is a homemaker with children 14 years of age or under does not violate U.S. Const., amend. 6 or U.S. Const., amend. 14, since a state may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Eighteen-to-21-year-olds not distinct group. — Assuming that 18-to-21-year-olds were excluded from the jury pool in a criminal case, this does not establish even a prima facie violation of the fair-cross-section requirement, because persons falling into this age range do not constitute a “distinctive” or cognizable group. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev’d on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

18-to-23-year-olds not distinct group. — Defendant failed to demonstrate that persons between ages of 18 and 23 constituted “distinct and identifiable group in the community” for purposes of challenge to composition of jury. See *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983), cert. denied, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

Young persons age 18 to 24 were not a cognizable group which had to be represented on defendant’s jury for sixth amendment purposes. *Potts v. State*, 259 Ga. 812, 388 S.E.2d 678 (1990).

The defendant was not entitled to have the indictment quashed because the list of potential grand jurors was drawn from the 1980 census instead of the 1990 census, notwithstanding defendant’s assertion that the use of the 1980 census resulted in the underrepresentation of the 18 to 24 age group in the grand jury pool, since such group was not cognizable for purposes of grand jury selection. *Swanson v. State*, 248 Ga. App. 551, 545 S.E.2d 713 (2001).

Eighteen-to-29-year-olds not cognizable group. — Petitioner failed to establish that young adults aged 18 to 29 constituted a cognizable group in the petitioner’s attempt to show underrepresentation of young

adults in the jury pool, because the group was not defined and the petitioner did not prove that the views held by adults aged 18 to 29 could not be represented by other members of the community. *Willis v. Kemp*, 838 F.2d 1510 (11th Cir. 1988), cert. denied, 489 U.S. 1059, 109 S. Ct. 1328, 103 L. Ed. 2d 596 (1989).

Overrepresentation of persons under 25. — Defendant’s challenge of the jury array based on overrepresentation of persons under 25 years of age failed to establish the significant underrepresentation of persons 25 and over and failed to show that the underrepresented group was cognizable. *Anthony v. State*, 213 Ga. App. 303, 444 S.E.2d 393 (1994).

Underrepresentation of young persons on grand jury list did not violate the requirement that the grand jury be drawn from a fair cross section of the community; the underrepresentation was explained by the jury commissioner’s compliance with the legal requirement that only a limited number of the most experienced persons on the traverse jury list be selected for inclusion on the grand jury list. *Parks v. State*, 254 Ga. 403, 330 S.E.2d 686 (1985).

Eighteen-to-30-year-old persons are not a cognizable class for the purpose of a challenge to the array of the traverse jury. *Davis v. State*, 241 Ga. 376, 247 S.E.2d 45, cert. denied, 439 U.S. 947, 99 S. Ct. 341, 58 L. Ed. 2d 338 (1978).

Lowering of minimum jury service age to 18 not constitutionally required. — Jury list which excludes all people 18 to 21 years of age does not deny defendant the right to a public trial and due process of law, despite the lowering of the minimum age for federal jurors to 18 by 26 U.S.C. § 1865. *United States v. Dukes*, 479 F.2d 324 (5th Cir. 1973).

Jurors who appeared in panel for previous trial of defendant. — The fact that a panel of jurors may have included the names of certain jurors who had appeared in a panel presented in a previous trial of the defendant and who had been peremptorily challenged by the defendant does not constitute a good ground of challenge to the array. *Cady v. State*, 198 Ga. 99, 31 S.E.2d 38, appeal dismissed and cert. denied, 323 U.S. 676, 65 S. Ct. 190, 89 L. Ed. 549 (1944).

If a juror is impaneled to try a defendant for a criminal offense and is peremptorily

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challenged by the defendant, the juror is not so disqualified that the juror can not again be impanelled at a subsequent trial for the same offense under the same indictment, on the grounds that the defendant would thereby be deprived of the defendant's full 20 strikes, or because it would deny the defendant's constitutional right of a fair and impartial trial and equal protection of the laws. *Cady v. State*, 198 Ga. 99, 31 S.E.2d 38, appeal dismissed and cert. denied, 323 U.S. 676, 65 S. Ct. 190, 89 L. Ed. 549 (1944).

Reinstatement of improperly challenged jurors. — When a Batson challenge results in a finding that jury selection was not racially neutral and when the jurors remain unaware of the party who struck them, reinstating improperly challenged jurors does not abridge the defendant's right to a fair and impartial jury. *Brown v. State*, 218 Ga. App. 469, 462 S.E.2d 420 (1995).

"Death-qualified" jury procedure does not violate the constitutional right to a jury trial. *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir. 1978).

When the defendant received a sentence of life without parole, not a death sentence, the defendant could not complain of the death-penalty qualification of the jurors; moreover, the death penalty qualification of prospective jurors was clearly authorized. *Stokes v. State*, 281 Ga. 825, 642 S.E.2d 82 (2007).

Exclusion of death penalty opponents does not violate due process clause of U.S. Const., amend. 14. — Questioning of jurors and exclusion of those opposed to the death penalty does not violate the due process clause of U.S. Const., amend. 14. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

Standard for disqualifying a prospective juror in a capital punishment case is whether the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the juror's instructions and the juror's oath. *Alderman v. State*, 254 Ga. 206, 327 S.E.2d 168, cert. denied, 474 U.S. 911, 106 S. Ct. 282, 88 L. Ed. 2d 245 (1985).

Death-scrupled jurors do not constitute a recognizable class, representation of which is necessary on the guilt phase to grant a valid cross section of the community. *Porter v. State*, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806 (1977).

Defendant has no right to have capital punishment objectors serve in the guilt determination phase of trial as part of the cross section of the community to which the defendant is entitled. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

Exclusion of capital punishment objectors does not deprive defendant of fair cross section. — Exclusion of jurors opposed to capital punishment from the guilt-innocence phase of the trial does not deprive the defendant of a trial by a jury reflecting a fairly representative cross section of the community. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977).

The exclusion of jurors who indicated that they would not under any circumstances impose the death penalty did not violate the defendant's right to an impartial, community-representative jury. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Excusing jurors who profess inability to impose death penalty under any circumstances. — Where an interrogation of venire persons revealed that each candidate could not have, under any circumstances conceivable at that time, imposed the death penalty upon the defendant, they were permissibly dismissed from the venire. *Johnson v. Kemp*, 585 F. Supp. 1496 (S.D. Ga. 1984), aff'd in part, rev'd in part on other grounds, 759 F.2d 1503 (11th Cir. 1985).

No error in failure to dismiss juror not irrevocably committed to death penalty. — It is not error for the court to fail to dismiss a juror where the juror is not so biased or irrevocably committed to the death penalty that the juror would ignore the court's instructions pertaining to the jury's sentence recommendation and impose the death penalty under all circumstances in which a murder conviction would be returned. *Godfrey v. Francis*, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930,

80 L. Ed. 2d 475 (1984), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Jury improperly selected where persons not irrevocably committed to death penalty systematically excluded. — A jury is improperly selected where persons who do not make it unmistakably clear that they will automatically vote against capital punishment are systematically excluded from the jury, in violation of the sixth, eighth and fourteenth amendments. *Potts v. Zant*, 575 F. Supp. 374 (N.D. Ga. 1983), aff'd, 734 F.2d 526 (11th Cir. 1984), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610, judgment vacated, 478 U.S. 1017, 106 S. Ct. 3328, 92 L. Ed. 2d 734 (1986), (remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570 (1986)), aff'd, 814 F.2d 1512 (11th Cir. 1987), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

Juror may not be excused for mere general scruples or opposition to the death penalty. — The venireman who is excused must make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. *Mason v. Balkcom*, 487 F. Supp. 554 (M.D. Ga. 1980), rev'd on other grounds, 669 F.2d 222 (5th Cir. 1982), cert. denied, 460 U.S. 1016, 103 S. Ct. 1260, 75 L. Ed. 2d 487 (1983).

Inquiry on voir dire as to opposition to death penalty not unconstitutional. — Allowing prospective jurors to be asked on voir dire whether they are conscientiously opposed to capital punishment does not deny a defendant an impartial jury in violation of U.S. Const., amend. 6 and U.S. Const., amend. 14. *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979), vacated in part on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Failure to determine juror's beliefs as to death penalty. — A trial judge's failure, during voir dire, to determine whether a prospective juror harbors not only an abstract belief against capital punishment, but also beliefs that would preclude the juror from voting the death penalty under any circumstances does not violate U.S. Const.,

amend. 6 and U.S. Const., amend. 14, where the juror is an alternate who never participates in any phase of the trial. *Smith v. Whisman*, 431 F.2d 1051 (5th Cir. 1970).

Excuse of death-scrupled jurors from murder and rape proceedings. — The right of an accused to a trial by an impartial jury, guaranteed by the state and federal Constitutions, means the right to a jury impartial as between the state and the accused on the question of the guilt or innocence of the accused. The crime of rape in this state may be punished by death, and a person accused of such crime has no constitutional right to have jurors trying the case who have conscientious scruples against the infliction of a punishment prescribed by the law. *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118, appeal dismissed, 385 U.S. 36, 87 S. Ct. 241, 17 L. Ed. 2d 36 (1966).

Where jurors are disqualified in a murder and rape proceeding because of their reservations about capital punishment, they are properly excused for cause, and the defendant is not deprived of the right to a jury selected from a representative cross section of the community. *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 855 (1979), cert. denied, 446 U.S. 970, 100 S. Ct. 2952, 64 L. Ed. 2d 831 (1980).

Necessity of prejudice from unconstitutionally composed jury pool. — If challenged prior to trial, a movant is not required to demonstrate prejudice flowing from an unconstitutionally composed jury pool because prejudice is presumed. *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), cert. denied, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984).

On collateral attack in federal court, when the challenge has been waived under state law, the burden of demonstrating prejudice resulting from underrepresentation is much greater than the presumption accorded the violation when raised prior to trial. *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), cert. denied, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984).

Juror's inability fairly to consider a life sentence is just as disqualifying as an inability fairly to consider a death sentence. *Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988).

Burden is on defendant to prove discrimination. — The burden is upon the defendant to demonstrate that a particular class

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was the subject of discrimination in the jury selection procedures. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Disparity between representation in population and juries insufficient where bias in selection not shown. — Absent proof that selection procedures are biased, proof of disparity between racial percentages in the population and on the juries is not sufficient to shift the burden of explanation to the state. *Wright v. Smith*, 474 F.2d 349 (5th Cir.), cert. denied, 414 U.S. 853, 94 S. Ct. 149, 38 L. Ed. 2d 102 (1973).

The trial court did not err by ruling that the composition of the grand and traverse jury pools did not violate the Constitution, O.C.G.A. § 15-12-40, and the Unified Appeal Procedure where, in a comparison of the 1990 Census numbers for Hispanics in the county with the percentage of Hispanics on the jury lists, it was shown that the absolute disparities were within the legal limit. *Morrow v. State*, 272 Ga. 691, 532 S.E.2d 78 (2000), cert. denied, 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed. 2d 350 (2001).

To establish a prima facie case of jury discrimination the complainant must show that an opportunity for discrimination existed from the source of the jury list and that use of the infected source produced a significant disparity between the percentages found present in the source and those actually appearing on the grand and traverse jury panels. *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); 439 U.S. 882, 99 S. Ct. 218, 58 L. Ed. 2d 194 (1978).

In order to establish a prima facie violation of the fair cross section requirement, the defendant must show that the group alleged to be excluded is a distinctive group in the community; that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *United States v. Rosenthal*, 482 F. Supp. 867 (M.D. Ga. 1979); *United States v. Butler*, 611 F.2d 1066 (5th Cir. 1980), cert. denied, 449 U.S. 830, 101 S. Ct. 97, 66 L. Ed. 2d 35 (1980).

Defendant must establish the following elements to demonstrate a prima facie vio-

lation of the fair cross-section requirement:

(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *United States v. Tuttle*, 729 F.2d 1325 (11th Cir. 1984), cert. denied, 469 U.S. 1192, 105 S. Ct. 968, 83 L. Ed. 2d 972 (1985).

Factors for determining discrimination in jury selection. — There is a progression of legal exercises leading to the conclusion of discrimination in jury selection: The first is the right to rely on the fact that peremptory strikes offer the prosecution a potential tool for discrimination. Second, the defendant must show membership in a racially cognizable group and that the prosecution used peremptory strikes to remove persons of the defendant's race from the jury. Then the defendant is burdened with showing that these facts and other relevant circumstances raise an inference of the prosecution's racial motive in the use of peremptory strikes. *Aldridge v. State*, 258 Ga. 75, 365 S.E.2d 111 (1988).

In order to make a prima facie showing of systematic exclusion of blacks from juries, a defendant has the burden of proving, first, that the opportunity for racial discrimination existed by reason of the use of a racially biased source of potential jurors, and, second, that the use of such an infected source produced a significant disparity between the percentages of blacks in the source and the percentage on the grand jury and petit jury panels. *Wright v. Smith*, 474 F.2d 349 (5th Cir.), cert. denied, 414 U.S. 853, 94 S. Ct. 149, 38 L. Ed. 2d 102 (1973).

In order to establish a prima facie case of discrimination, the defendant must demonstrate that there exists a substantial disparity between the proportion of blacks chosen for jury duty and the proportion of blacks in the eligible population, and that the selection procedures themselves are not racially neutral. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Statistical evidence establishing that blacks are underrepresented, together with evidence that the jury selection procedures

are not racially neutral, establishes a prima facie case of invidious racial discrimination thus shifting the burden of proof to the state. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Random selection producing no black jurors. — The fact that no blacks were on the grand jury that indicted the defendant did not raise a prima-facie case of discrimination where only two percent of the residents of the county were black and the county clerk testified that 15 of the 727 (2%) names placed in the grand jury box were black, but that none of those 15 names were randomly drawn by the Superior Court in open court. *Wigfall v. State*, 257 Ga. 585, 361 S.E.2d 376 (1987).

Both black persons and women constitute recognizable, distinct classes for purposes of challenges based on allegations of discriminatory selection of juries and that jury venires do not represent a fair cross section of the community. *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983).

Use of peremptory strikes to exclude blacks. — The defendant was not denied due process of the law on the ground that the state used all of its peremptory strikes to exclude blacks from a petit jury. *Avery v. State*, 174 Ga. App. 116, 329 S.E.2d 276 (1985).

Where all of the juries relied on by defendant show a systematic exclusion of blacks from petit juries were composed of at least 25 percent black jurors with the exception of one jury which had only one black juror, the State used all of its peremptory challenges in only four of the ten cases, and there were no cases involving all-white juries, defendant failed to establish a constitutional denial of due process and the right to a fair trial through the discriminatory use of peremptory challenges. *Patterson v. State*, 176 Ga. App. 784, 338 S.E.2d 283 (1985).

When a prosecutor uses peremptory challenges to strike all black veniremen from a jury, the defendant is deprived of equal protection; and, unless the prosecutor can present a racially neutral explanation for the elimination of racially discrete jurors through peremptory challenges, a "guilty" verdict arrived at by the jury is subject to reversal and remand. *Hamilton v. State*, 181 Ga. App. 279, 351 S.E.2d 705 (1986).

Use of "comparative disparity" standard to show underrepresentation of blacks and

women. — The defendant, who relied on the "comparative disparity" standard to show unconstitutional underrepresentation of blacks and women, as opposed to white males, on the grand and traverse juries, and not on the "absolute disparity" produced by the jury selection process, in relation to the number of such persons in the community, failed to carry this burden of proof. *Godfrey v. Francis*, 613 F. Supp. 747 (N.D. Ga. 1985), aff'd, 836 F.2d 1557 (11th Cir.), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Disparities insufficient to support inference of purposeful discrimination. — An absolute disparity of less than 5 percent between the black percentage of the jury pools and the black percentage of the community and a comparative disparity (absolute disparity divided by the black percentage of the community) of 28 percent was insufficient to support an inference of purposeful discrimination, where the jurors were randomly selected from the list of registered voters. *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Where the testimony was that blacks were underrepresented by 1.9 percent absolute and 47.9 percent comparative on the grand jury list, and by 1.2 percent absolute and 30.9 percent comparative on the traverse jury list, the comparative disparities shown, although not irrelevant, were insufficient to establish any constitutional violation. *Jefferson v. State*, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987), 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

Recent and long-time registered voters not distinct and identifiable groups. — Defendant failed to establish prima facie that those who were more recently registered voters and those who had been registered for a longer period were distinct and identifiable groups in the community. *Larmon v. State*, 256 Ga. 228, 345 S.E.2d 587 (1986).

Fact that jurors' names were in alphabetical order or their residences were on the same street did not cause substantial underrepresentation of any distinct and identifiable group in the community. *Larmon v. State*, 256 Ga. 228, 345 S.E.2d 587 (1986).

Fact that the names on the master jury list were originally obtained from geographical

Trial by Jury (Cont'd)**2. Selection of Jurors (Cont'd)**

voting districts would not result in a nonrandom geographical pattern. *Larmon v. State*, 256 Ga. 228, 345 S.E.2d 587 (1986).

It would be desirable if jury lists contained no alphabetical, geographical, or numerical patterns. — Therefore, it is strongly suggested that trial courts take steps to totally randomize the juror selection process. *Larmon v. State*, 256 Ga. 228, 345 S.E.2d 587 (1986).

Where there was no challenge to the initial programmed randomness of selecting jurors from a scan of the entire list of registered voters, defendant was not entitled to an additional final computer printout comprised of another entirely random arrangement of the previously randomly selected individuals. *Larmon v. State*, 177 Ga. App. 763, 341 S.E.2d 237, *aff'd*, 256 Ga. 228, 345 S.E.2d 587 (1986).

Systematic exclusion of blacks and women indicated. — For purposes of U.S. Const., amend. 6's right to a jury composed of a representative segment of the community, the disparities of blacks and women on county traverse jury lists over a period of time indicates a systematic exclusion of these two groups. *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), *cert. denied*, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984).

To assert a trial jury composition challenge collaterally in federal court when such right has been waived under state law, requires the petitioner to demonstrate both cause for the failure to challenge and actual prejudice. *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), *cert. denied*, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984).

Replacement of ill juror not unconstitutional. — Although the erroneous replacement of a juror may under some circumstances deprive a defendant of the right to have the trial completed by a particular tribunal, the sixth amendment right to a fair, impartial and representative jury, and the due process rights grounded in the entitlement to procedures mandated by state law, the defendant was not denied any such rights as a result of the replacement of a juror who, the record showed, was too ill to continue in the deliberations. *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479

U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986).

Presence of defendant during voir dire of jury. — Defendant's absence during the voir dire of prospective jurors did not violate defendant's sixth amendment right to confront and cross-examine witnesses. *Goodroe v. State*, 224 Ga. App. 378, 480 S.E.2d 378 (1997).

Disruptive outbursts affecting defendant's right to be present. — Since defendant continued with disruptive, vocal outbursts after twice being removed from the trial court during jury selection, the third and final removal of defendant for the remainder of the jury selection process was not error because defendant failed to heed the trial court's warnings to control oneself and, thereby, waived defendant's right to be present during jury selection. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Improper voir dire examination restricted. — The trial court did not violate Uniform Superior Court Rule 10.1, O.C.G.A. § 15-12-133, the sixth and fourteenth amendments, or Ga. Const. 1983, Art. I, Sec. I, Para. I and XI, by restricting improper voir dire examination of prospective jurors concerning racial bias, pretrial publicity, and self-defense. *Walker v. State*, 258 Ga. 443, 370 S.E.2d 149 (1988).

Batson challenge not preserved. — Defendant failed to preserve defendant's Batson claim for review where, following the initial Batson challenge, defendant and the state agreed to the seating on the jury of a woman and an African-American, and defendant did not object when the African-American was later removed due to the African-American's failure to disclose a recent arrest. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Race-neutral explanation for peremptory strikes. — Appeals court rejected the defendant's claim that the state committed a Batson violation in peremptorily striking two jurors, as: (1) the state's reasons in striking the first juror appeared concrete and race-neutral and any question of doubt was decided in favor of the state, given the great deference to the determination that the state's reason was not so wholly fantastic as to be pretextual; and (2) a second juror was properly stricken based on evidence that the

juror worked nights, appeared to be extremely fatigued, and actually slept through portions of the voir dire. *Woolfolk v. State*, Ga. , S.E.2d , 2007 Ga. LEXIS 359 (May 14, 2007).

Standard of review of trial courts' rulings. — *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) is not controlling authority as to the standard of review to be applied by state appellate courts reviewing trial courts' rulings on jury selection. *Greene v. Georgia*, 117 S. Ct. 578 (1996).

3. Impartiality of Jurors

Unlike U.S. Const., amend. 6, U.S. Const., amend. 5 does not expressly require impartiality. — U.S. Const., amend. 6 expressly provides that the trial jury in a criminal case must be impartial. No such requirement in respect to grand juries is found in U.S. Const., amend. 5, which contains the guaranty against prosecutions for infamous crimes unless on a presentment or indictment of a grand jury. *Creamer v. State*, 150 Ga. App. 458, 258 S.E.2d 212 (1979).

Conclusions reached by the fact-finder should be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. A conviction secured, in whole or in part, by use of information secured from nonjudicial sources obviously constitutes a denial of due process of law in its most rudimentary conception. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Juror's conversation with a state's witness did not prejudice defendant's right to a fair trial such that the jury's verdict should be set aside where the witness asked the juror what time the trial was to resume, and the juror testified that the juror did not form an opinion as to defendant's guilt or innocence

due to the conversation. *Terrell v. State*, 268 Ga. App. 173, 601 S.E.2d 500 (2004).

After one prospective juror made a comment that the defendant killed redheads and that juror was later excused, the trial court did not violate the defendant's right to an impartial jury under Ga. Const. 1983, Art. I, Sec. I, Para. XI and U.S. Const., amend. 6 in refusing to excuse other prospective jurors. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, U.S. , 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Jury free of external influences especially important in capital cases. — In capital cases, the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Accused has right to expect protection from massive and prejudicial publicity. — While the government has no authority to restrain the reporting of the press, nor to dictate what it does or does not report, a person accused of crime has the right to expect the government and its judicial officers to protect the defendant from massive and prejudicial publicity surrounding the case. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Government has burden of providing protection. — Although the right of a free press embodied in U.S. Const., amend. 1 is guaranteed, the individual's right to a fair trial guaranteed by the due process clause of U.S. Const., amend. 5 and in the other individual provisions of the Bill of Rights is absolute, and if prejudicial news coverage is present, the burden is on the government to protect the rights of the defendant. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Doctrine of inherent prejudice. — The doctrine of inherent prejudice, in regard to the accused's right to a fair trial applies if, because of the circumstances, there is such a high probability that prejudice will result so that the procedure is deemed inherently

Trial by Jury (Cont'd)**3. Impartiality of Jurors (Cont'd)**

lacking in due process, and in such cases, no showing of identifiable prejudice is necessary. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Extrajudicial knowledge is measured in terms of totality of circumstances. — Juror's extrajudicial knowledge regarding an appellant's present crime represents a serious potential for prejudice to that appellant's right to an impartial jury, but such potential can be discounted under U.S. Const., amend. 6 if review of the pretrial publicity and total voir dire fails to demonstrate that the totality of the circumstances were inherently prejudicial. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated in part on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Extrajudicial knowledge impeached verdict. — Defendant's right to confrontation was violated when a juror gathered extra-judicial information on a key issue in the case and relayed it to the other jurors; since the verdict became unanimous only after the introduction of the improper evidence, there was a reasonable possibility that the juror's misconduct contributed to defendant's conviction. *Hammock v. State*, 277 Ga. 612, 592 S.E.2d 415 (2004).

Qualified jurors need not be totally ignorant of facts and issues involved in order to guarantee that a defendant has a panel of impartial, indifferent jurors. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

The sixth and fourteenth amendment right to an impartial jury does not require that jurors be wholly ignorant of the case before the trial begins. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), aff'd in part, rev'd in part on other grounds, 756 F.2d 1483 (11th Cir. 1985).

Preconceived notion as to guilt or innocence, without more, does not rebut presumption of impartiality. — The mere existence of a preconceived notion as to the guilt or innocence of an accused, without more, is

not sufficient to rebut the presumption of a prospective juror's impartiality. Rather, a juror's impartiality is sufficient if the juror can lay aside this impression or opinion and render a verdict based on the evidence presented in court. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

General rule regarding presumption of impartiality does not foreclose inquiry as to whether, in a given case, the application of the rule works as a deprivation of liberty without due process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Constitutional test of impartiality does not turn on subjective declarations of individual jurors. *Hutcheson v. State*, 246 Ga. 13, 268 S.E.2d 643 (1980).

Circumstances inherently prejudicial to right to impartial jury can impeach a juror's declaration of impartiality. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979).

Juror's assertion of impartiality does not close inquiry. — The rule that it is sufficient for the juror to state that the juror can lay aside the juror's impressions and render a verdict based only on the evidence does not close inquiry to determine whether, in a given case, the application of the rule deprives a defendant of due process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Juror's assurances that the juror is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Excuse of jurors for partiality as measure of prejudice from pretrial publicity. — Corroboration for a court's belief that pretrial publicity has not been inherently prejudicial can be found in the percentage of prospec-

five jurors excused for partiality regarding the accused's guilt. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated in part on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Where only 4 percent of prospective jurors are excused for partiality regarding the defendant's guilt, pretrial publicity surrounding the defendant's case has not created a community bias inherently prejudicial to the appellant's right to an impartial jury. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated in part on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Precautions taken to minimize effect of pretrial publicity. — Where in a publicized murder case, in light of the possibility of prejudice, the trial court grants extensive individual voir dire of prospective jurors outside the presence of the others, and grants each of defendant's motions to strike jurors for cause, leaving a panel of 50 prospective jurors, some of whom admitted to a vague knowledge of the crimes, but none could recall details and each specifically stated an ability to weigh the evidence impartially, there is no prejudicial pretrial publicity which would outweigh the stated impartiality of the prospective jurors. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

Statement in indictment as to previous convictions. — Defendant is not denied a fair trial by an impartial jury by listing in the indictment a number of previous convictions of burglary and other crimes. *Crocker v. Smith*, 225 Ga. 529, 169 S.E.2d 787 (1969).

Presence of a bereaved parent at the prosecutor's table during trial of one accused of murdering the parent's child surely must have an impact on a jury and cannot be said to be harmless with regard to the defendant's right to have a fair trial. *Walker v. State*, 132 Ga. App. 476, 208 S.E.2d 350 (1974).

Jurors exposed to anti-drunk driving poster during DUI trial. — Defendant, charged with driving under the influence, was not deprived of a fair trial, where the six empaneled jurors who were exposed to an anti-drunk driving poster responded affirmatively when they were asked by defense counsel, "can you dismiss that poster from

your minds and say to me with absolute certainty that it has no bearing on your minds and would have no bearing on this case?" *Bryant v. State*, 201 Ga. App. 305, 410 S.E.2d 778 (1991).

Although the court permitted the jury, over objection, to overhear a colloquy between the court and an alleged accomplice who was to testify for the state in a felony-murder prosecution and balked when the witness' attorney was not present, but there was no evidence of knowledge by the prosecutor that this witness would not testify unless the witness' attorney was present, it was not prejudicial error. *Williams v. State*, 244 Ga. 485, 260 S.E.2d 879 (1979).

Reseating jurors who are aware of striking party. — Since the jurors who were reseated had previously been struck in their presence, and there had been no waiver of the right to object to the reseating of such jurors, it was improper to reseat these jurors who were aware of the party who struck them. As such, the convictions of the defendants must be reversed and a new trial ordered. *Gaines v. State*, 258 Ga. App. 902, 575 S.E.2d 704 (2002).

Replacing one juror with an alternate after out-of-court contact between the juror and defense counsel did not violate a murder defendant's constitutional rights to due process and trial by an impartial jury, where the trial court had a sound basis for exercising its discretion to discharge the juror. *Miller v. State*, 261 Ga. 679, 410 S.E.2d 101 (1991).

Juror communication with witnesses. — Where a juror in the course of a criminal trial improperly communicates to a witness that the defendant is going to be acquitted unless the state shores up its case in a certain manner, and this information is relayed to the prosecution, the defendant has been denied the fundamental right to a fair trial. *Jones v. State*, 247 Ga. 268, 275 S.E.2d 67, cert. denied, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 86 (1981).

"Chit chat" between jurors, but not pre-determination of decision, allowed. — A jury instruction at the beginning of the trial concerning the deliberation process, which stated that "there's nothing wrong with chit chat" between the jurors, coupled with a lengthy admonition by the court that the jurors should refrain from reaching a decision until all the evidence was submitted,

Trial by Jury (Cont'd)**3. Impartiality of Jurors (Cont'd)**

closing arguments concluded, and after the charge of the court, did not constitute plain error requiring a reversal of the conviction. *United States v. Meester*, 762 F.2d 867 (11th Cir.), cert. denied, 474 U.S. 1024, 106 S. Ct. 579, 88 L. Ed. 2d 562 (1985).

Fact that two or more jurors visited the crime scene and related information about their observations to the rest of the jurors during their deliberations did not constitute reversible error where there was nothing to indicate that any of the jurors changed their minds because of the extra-record information. *Moore v. State*, 179 Ga. App. 125, 345 S.E.2d 631 (1986).

Right to impartial jury violated where significant possibility of juror prejudice. — The trial court's failure to conduct a voir dire (or to allow defense counsel to make relevant inquiries to the panel members) after the events of the weekend preceding the trial, involving a protest march against the death penalty, prison conditions and the indictment of six black inmates for mutiny and murder, counter protests, and extensive publicity, all of which raised a significant possibility of juror prejudice, violated the defendant's right to an impartial jury. *Jordan v. Lippman*, 763 F.2d 1265 (11th Cir. 1985).

Because an average person in a juror's position as the spouse of a volunteer worker at the district attorney's office would have been partial to the prosecutor's case, although the spouse was replaced by an alternate juror after only three state witnesses had testified, the possibility of a taint already created in the jury panel was not cured; the petition for writ of habeas corpus was granted. *Nichols v. Thomas*, 788 F. Supp. 570 (N.D. Ga. 1992).

Where bias appears low despite publicity and defendant's confession admitted, prejudice may be discounted. — In a murder trial, a two and one-half month period between the publicity and the trial, a low level of community bias as reflected in the total voir dire, and the admission into evidence of the defendant's confessions permit a court to discount the potential for prejudice admittedly present in the extrajudicial knowledge of the selected jurors in the case, and to find

that the totality of circumstances surrounding the defendant's trial are not inherently prejudicial to the defendant's right to an impartial jury. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated in part on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Actual or inherent prejudice must be shown. — Under U.S. Const., amend. 6, in order for an appellant to establish the denial of the right to an impartial jury, the appellant must show either actual juror partiality or circumstances inherently prejudicial to that right. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated in part on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980); *Jones v. State*, 157 Ga. App. 163, 276 S.E.2d 674, cert. denied, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 86 (1981).

Elements of proof of pretrial publicity. — Under the decisions of the Supreme Court of the United States, where pretrial publicity is at issue, to find that the defendant did not receive a fair trial, the defendant must show that the setting of the trial was inherently prejudicial or that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), sentence vacated, 243 Ga. 244, 253 S.E.2d 707 (1979); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976); *Taft v. State*, 154 Ga. App. 566, 269 S.E.2d 69 (1980).

Burden of proof of prejudice. — The general rule is that a defendant has the burden on appeal of proving actual jury prejudice if a conviction is to be reversed on grounds of prejudicial publicity. The requirement of showing actual prejudice may not be necessary in extreme circumstances where there has been inherently prejudicial publicity such as to make the possibility of prejudice highly likely or almost unavoidable. *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 47 L. Ed. 2d 760, 96 S. Ct. 1505 (1976).

One who challenges the fairness of the trial based on prejudicial publicity carries the burden of showing that prejudice resulted from the publicity. This is especially true in a federal habeas proceeding. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983),

aff'd in part, rev'd in part on other grounds, 756 F.2d 1483 (11th Cir. 1985).

To find the existence of actual prejudice from pretrial publicity, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Second, these jurors, it must be determined, could not have laid aside these performed opinions and rendered a verdict based on the evidence presented in court. *Coleman v. Zant*, 708 F.2d 541 (11th Cir. 1983), rev'd on other grounds, 778 F.2d 1487 (11th Cir. 1985).

Prejudice is presumed from pretrial publicity when: (1) pretrial publicity is sufficiently prejudicial and inflammatory; and (2) the prejudicial pretrial publicity saturated the community where the trials were held. *Coleman v. Zant*, 708 F.2d 541 (11th Cir. 1983), rev'd on other grounds, 778 F.2d 1487 (11th Cir. 1985).

Media access to evidence. — Until the appeal process is completed, the media may not have access to the electronically produced evidence that the police acquired during their investigation and trial of the case, such as a videotaped statement by the defendant, as this may prejudice defendant's future rights to a fair trial. *In re Pac. & S. Co.*, 257 Ga. 484, 361 S.E.2d 159 (1987).

Prejudicial pretrial publicity requires change of venue. — When prejudicial pretrial publicity or an inflamed community atmosphere precludes seating an impartial jury, due process requires the trial court to grant a defendant's motion for a change of venue. *Coleman v. Zant*, 708 F.2d 541 (11th Cir. 1983), rev'd on other grounds, 778 F.2d 1487 (11th Cir. 1985).

Defendant may ask jurors whether family members worked for law enforcement agencies. — The trial court errs in limiting voir dire of the jurors by refusing to allow the defendant to ask the panel whether members of the jurors' immediate families had ever worked for law enforcement agencies. *Henderson v. State*, 251 Ga. 398, 306 S.E.2d 645 (1983).

Habeas petitioner must show actual prejudice, community prejudice, or pervasive, inflammatory pretrial publicity. — A habeas petitioner must show an actual or identifiable prejudice on the part of the jury result-

ing from publicity, community prejudice actually infecting the jury box, or pretrial publicity so inflammatory and prejudicial and so pervasive or saturating the community as to render virtually impossible a fair trial by an impartial jury, thus raising a presumption of prejudice. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), aff'd in part, rev'd in part on other grounds, 756 F.2d 1483 (11th Cir. 1985).

Presence of guards at trial. — Although a defendant is entitled to trial free of the partiality which the presence of an excessive number of guards may create, special circumstances may make the presence of a number of guards necessary. *Zant v. Gaddis*, 247 Ga. 717, 279 S.E.2d 219, cert. denied, 454 U.S. 1037, 102 S. Ct. 579, 70 L. Ed. 2d 483 (1981).

Employee of jail as juror. — An employee of the jail where the defendant was housed pending trial should have been stricken as a juror for cause because of the employee's special knowledge. Therefore, defendant's conviction was reversed because the defendant had to use a peremptory strike on the juror. *Kier v. State*, 263 Ga. App. 347, 587 S.E.2d 841 (2003).

Court's threat to remove unruly defendant. — No rights under the fifth and sixth amendments to the Constitution of the United States were violated where after several outbursts on the defendant's part, the trial court informed the defendant, outside the jury's presence, that the defendant would be removed from the courtroom if the defendant again engaged in such unseemly behavior. *Russell v. State*, 181 Ga. App. 665, 353 S.E.2d 565 (1987).

As matter of public policy, juror cannot be heard to impeach the verdict, either by way of disclosing the incompetency or misconduct of fellow jurors, or by showing the juror's own misconduct or disqualification from any cause. The only exception to the firm application of this rule is if protections provided a criminal defendant by the sixth amendment are applicable. *Lozynsky v. Hairston*, 168 Ga. App. 276, 308 S.E.2d 605 (1983).

Trial court's finding as to juror's impartiality not set aside unless error "manifest". — A trial court's finding as to a prospective juror's ability to lay aside an opinion about the case arising from pretrial publicity

Trial by Jury (Cont'd)**3. Impartiality of Jurors (Cont'd)**

should not be set aside unless the error is "manifest." *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), *aff'd in part, rev'd in part* on other grounds, 756 F.2d 1483 (11th Cir. 1985).

Juror excused because of capital punishment views. — Where defendant argues that the exclusion of certain venire-persons from the jury panel for cause violated the sixth amendment right to be tried before an impartial jury, the appropriate standard is that a juror can be excluded for cause because of his or her views on capital punishment if the juror's views would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the juror's instructions and the juror's oath. *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), *cert. denied*, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

Trial court's disqualification of a juror for cause based upon the juror's opposition to the imposition of the death penalty was not an abuse of discretion as: (1) the juror initially indicated that the juror was open to considering the death penalty as a sentencing option, but almost immediately into voir dire the juror vacillated and repeatedly stated that the juror did not know whether the juror could vote for the death penalty; (2) after extensive questioning by the trial court, the juror stated that the death penalty was against the juror's nature and indicated that the juror did not think the juror could vote for it, regardless of the circumstances; and (3) in finding the juror unqualified, the trial court relied in large part on the juror's demeanor, noting the juror's "body language" and the fact that, although the juror had indicated a couple of times that the juror might consider the death penalty, the juror "seemed to struggle with it." *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006).

Appellate court obligated to make independent evaluation of evidence regarding juror impartiality. — In determining whether an unbiased jury was empaneled, an appellate court is obligated to make an independent evaluation of the circumstances involved in the case. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), *aff'd in part, rev'd in part* on other grounds, 756 F.2d 1483 (11th Cir. 1985).

No evidentiary hearing as to likelihood of nondeath-qualified juries to convict. — A defendant is not entitled to an evidentiary hearing with regard to the contention that death-qualified juries are more likely to convict than nondeath-qualified juries. *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983), *cert. denied*, 464 U.S. 977, 104 S. Ct. 414, 78 L. Ed. 2d 352 (1983).

Rebuttal of prejudice presumed from publicity. — Prejudice presumed by evidence of inflammatory pretrial publicity was rebutted by an examination of the voir dire which showed that the jury actually empaneled was not so infected by the publicity that the jurors could not lay aside any preconceived opinions about the case and render a verdict solely upon the evidence. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990).

When jury's verdict may be impeached. — The rule that jurors cannot impeach their own verdict is inapplicable where jurors intentionally gather extra-judicial evidence that is highly prejudicial to the accused, and then communicate that information to other jurors in a closed jury room, since, under these circumstances, the juror making such statements essentially becomes an unsworn witness against the defendant in violation of the sixth amendment. *Satterwhite v. State*, 235 Ga. App. 687, 509 S.E.2d 97 (1998).

Nature and Cause of Accusation

Statutes should sufficiently warn of proscribed conduct. — So as not to be vague, indefinite and uncertain so that U.S. Const., amend. 6 is violated, the language of a statute should convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *United States v. Fabro, Inc.*, 206 F. Supp. 523 (M.D. Ga. 1962).

U.S. Const., amend. 6 provides that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation. *Sutton v. United States*, 157 F.2d 661 (5th Cir. 1946); *United States v. Contris*, 592 F.2d 893 (5th Cir. 1979).

Validity of an indictment to be determined by reading it as a whole. *United States v. Contris*, 592 F.2d 893 (5th Cir. 1979).

Trial court did not err by denying a defen-

dant's motion to quash an indictment, based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), because the face of the indictment did not contain the statutory aggravators for the death penalty; the state was not required to list the statutory aggravators in the indictment. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

Whether an indictment sufficiently charges a crime is question of law, not of fact. *United States v. Contris*, 592 F.2d 893 (5th Cir. 1979).

Where the language of the indictment did not track the exact language of the assault statute, but did allege that the defendant "maliciously" struck the victim, it properly alleged the necessary element of intent since, given the circumstances of the case whereby the victim did not see the defendant strike the victim, it would have been difficult to conclude that the victim was placed in reasonable apprehension of being injured violently. *Gamble v. State*, 235 Ga. App. 777, 510 S.E.2d 69 (1998).

Indictments are read for their clear meaning, and convictions will not be reversed because of minor deficiencies which do not prejudice the accused. *United States v. Contris*, 592 F.2d 893 (5th Cir. 1979).

Sufficiency of an indictment is to be tested by practical rather than technical considerations, and the test of sufficiency is not whether the indictment could have been more artfully or precisely drawn, but whether it states the elements of the offense intended to be charged and adequately appraises the defendant of that which the defendant must be prepared to meet. *United States v. Contris*, 592 F.2d 893 (5th Cir. 1979).

Criteria for testing sufficiency of indictment. — The two criteria by which the sufficiency of an indictment is to be tested are whether the facts stated show the essential elements of the offense and whether the facts alleged are sufficient to permit the defendant to plead former jeopardy in a subsequent prosecution. *Sutton v. United States*, 157 F.2d 661 (5th Cir. 1946); *Marshall v. State*, 127 Ga. App. 805, 195 S.E.2d 469 (1972); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 47 L. Ed. 2d 760, 96 S. Ct. 1505 (1976); *United States v. Contris*, 592 F.2d 893 (5th Cir. 1979).

Introduction of a nontestifying joint offender's confession to show the defendant's involvement in the crimes violates the defendant's constitutional right to confrontation. *Brooks v. State*, 271 Ga. 698, 523 S.E.2d 866 (1999).

Use in indictment of trade name which does not designate individual nor import a corporation. — An indictment containing a trade name which does not designate an individual nor import a corporation is not void where it satisfies the requisites of informing the defendant with reasonable certainty of the nature of the accusation for defense purposes and does not subject defendant to possibility of double jeopardy, particularly where the trade name is unique to the area and the accused's dealings have been in such trade name. *Marshall v. State*, 127 Ga. App. 805, 195 S.E.2d 469 (1972).

Effect of error in indictment as to date of offense. — A defendant is not deprived of any constitutional right by reason of the fact that the indictment charged one date, whereas the crime actually occurred shortly before midnight on the date before, where no alibi evidence is offered, nor any continuance requested on the ground of surprise that the evidence showed the commission of the crime on a date different from that shown in the indictment, and that additional time would be needed to procure alibi testimony to account for the appellant's whereabouts on that date. *Carmichael v. State*, 228 Ga. 834, 188 S.E.2d 495 (1972).

Omission of the word "criminal" in a notice of contempt proceeding is not fatal where the notice fully describes the conduct charged, where there is no showing that the contemnor is prejudiced by the failure to clearly denominate the nature of the contempt proceeding, and where the contemnor is accorded all rights due a defendant in a criminal contempt proceeding. *Schiselman v. Trust Co. Bank*, 246 Ga. 274, 271 S.E.2d 183 (1980).

Contempt motion seeking other sanctions and relief "as may be appropriate". — Where a person is on notice that the person is being tried for contempt and the movant seeks such other sanctions as are appropriate to ensure the enforcement and the observance of the court's order or seeks such other relief as may be appropriate, the contemnor is on notice that the proceeding

Nature and Cause of Accusation (Cont'd)

is both civil and criminal in nature and that criminal sanctions may be imposed in an appropriate case. *Schiselman v. Trust Co. Bank*, 246 Ga. 274, 271 S.E.2d 183 (1980).

Purpose of commitment hearing. — The purpose of a commitment hearing is simply to determine whether there is probable cause to believe the accused guilty of the crime charged, and if so, to bind the accused over for indictment by the grand jury. *Douglas v. State*, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

Hearing unnecessary once indictment returned. — Once an indictment has been returned, the necessity for a commitment hearing has been eliminated. *Douglas v. State*, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

Holding of a commitment hearing is not a requisite to a trial for commission of a felony. *Douglas v. State*, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

When failure to hold hearing harmless. — Since the purpose of the commitment hearing is to determine whether there is probable cause to hold the accused for trial, the subsequent indictment, trial and conviction of the accused render the omission of the hearing harmless. *Douglas v. State*, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

Alleged loss of discovery occasioned by the failure to conduct a commitment hearing is not a legally recognizable basis for reversal. *Williams v. State*, 157 Ga. App. 168, 276 S.E.2d 852 (1981).

Criminal Procedure Discovery Act constitutional. — Pretrial discovery provisions of the Criminal Procedure Discovery Act (O.C.G.A. § 17-16-1 et seq.) do not implicate or infringe upon the confrontation clause that guarantees only the right to confront and cross-examine those individuals called to testify against a defendant at trial. *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999).

Confrontation of Witnesses

Rights guaranteed to defendant. — The confrontation clause of U.S. Const., amend. 6, as applicable to the states through the due process clause of U.S. Const., amend. 14, guarantees the defendant in a criminal trial both the general right to cross-examine wit-

nesses against the defendant and the more specific right to cross-examine a key state's witness concerning pending criminal charges against the witness. *Hines v. State*, 249 Ga. 257, 290 S.E.2d 911 (1982); *Byrd v. State*, 262 Ga. 426, 420 S.E.2d 748 (1992); *Beam v. State*, 265 Ga. 853, 463 S.E.2d 347 (1995).

The state has no right to ask leading questions of a co-indictee who has refused to testify, since such questioning is tantamount to the state testifying on behalf of a recalcitrant witness and serves to abrogate a defendant's fundamental right to confront, question and secure answers from the defendant's accusers. *Alexander v. State*, 236 Ga. App. 142, 511 S.E.2d 249 (1999).

Where deceased murder victim's hearsay statements were not remotely similar to prior testimony at a preliminary hearing or police interrogation, because they were made in a conversation with a friend, before the commission of any crime, and without any reasonable expectation that they would be used at a later trial, the hearsay statements were not "testimonial," and indicia of reliability other than the opportunity for cross-examination were constitutionally permissible considerations in applying the necessity exception to Georgia's hearsay rule. *Demons v. State*, 277 Ga. 724, 595 S.E.2d 76 (2004).

Confrontation in a criminal trial really means the right to ask questions and secure answers from the witness confronted. *Lingerfelt v. State*, 235 Ga. 139, 218 S.E.2d 752 (1975).

Right is to confront witnesses, not accuser. — The defendant's constitutional right under U.S. Const., amend. 6 is the right to be confronted with the witnesses testifying against the defendant, not by the accuser, which in criminal cases, is the state or the people. *Brown v. State*, 147 Ga. App. 638, 249 S.E.2d 689 (1978).

Applicability of confrontation of witnesses provision. — When a buyer claiming that the buyer was fraudulently sold real estate argued, on appeal, that the trial court's summary dismissal of the buyer's complaint under O.C.G.A. §§ 9-11-12(b)(6) and 9-11-56 deprived the buyer of the right to confront witnesses, this claim had no merit because the right to confront witnesses only applied to criminal proceedings. *Crane v. Samples*,

267 Ga. App. 895, 600 S.E.2d 624 (2004), cert. denied, 544 U.S. 927, 125 S. Ct. 1650, 161 L. Ed. 2d 488 (2005).

Admission of witness' prior statements to police identifying defendant as the shooter of a victim did not violate defendant's right to confront the witnesses under the sixth amendment; despite the fact that the witnesses claimed at trial that they did not recall many of the facts surrounding the incident and did not identify defendant as the shooter at trial, defendant was not precluded from cross-examining them. *Robinson v. State*, 271 Ga. App. 584, 610 S.E.2d 194 (2005).

Because a life estate claimant filed a civil action which resulted in summary judgment against the claimant, the argument on appeal that the claimant's sixth amendment confrontation rights were violated lacked merit, as the sixth amendment only applied to criminal actions. *Crane v. Poteat*, 275 Ga. App. 669, 621 S.E.2d 501 (2005), cert. denied, 127 S. Ct. 52, 2006 U.S. LEXIS 5965, 166 L. Ed. 2d 51 (2006).

Because a hearsay statement made by the defendant's late sibling to the defendant's spouse about the defendant's conduct and statements made immediately after the shooting at issue was not testimonial in nature, it did not implicate the confrontation clause of the federal and state constitution. *Holton v. State*, 280 Ga. 843, 632 S.E.2d 90 (2006).

Because a preliminary hearing was ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function was the more limited one of determining whether probable cause exists to hold the accused for trial, an accused did not have a constitutional right to confrontation, as said right applied only to trials. *Gresham v. Edwards*, 281 Ga. 881, 644 S.E.2d 122 (2007).

Limited scope to relevant evidence. — The confrontation clause does not confer upon criminal defendants a right to impeach a witness for an out-of-court statement never introduced into evidence. *Jones v. Goodwin*, 982 F.2d 464 (11th Cir. 1993).

The sixth amendment's confrontation clause allows for appropriate limitations on defendant's right to inquire into an adverse witness's potential bias. Trial courts have considerable latitude to reasonably limit

such cross-examination out of concerns about harassment, prejudice, confusion of the issues, witness safety, or questioning that is repetitive or only marginally relevant. *Hewitt v. State*, 277 Ga. 327, 588 S.E.2d 722 (2003).

Purpose. — The mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of a statement. *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970).

The accused's right to confront the witnesses against the accused is essential for three basic reasons: (1) it ensures that the witness will give statements under oath, thus impressing the witness with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) it forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; and (3) it permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making the statement, thus aiding the jury in assessing the witness' credibility. *Harrell v. State*, 241 Ga. 181, 243 S.E.2d 890 (1978).

The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Hines v. State*, 249 Ga. 257, 290 S.E.2d 911 (1982).

Main and essential purpose of confrontation is to provide the opportunity for cross-examination. *Hawkins v. State*, 175 Ga. App. 606, 333 S.E.2d 870 (1985).

Confrontation rights are personal to the accused. *State v. Phillips*, 247 Ga. 246, 275 S.E.2d 323 (1981).

Right is fundamental and obligatory on the states. — Right of an accused under U.S. Const., amend. 6 to confront the witnesses against the defendant is a fundamental right made obligatory on the states by U.S. Const., amend. 14. *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970); *Lingerfelt v. State*, 235 Ga. 139, 218 S.E.2d 752 (1975); *Park v. Huff*, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975).

Government need not immunize witnesses for defense. — The government has no duty

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under the sixth amendment or otherwise to immunize witnesses for the benefit of the defense. Rather, the government's power to grant immunity is a discretionary matter which a defendant has no right to subject to judicial review. *United States v. Georgia Waste Sys.*, 731 F.2d 1580 (11th Cir. 1984).

Appearance of immunized witness. — Defendants were not deprived of their right to effective cross-examination on the basis of the state's creation of an "unfavorable inference" through the appearance on the witness stand of a witness who had been granted immunity pursuant to O.C.G.A. § 24-9-28(a) and who refused to testify. *Willard v. State*, 244 Ga. App. 469, 535 S.E.2d 820 (2000).

Although a trial court erred in allowing the prosecution, in the presence of the jury, to propound a series of leading questions to a murder and armed robbery co-indictee who remained mute even though the co-indictee was granted immunity, the error was harmless in light of the testimony from three eyewitnesses and other direct and circumstantial evidence; in light of the evidence and the fact that the prosecutor's questioning itself was not evidence and the fact that it added nothing of material value to the evidence properly presented, the state carried its burden of showing beyond a reasonable doubt that the error did not contribute to the verdict against the defendant. *Horne v. State*, 281 Ga. 799, 642 S.E.2d 659 (2007).

Defendant must see witnesses testify. — When a defendant complained that the trial court did not allow defendant to sit where defendant could view witnesses against defendant as they were testifying, it was error to hold that defendant's right to confrontation did not require that defendant be able to see witnesses as they testified. *Richardson v. State*, 276 Ga. 639, 581 S.E.2d 528 (2003).

Defendant has no right to appear before grand jury. — A court does not err in refusing to allow the defendant or defense counsel to appear before the grand jury to present evidence and to cross-examine witnesses. The defendant is not on trial at this stage of the proceedings and therefore this refusal denies the defendant neither the right of confrontation, nor equal protection

of the laws. *Jackson v. State*, 225 Ga. 790, 171 S.E.2d 501, rev'd on other grounds, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1969).

Exclusion of defendant from evidentiary hearing. — Defendant's exclusion from an evidentiary hearing on a motion for new trial did not violate defendant's right to confrontation or due process. *United States v. Boyd*, 131 F.3d 951 (11th Cir. 1997).

The right to confrontation at a parole revocation hearing is less stringent than the sixth amendment's confrontation guarantee in a criminal trial. Evidence that would violate the sixth amendment or would be inadmissible hearsay if presented at a criminal trial may, in proper circumstances, be considered at a parole or probation revocation hearing without violating the due process right to confrontation. *Williams v. Lawrence*, 273 Ga. 295, 540 S.E.2d 599 (2001).

Privilege against self-incrimination may not be overridden by the right of confrontation. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Remedy where confrontation right must yield to privilege against self-incrimination. —

If a witness validly claims the privilege against self-incrimination, the defendant's only relief is a motion to strike that portion of the direct testimony with regard to which the confrontation right is lost. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

No right to pretrial disclosure. — The confrontation clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial. *Aguiar v. State*, 202 Ga. App. 62, 413 S.E.2d 245 (1991).

State's witness not required to submit to a pre-trial interview. — The state may not deny defendant access to a witness material to the defense, but a witness cannot be compelled to submit to a pre-trial interview. *Sosebee v. State*, 190 Ga. App. 746, 380 S.E.2d 464, cert. denied, 493 U.S. 933, 110 S. Ct. 323, 107 L. Ed. 2d 313 (1989).

When the witness is a child, it is permissible for the legal custodian to decide whether the child will be made available to defense counsel for a pre-trial interview. *Kelly v. State*, 197 Ga. App. 811, 399 S.E.2d 568 (1990).

Right of cross-examination is included in the right of a criminal defendant to confront

the witnesses against the defendant. *Lingerfelt v. State*, 235 Ga. 139, 218 S.E.2d 752 (1975).

Although the admission of a victim's statements to a deputy violated the defendant's sixth amendment rights as the defendant was not able to cross-examine the victim, the error was harmless as to the defendant's aggravated assault and battery convictions in light of the photographs of the victim's injuries and the defendant's admission that the defendant grabbed the victim around the neck and that the defendant might have hit the victim in the face. *Miller v. State*, 273 Ga. App. 761, 615 S.E.2d 843 (2005).

Admission of a victim's statements to a deputy violated the defendant's sixth amendment rights as the defendant was not able to cross-examine the victim; as the victim's statements were the only real evidence supporting the terroristic threats and obstructing a person making an emergency call convictions, those convictions were reversed. *Miller v. State*, 273 Ga. App. 761, 615 S.E.2d 843 (2005).

Right of cross-examination inherent in right of confrontation. — Inherent in the right of confrontation, and in the compulsory process concomitant therewith, is the right to cross-examine the witnesses against the accused. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Defendant should have been allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias in favor of the State resulting from the witness' probationary status as a juvenile delinquent, notwithstanding that such impeachment would conflict with the State's asserted interest in preserving the confidentiality of juvenile delinquency proceedings. Since defendant was denied the sixth amendment right of confrontation, defendant was entitled to a new trial. *Mangum v. State*, 274 Ga. 573, 555 S.E.2d 451 (2001).

Former jurors as witnesses. — Testimony, in the defendant's second murder trial, given by two witnesses who had been jurors in the defendant's first murder trial, that the jurors heard the defendant make an admission of guilt while exiting the courtroom during the first trial, did not offend the

confrontation clause; the trial court did not limit or restrict the defendant in cross-examination of the witnesses in any way, and the testimony did not suggest that there was a prior trial on the merits or that the witnesses had participated in such a trial. *Slakman v. State*, 280 Ga. 837, 632 S.E.2d 378 (2006), cert. denied, 2007 U.S. LEXIS 2249 (U.S. 2007).

Restriction of cross-examination. — The trial court did not impermissibly restrict cross-examination of a witness where the jury heard counsel's direct question on whether the witness's testimony at trial was related to the pending charges against the witness and barring inquiry into the nature of the pending charges did not impair the defense from providing the jury with sufficient information on the witness' motives and biases. *Watkins v. State*, 276 Ga. 578, 581 S.E.2d 23 (2003).

Because a witness had no specific bias and the witness' history of past speeding tickets was irrelevant, the trial court did not abuse its discretion by restricting defendant's cross-examination of the witness. *Brittian v. State*, 274 Ga. App. 863, 619 S.E.2d 376 (2005).

Restriction of cross-examination was not harmless error. — Witness who was under commitment to the Department of Juvenile Justice was subject to the allegation that the witness was shading testimony in favor of the state; the trial court's restriction of defendant's cross-examination of two state's witnesses was not a harmless error where the state's case relied primarily on these witnesses. *Wright v. State*, 279 Ga. 498, 614 S.E.2d 56 (2005).

To deny the accused the right to impugn a witness' testimony is to deny the accused cross-examination, and the denial of the right to cross-examine denies the accused due process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

It is reversible error to preclude cross-examination of an accomplice regarding the deal the accomplice has reached with the state, including the disparity between the sentence the state will recommend in exchange for the accomplice's cooperation and the sentence the accomplice would have

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received without that cooperation. *Vogleson v. State*, 250 Ga. App. 555, 552 S.E.2d 513 (2001).

Cross-examination as to general propensity for truthfulness. — U.S. Const., amend. 6 does not guarantee the defendant a right to inquire on cross-examination into incidents that would impeach the witness' general propensity for truthfulness. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Right to confrontation not violated by limiting cross-examination on former charges. — In a case in which defendant was on trial for, inter alia, an aggravated assault against the girlfriend of defendant's friend and the malice murder of another resident of the friend's home, the trial court did not err or violate defendant's sixth amendment right of confrontation by preventing defendant from cross-examining the victim about a warrant for the victim's arrest, which, although outstanding at the time of the murder, was no longer pending at the time of trial, as the charge was no longer relevant to show the victim's possible bias. *George v. State*, 276 Ga. 564, 580 S.E.2d 238 (2003).

Indictment not competent method for impeaching a witness. — The trial court did not err when it refused to allow an indictment against the victim for a crime allegedly committed subsequent to the crime at issue to go to the jury room with the rest of the exhibits since an indictment generally is not a competent method for impeaching a witness. *Medina v. State*, 247 Ga. App. 821, 545 S.E.2d 366 (2001).

"Forgetful witness." — The sixth amendment is satisfied if a defendant is given the opportunity to cross-examine a forgetful witness about the witness' bias, the witness' lack of care and attentiveness, and even the very fact that the witness has a bad memory. *Brown v. State*, 266 Ga. 723, 470 S.E.2d 652 (1996).

Prior thorough cross-examination of a witness unavailable at a trial adequately satisfies the confrontation requirement of U.S. Const., amend. 6. *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970).

Defendant's right to cross-examine a witness at trial was not abridged where the witness testified at the defendant's preliminary hearing, but was subsequently killed

and unavailable to testify at the defendant's trial. The record showed that the defense counsel extensively cross-examined the witness at the preliminary hearing with regard to the issue of identification. *Hosick v. State*, 262 Ga. 432, 421 S.E.2d 65 (1992).

Although the defendant's opportunity to cross-examine a witness who later died was not ideal, given that the defendant had only six days' notice of the hearing, sufficient opportunity to cross-examine the witness was afforded, and any lack of cross-examination was the result of a waiver of that opportunity; thus, the witness's deposition was properly admitted at trial. *Rice v. State*, 281 Ga. 149, 635 S.E.2d 707 (2006).

Waiver by earlier guilty plea. — Officers who interviewed the defendant's earlier victims within hours after they had been raped, properly testified from reports from these initial interviews, since the defendant, by pleading guilty to the earlier crimes, waived the earlier opportunity to cross-examine those victims. *Moore v. State*, 207 Ga. App. 412, 427 S.E.2d 779 (1993).

Where defendant in a prosecution for rape and aggravated sodomy pled guilty to a prior charge of aggravated sexual assault, it was not error to admit evidence of the prior victim's testimony and the testimony of a witness who arrived shortly after that assault. *McBee v. State*, 228 Ga. App. 16, 491 S.E.2d 97 (1997).

Because the defendant admitted the commission of armed robbery of a witness as described in the indictment, the defendant waived the right to challenge the witness' statements regarding the incident; therefore, the admission of the evidence did not violate the right of confrontation, and there was no error in admitting the statements under the necessity exception of O.C.G.A. § 24-3-1(b). *Johnson v. State*, 247 Ga. App. 157, 543 S.E.2d 439 (2000).

Confrontation claim waived. — Defendant waived any claim that the state's explanation of the absence of an expected witness infringed the defendant's sixth amendment right to confront the witnesses against the defendant as the defendant failed to raise the issue either at trial or on appeal. *Clemons v. State*, 265 Ga. App. 825, 595 S.E.2d 530 (2004).

Because defendant objected to the introduction of the codefendant's statement to

police on relevance and impermissible character evidence grounds but not based on a sixth amendment violation, defendant waived the argument that introduction of the statement deprived defendant of the sixth amendment confrontation right. *Vincent v. State*, 276 Ga. App. 415, 623 S.E.2d 255 (2005).

Rationale for exception. — An exception to the confrontation requirement is where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant, which witness was subject to cross-examination by that defendant. This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement. *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970).

Where testimony of now-deceased witness from another trial is introduced, the rights of the accused to confrontation and the opportunity to have a jury assess the demeanor and credibility of a witness are satisfied where in a former trial, the witness was under oath and thoroughly examined on both direct and cross-examination. *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970).

Because defendant had no opportunity to confront a deceased witness at an accomplice's trial, the trial court erred in admitting the witness's statements at defendant's trial pursuant to O.C.G.A. § 24-3-10; in addition, the statements were testimonial and violated defendant's confrontation rights. *Willingham v. State*, 279 Ga. 886, 622 S.E.2d 343 (2005).

Victim's non-testimonial statement. — Admission of a hearsay statement made by a murder victim before the victim's death, in which, upon seeing the defendant at the victim's home, the victim said to the victim's friend, "What is he doing here? He's not supposed to know where we live," did not violate the defendant's right to confront the absent declarant because the statement in question was not a "testimonial" statement. *Griffin v. State*, 280 Ga. 683, 631 S.E.2d 671 (2006).

Similar transaction hearing was sufficient even though, instead of calling a witness to

testify, the state merely proffered a summary of a witness's testimony; the state introduced no hearsay evidence during trial, and the defendant had ample opportunity to cross-examine the similar transaction witness then. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

Use of transcript from preliminary hearing where witness at hearing unavailable. — Where witness from preliminary hearing was not available at time of trial, having had escaped from prison, defendant's right of confrontation is not violated by admission of transcript of witness' testimony at defendant's preliminary hearing, at which defendant was represented by counsel and witness was cross-examined. *Stidem v. State*, 246 Ga. 637, 272 S.E.2d 338 (1980).

Admission of videotape of unavailable witness permitted. — Trial court's admission of part of a videotape involving the defendant's interview with a detective who was unavailable at trial, which the trial court earlier had said it would exclude, was not an abuse of discretion and did not violate the defendant's right to confrontation; the trial court admitted it because defense counsel "opened the door" to its admission by asking about it on direct examination, and any error in admitting it was harmless because the detective's comments about a theory that the spouse might have committed suicide were favorable to the defendant and any inference that the defendant shot the defendant's spouse was supported by other evidence. *Rowe v. State*, 276 Ga. 800, 582 S.E.2d 119 (2003).

Admission of videotape harmless error. — Trial court's admission of the videotaped testimony of a witness who could not be located for defendant's criminal trial was a violation of the rights under the confrontation clause because it constituted impermissible testimonial evidence; however, the error was harmless because there was no reasonable probability that it contributed to the verdict, as the testimony was cumulative of other properly admitted evidence. *Copprue v. State*, 279 Ga. 771, 621 S.E.2d 457 (2005).

Admission of 9-1-1 call. — Defendant's motion in limine to exclude evidence of a 9-1-1 call and the defendant's motion for a directed verdict were properly denied as the

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9-1-1 call was not testimonial since it was not premeditated and was made to prevent or stop a crime; under Georgia law, 9-1-1 statements were admissible as part of the res gestae or as an excited utterance and the confrontation clause and Crawford v. Washington, 541 U.S. 36 (2004), were inapplicable. Kimbrell v. State, 280 Ga. App. 867, 635 S.E.2d 237 (2006).

Admission of hearsay. — Because hearsay testimony was cumulative of other properly admitted evidence, its admission, even if erroneous, was harmless; thus, defendant's contention of a Crawford violation lacked merit. Buttram v. State, 280 Ga. 595, 631 S.E.2d 642 (2006).

Control of the cross-examination of a witness is to a great degree within the discretion of the trial court and will not be controlled unless abused. Eades v. State, 232 Ga. 735, 208 S.E.2d 791 (1974).

Trial court did not err when it limited the cross-examination of one detective concerning the other detective's interview with the defendant about how the other detective formed opinions and impressions regarding the other detective's theory regarding how defendant's spouse was killed, as the defendant's sixth amendment right to cross-examine the detective was not abridged by the limitation since the defendant was trying to ask about matters that were beyond the detective's knowledge. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119 (2003).

Defendant's cross-examination of an arresting officer was not unduly restricted when defendant was not allowed to ask the officer at trial if the officer's testimony at a suppression hearing satisfied the requirements for establishing the admissibility of the fruits of a pat-down search, as that legal determination was the province of the court, had previously been addressed by the court, and was not an issue for the jury. Mohamed v. State, 276 Ga. 706, 583 S.E.2d 9 (2003).

Although it is better that cross-examination should be too free than too restricted, this right to a thorough and sifting cross-examination must be tempered and restricted so as not to infringe on privileged areas or wander into the realm of irrelevant testimony. Eades v. State, 232 Ga. 735, 208 S.E.2d 791 (1974).

While the scope of cross-examination is within the discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy U.S. Const., amend. 6. United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953, 99 S. Ct. 349, 58 L. Ed. 2d 344 (1978).

Abuse of discretion in preventing all inquiry on subject. — While the extent of cross-examination is within the sound discretion of the trial court, cutting off all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination is an abuse of discretion. Byrd v. State, 262 Ga. 426, 420 S.E.2d 748 (1992).

Limitation of cross-examination must not prejudice right to test truthfulness. — A defendant's right under U.S. Const., amend. 6 to confront the witnesses against the defendant is not violated in all cases in which cross-examination is limited. The question in each case must finally be whether the defendant's inability to make the inquiry creates a substantial danger of prejudice by depriving the defendant of the ability to test the truth of the witness's direct testimony. If the defendant has, so much of the direct testimony as cannot be subjected to sufficient inquiry must be struck. United States v. Brown, 634 F.2d 819 (5th Cir. 1981).

Confrontation clause is not offended when the defendant at trial waives objection to the use of prior sworn testimony of an inaccessible state witness and therefore cannot claim the waiver was error for the first time on appeal. Riley v. State, 237 Ga. 124, 226 S.E.2d 922 (1976).

Where a co-indictee's confession implicating the defendant in armed robberies was corroborated by a number of witnesses who positively identified the defendant as the perpetrator of each armed robbery, the defendant had the opportunity to challenge the reliability of the co-indictee's effort to implicate the defendant in the crimes through leading questions posed by defense counsel's cross-examination, and thus to the extent that the co-indictee's refusal to respond to questioning deprived the defendant of the constitutional right to confront the co-indictee, the constitutional violation was harmless beyond a reasonable doubt. Alexander v. State, 236 Ga. App. 142, 511 S.E.2d 249 (1999).

Note-passing inmate was properly permitted to relate to the jury statements made by other inmates when they were discussing what to do about the possibility the victim was going to tell the authorities about their effort to escape as the co-conspiratorial statements were made during the pendency of the conspiracy and they were presumed to be sufficiently reliable to satisfy the confrontation clause's requirement of trustworthiness; the admission of the statements was not at odds with *Crawford v. Washington*, 541 U.S. 36 (2004), because statements admissible pursuant to the hearsay exception permitting the use of statements made in furtherance of a conspiracy were not testimonial. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Right to cross-examine witness as to recent arrest. — Even though the trial court erred in refusing to allow defendant to pursue the topic of the witness' recent arrest, the error was harmless where the witness otherwise was subjected to a thorough and sifting cross-examination. *Garcia v. State*, 267 Ga. 257, 477 S.E.2d 112 (1996).

Trial court did not abuse its discretion or deny the defendant the right of confrontation guaranteed by U.S. Const., amend. 6 by precluding the defendant from cross-examining a witness offered by the state regarding the facts underlying criminal charges that were pending against the witness, as there was no indication in the record that those underlying facts were relevant or would have exposed any bias or motive of the witness; even if the limitation on such cross-examination were erroneous, any error was harmless, as the witness did not implicate the defendant or otherwise show bias for the state, and the evidence of the defendant's guilt was overwhelming. *Brown v. State*, 276 Ga. 192, 576 S.E.2d 870 (2003).

Cross-examination with over-age convictions. — Based on the slight probative value of over-age convictions, the fact that O.C.G.A. § 24-9-84.1 (b) permits use of such convictions on a showing of specific facts and circumstances establishing the probative value of the particular conviction, and the fact that O.C.G.A. § 24-9-84.1 does not preclude all inquiry on a subject with respect to which a defendant is entitled to a reasonable cross examination, that section is not unconstitutional as a violation of the confrontation

clause. *Hinton v. State*, 280 Ga. 811, 631 S.E.2d 365 (2006).

Cross-examination as to agreement between witness and state. — There was no denial of due process or confrontation rights where the trial court ruled improper a question by defense counsel on cross-examination that presumed the existence of an unprovable "deal" between the state and the witness; the court did not preclude all inquiry on a subject with respect to which the defendant was entitled to reasonable cross-examination. *Watkins v. State*, 264 Ga. 657, 449 S.E.2d 834 (1994).

Where defendant failed to prove either that there had been a deal or that the witness had any expectation of a deal, the trial court did not impermissibly abridge defendant's sixth amendment rights by limiting defendant's cross-examination concerning charges against the witness. *Wright v. State*, 266 Ga. 887, 471 S.E.2d 883 (1996).

Defendant was denied the constitutional right to confrontation when a case agent was allowed to state that no deal had been reached with a confidential informant without being cross-examined; however, the error was not reversible because no prejudice was shown where the confidential informant testified at trial and was thoroughly cross-examined concerning the motives for testifying against defendant and where no evidence was presented regarding a deal with the confidential informant. *Garrison v. State*, 260 Ga. App. 788, 581 S.E.2d 357 (2003).

A defendant's right to cross-examine an accomplice witness regarding parole was irrelevant on the question of the witness's potential bias in testifying favorably for the state because there was no evidence of any deal between the witness and the state regarding parole. In addition, the authority to grant parole rested with the State Board of Pardons and Paroles, and not the office of the district attorney. *Hewitt v. State*, 277 Ga. 327, 588 S.E.2d 722 (2003).

Trial court violated the defendant's sixth amendment right of confrontation because it granted the state's motion in limine and restricted the defendant's cross-examination of the defendant's accomplice as to the accomplice motivation in testifying for the state, including the accomplice's recommended sentence if the accomplice cooper-

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ated with the state and the accomplice's sentence without that cooperation. The error was harmless beyond a reasonable doubt, however, in light of the overwhelming evidence of the defendant's guilt, even without the accomplice's testimony, including a victim's identification of the defendant as the person who robbed and abducted the victim, personal papers at the apartment where the victim was held belonged to the defendant and a first victim, and the recovery of the first victim's jacket from the defendant's friend's home, in the location disclosed by the defendant. *Thompson v. State*, 266 Ga. App. 29, 596 S.E.2d 205 (2004).

Cross-examination as to potential bias of state's witness. — The sixth amendment does not afford the defendant in a criminal proceeding an absolutely unfettered right to cross-examine the state's witnesses as to their potential bias. *Shaw v. State*, 201 Ga. App. 456, 411 S.E.2d 537 (1991).

A trial court's restriction of the pursuit of cross examination as to the potential bias of a state's witness, even if erroneous, may yet be harmless. *Shaw v. State*, 201 Ga. App. 456, 411 S.E.2d 537 (1991).

Precluding a line of questioning by defense counsel purporting to show motive for false testimony on behalf of the government witness erroneously limited defendant's right to cross-examine guaranteed by the sixth amendment since the witness may have been motivated by an effort to prevent an investigation into the witness' child's arrest in another case. *United States v. Lankford*, 955 F.2d 1545 (11th Cir. 1992).

Cross-examination of victim-witness' pending criminal charges was needed to inquire of any desire to influence their disposition by assisting the state in prosecution. *Hurston v. State*, 206 Ga. App. 570, 426 S.E.2d 196 (1992).

Although the trial court erred in refusing to allow the defense to cross-examine the defendant's friend concerning possible bias in favor of the state based on the friend's first-offender status, the error was harmless given the overwhelming evidence against defendant. *Melson v. State*, 263 Ga. App. 647, 588 S.E.2d 822 (2003).

Defendant's right to a thorough and sifted cross-examination of the state's key wit-

ness was not violated, where the trial court appropriately exercised its sound discretion to determine the extent of cross-examination when the questions left the area of the witness's belief of personal benefit and went to the fact underlying a pending charge against the witness. *Baptiste v. State*, 190 Ga. App. 451, 379 S.E.2d 165, cert. denied, 190 Ga. App. 897, 379 S.E.2d 165 (1989).

Government informant. — Where the accused makes a credible initial showing that the informant may have been mistaken as to the name of the person selling drugs to undercover police officers on the occasion in question, the police privilege against revealing the name of its informant must yield to a defendant's fundamental right to a fair trial. *Wilson v. State*, 209 Ga. App. 436, 433 S.E.2d 703 (1993).

Refusal to order the identification of a reliable confidential informant did not violate defendant's right to confrontation because the informant was not a witness to the crime for which defendant was charged. *Brown v. State*, 229 Ga. App. 87, 493 S.E.2d 230 (1997).

Defendant was not denied the right to confront defendant's accusers when the state was not required to reveal the identity of the confidential informant since the identity of the confidential informant bore no relation to defendant's guilt or innocence. *Baggs v. State*, 265 Ga. App. 282, 593 S.E.2d 734 (2004).

Curtailing of cross-examination where insufficient foundation laid. — Where the defendant fails in the defendant's efforts to lay a foundation for a specific defense theory and this line of questioning is overruled, the trial court does not err in sustaining the state's objection to the defendant's question to a witness regarding the alleged homosexuality of the victim. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Affidavits of absent witnesses cannot be admitted in evidence at criminal trials because doing so violates the right of defendants to confront witnesses against them. *Adams v. State*, 217 Ga. App. 706, 459 S.E.2d 182 (1995).

U.S. Const., amend. 6 does not require admission of all character evidence probative of truthfulness of witness even though evidence may be of help to jury. *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980).

Denial of cross-examination where exhibits constitute highest and best evidence. —

Because defense counsel attempted to cross-examine the state's witnesses as to whether certain accusations or traffic citations which had been admitted in evidence contained a driving under the influence charge, and because each time the state successfully objected that the exhibits themselves would be the highest and best evidence, the defendant was not denied due process, equal protection or the right to cross-examine witnesses. *Ferrell v. State*, 149 Ga. App. 405, 254 S.E.2d 404 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653 (1980).

Indicia of reliability must be present where no confrontation of declarant. —

In cases involving a defendant's right under U.S. Const., amend. 6 to confrontation, the focus of concern is to ensure that there are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant, and to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

What indicia of reliability viewed as determinative. —

Those indicia of reliability which have been viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant are that the statement was nonnarrative; that the declarant is shown by the evidence to know whereof the declarant speaks; that the witness is not apt to be proceeding on faulty recollection; and that the circumstances show that declarant had no apparent reason to lie to the witness. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979).

Admission of hearsay where indicia of reliability present. —

Where three of the indicia of reliability are present, the admission of hearsay testimony concerning the individual's statements incriminating both the individual and the defendant does not violate the defendant's confrontation rights under the state and federal Constitutions. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Admission of the defendants' hearsay statements as statements made by coconspirators under O.C.G.A. § 24-3-5 did not violate the confrontation clause of U.S. Const., amend. 6, as the statements were reliable, and the statements were not testimonial in nature; each statement corroborated the other statements and the physical evidence, and each of the defendants implicated himself or herself in their statement. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 2007 U.S. LEXIS 2212 (U.S. 2007).

Admission of child molestation victims' out-of-court statements did not violate right to confrontation, where the statements bore sufficient "indicia of reliability." *Smith v. State*, 199 Ga. App. 378, 405 S.E.2d 78, cert. denied, 199 Ga. App. 907, 405 S.E.2d 78 (1991).

Constitutional right to confrontation does not require that all hearsay be excluded from evidence in criminal cases. *Little v. Balkcom*, 245 Ga. 285, 264 S.E.2d 219 (1980); *Ewald v. State*, 156 Ga. App. 68, 274 S.E.2d 31 (1980).

A witness can testify as to what the witness has heard without violating the confrontation clause if subject to cross-examination. *Little v. Balkcom*, 245 Ga. 285, 264 S.E.2d 219 (1980); *Ewald v. State*, 156 Ga. App. 68, 274 S.E.2d 31 (1980).

Hearsay exceptions must comport with right of confrontation. —

While U.S. Const., amend. 6 does not prevent creation of new exceptions to the hearsay rule based upon real necessity and adequate guarantees of trustworthiness, it does embody those requirements as essential to all exceptions to the rule, present or future. To hold otherwise would be to hold that Congress could abolish the right of confrontation by making unlimited exceptions to the hearsay rule. *Matthews v. United States*, 217 F.2d 409 (5th Cir. 1954).

Hearsay exception satisfied confrontation clause. —

Hospital record showing blood test results was properly admitted as a business records exception to the hearsay rule and bore an "indicia of reliability" sufficient to satisfy the confrontation clause. *Dixon v. State*, 227 Ga. App. 533, 489 S.E.2d 532 (1997).

Trial court did not err in admitting two statements the victim made regarding defen-

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dant's kidnapping of the victim, pursuant to the res gestae exception to the hearsay rule, as the victim was still under the influence of defendant's criminal act, and the state and federal courts have previously determined that admission of res gestae evidence did not violate a defendant's right to confront defendant's accuser. *White v. State*, 265 Ga. App. 117, 592 S.E.2d 905 (2004).

Admission of hearsay evidence not harmless error. — Because the evidence against the defendant was not overwhelming, admission of the officer's testimony that the witness told the officer that defendant sold the witness drugs was hearsay that violated the defendant's right to a fair trial, and was therefore not harmless error. *Welch v. State*, 231 Ga. App. 74, 498 S.E.2d 555 (1998).

Admission of prior inconsistent statements as affirmative evidence does not violate the confrontation clause of U.S. Const., amend. 6, because the declarant is testifying as a witness at the trial and therefore subject to full and effective cross-examination. *United States v. Hill*, 481 F.2d 929 (5th Cir.), cert. denied, 414 U.S. 1115, 94 S. Ct. 847, 38 L. Ed. 2d 742 (1973).

Out-of-court statements. — The confrontation clause is not violated by admitting a declarant's out-of-court statement as long as the declarant is testifying as a witness and subject to full cross-examination. *Durham v. State*, 240 Ga. 203, 240 S.E.2d 14 (1977); *Andrews v. State*, 156 Ga. App. 734, 275 S.E.2d 782 (1980).

Because defendant was provided a full opportunity for confrontation regarding the victim's prior out-of-court statements, the trial court did not err in admitting a police investigator's hearsay evidence. *Gartrell v. State*, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

As a witness's statement in response to police questioning was testimonial and the defendant did not have a prior opportunity to cross-examine the witness about the contents of the statement, the statement's admission erroneously infringed upon the defendant's right to confront the witnesses against the defendant; however, the witness was located and brought to court the day after the statement was read and the defendant chose not to cross-examine the witness.

Thus, the error in admitting the statement was cured and the error was not grounds for reversal. *Lott v. State*, 281 Ga. App. 373, 636 S.E.2d 102 (2006).

Provision of O.C.G.A. § 24-3-16 permitting evidence of a victim's out-of-court statements does not violate the confrontation clause. *Fuller v. State*, 211 Ga. App. 104, 438 S.E.2d 183 (1993).

Violation of due process of law in conducting a confrontation depends on the totality of the surrounding circumstances. *Baier v. State*, 124 Ga. App. 334, 183 S.E.2d 622 (1971).

On-the-scene confrontations and identifications. — Although a conventional line-up viewing is normally the appropriate procedure, nevertheless, prompt, on-the-scene confrontations and identifications, though inherently suggestive because of the representation of a single suspect, are permissible in aiding a speedy police investigation and that where possible doubts as to identification need to be resolved promptly, such on-the-spot identifications promote fairness by enhancing the accuracy and reliability of identification, thereby permitting expeditious release of innocent subjects. *Bennefield v. Brown*, 228 Ga. 705, 187 S.E.2d 865 (1972); *Flores v. State*, 228 Ga. App. 152, 491 S.E.2d 86 (1997).

Suggestive pretrial identification procedures taint courtroom identification. — Pretrial identification procedures which include an impermissibly suggestive photographic confrontation, followed by a suggestive in person confrontation at a critical stage of the proceedings conducted without counsel, disclose an inextricably related identification process making it impossible to determine that the courtroom identification is untainted thereby and had an independent origin in the face-to-face confrontation by the eyewitness at the scene of the burglary. *Baier v. State*, 124 Ga. App. 334, 183 S.E.2d 622 (1971).

Per se exclusionary rule does not apply to confrontations occurring before the initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Mitchell v. Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972).

Videotape statements admissible since testifying. — Since both of defendant's accom-

plices testified and were cross-examined at trial, any sixth amendment right to confrontation concerns regarding the admission into evidence at trial of the statements defendant and one accomplice made on a videotape while being arrested were satisfied. *Heard v. State*, 257 Ga. App. 505, 571 S.E.2d 524 (2002).

Defendant's right of confrontation was not violated by the admission of a videotaped statement of a witness, who did not remain silent at the trial, and completely denied making any statement to the police regarding the murder. *Wilson v. State*, 277 Ga. 114, 587 S.E.2d 9 (2003).

Use of a photo suggestive of criminal conduct during an investigation does not make identification testimony possibly affected by the photo per se inadmissible. *United States v. Axtman*, 589 F.2d 196 (5th Cir. 1979).

Where the suspect is already in custody for other reasons, and only three pictures are used for the witness to choose from, two of which depict the suspect, and one which has been altered in a manner which might suggest that it depicted the suspect, the photographic identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Baier v. State*, 124 Ga. App. 334, 183 S.E.2d 622 (1971).

Exhibition of pictures of members of a line-up, including that of the defendant, to a witness for identification purposes does not violate the defendant's rights under U.S. Const., amend. 6 and work a per se exclusion of the identification. *Creamer v. State*, 229 Ga. 704, 194 S.E.2d 73 (1972).

In-court identification admissible if independent from illegal pretrial identification. — Notwithstanding any illegality in the pretrial identification procedures, in-court identification by a witness may nevertheless be admitted so long as it has an independent origin from the illegal identification procedure. *Foster v. State*, 156 Ga. App. 672, 275 S.E.2d 745 (1980).

Conviction based on eyewitness identification at trial following a pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification; furthermore, even if a

pre-trial identification is tainted, an in-court identification is not constitutionally inadmissible if it does not depend upon the prior identification but has an independent origin. *Taylor v. State*, 203 Ga. App. 210, 416 S.E.2d 554 (1992).

Where the victim observed defendant at the scene and gave a detailed description to the police immediately following the robbery, the victim's identification had an independent origin other than the photo identification; therefore, the court found no error with the trial court's admission of the photographic identification. *Taylor v. State*, 203 Ga. App. 210, 416 S.E.2d 554 (1992).

Per se rule applies to illegal line-up identification itself. — While an illegality in the pretrial identification procedure does not automatically prevent the witness from also identifying the defendant during the trial, a per se rule of exclusion does apply to evidence of the illegal line-up identification itself. *Foster v. State*, 156 Ga. App. 672, 275 S.E.2d 745 (1980).

Co-defendant's confession inadmissible where co-defendant does not take stand. — Evidence of the confession of one co-defendant, which confession implicates another, cannot be admitted where the confessor does not take the stand and is not available for cross-examination. *Collins v. State*, 144 Ga. App. 102, 240 S.E.2d 597 (1977); *Cape v. State*, 144 Ga. App. 193, 240 S.E.2d 736 (1977); *Munford v. Seay*, 241 Ga. 223, 244 S.E.2d 857 (1978); *Sewell v. State*, 153 Ga. App. 177, 264 S.E.2d 708 (1980).

Defendant was deprived of right to confrontation by admission into evidence of the co-defendant's confession implicating the defendant where the co-defendant did not take the stand, and where evidence against the defendant was not so overwhelming as to render any error harmless. *Hamilton v. State*, 162 Ga. App. 620, 292 S.E.2d 473 (1982).

Admission of co-conspirator's statement. — In cases involving a co-conspirator exception to the hearsay rule, the admission of the statement of a co-conspirator does not violate the confrontation clause if the statement and the circumstances surrounding it contain sufficient "indicia of reliability." *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 415, 314 S.E.2d 210 (1984); *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234

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(1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984); *Hunter v. State*, 179 Ga. App. 368, 347 S.E.2d 2 (1986).

Where the four factors indicative of reliability identified by the United States Supreme Court are present in the case, a demonstration of the unavailability of the co-conspirator is not required and the defendant's sixth amendment confrontation rights are not violated by introduction of testimony regarding the co-conspirator's declarations. *Hunter v. State*, 179 Ga. App. 368, 347 S.E.2d 2 (1986).

Testimony by an undercover police officer as to a statement made by a co-conspirator during the pendency of the criminal project was not inadmissible simply because the co-conspirator was not available for cross-examination since, after the fact of conspiracy is proved, the declarations of any one of the conspirators during the pendency of the project is admissible against all. *Clark v. State*, 236 Ga. App. 153, 510 S.E.2d 907 (1999).

Admission of co-defendant's statements made during the concealment phase of a conspiracy did not violate the confrontation clause as there were sufficient indicia of reliability because the co-defendant had personal knowledge of the identities and roles of the participants, the possibility that co-defendant's statements were based on faulty recollection was remote because the statements concerned direct involvement in a murder, it was unlikely that co-defendant misrepresented defendant's involvement in the crimes, and the statements were against co-defendant's penal interest. *Shelton v. State*, 279 Ga. 161, 611 S.E.2d 11 (2005).

Statements by the defendant's co-conspirator to a third person regarding the defendant's actions during the criminal project and during the concealment phase bore sufficient indicia of reliability to be admissible in defendant's criminal trial, pursuant to O.C.G.A. § 24-3-5, and any objection on the grounds of the confrontation clause under U.S. Const., amend. 6 or on hearsay grounds would have lacked merit; reliability factors included that there was no express statement of past facts and the declarant spoke of matters based on first hand knowledge on the same day that they had

occurred. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

Statement by a co-conspirator to a witness had sufficient indicia of reliability, and its admission did not violate the confrontation clause; while the statement was an assertion of past facts, by the co-conspirator's admission that the co-conspirator committed the crime, the co-conspirator had personal knowledge of the other perpetrators, the possibility that the co-conspirator's recollection of the incident was faulty was remote in light of the heinousness of the crime and the co-conspirator's description that it was the best time the co-conspirator had ever had, and there was no reason for the co-conspirator to misrepresent the defendants' involvement in the crime, because the co-conspirator and the other defendants were friends; furthermore, two of the co-conspirator's statements were against the co-conspirator's own penal interest, which also weighed in favor of reliability. *Dickerson v. State*, 280 Ga. App. 29, 633 S.E.2d 367 (2006).

Admission of a co-conspirator's hearsay statement that defendant was the "triggerman" in a robbery violated the confrontation clause, and could not be deemed harmless error, where the hearsay lacked sufficient indicia of reliability: The statement was not *res gestae*, was not given under oath, was not against penal interest, and was exculpatory. *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992).

Admission of a nontestifying codefendant's statement with the names of co-defendants redacted and replaced by blanks violated *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). *McDonald v. State*, 210 Ga. App. 689, 436 S.E.2d 811 (1993).

Admission into evidence of co-defendant's prior videotaped statement as a prior inconsistent statement or under the necessity exception to the hearsay rule was error where the co-defendant was present at the trial, but refused to testify. *Barksdale v. State*, 265 Ga. 9, 453 S.E.2d 2 (1995).

In defendant's trial on charges alleging that defendant and two co-defendants robbed and killed a person in 1986, the trial court did not violate defendant's rights under the confrontation clause by admitting

statements which defendant's co-defendants made, even though the co-defendants did not testify, because those statements were properly redacted before they were admitted and the jury was properly instructed on their use. *Ingram v. State*, 277 Ga. 46, 586 S.E.2d 221 (2003).

Admission of a statement by co-defendant to the police investigator violated defendant's right to confrontation because defendant and co-defendant were jointly tried, co-defendant's statement was used to implicate defendant in the crime, and co-defendant did not take the stand to face cross-examination. *Sharber v. State*, 268 Ga. App. 365, 601 S.E.2d 732 (2004).

Admission of a non-testifying co-defendant's statement did not violate defendant's right to confrontation because the statement was redacted to remove any reference to defendant; as nothing in the statement pointed directly at defendant as a participant in the crime, the statement was not inculpatory, and the court did not err in admitting it. *Dunbar v. State*, 271 Ga. App. 753, 610 S.E.2d 702 (2005).

Nontestifying co-defendant's statement.

— Unless the statement is otherwise directly admissible against the defendant, the confrontation clause is violated by the admission of a nontestifying co-defendant's statement which inculcates the defendant by referring to the defendant's name or existence, regardless of the existence of limiting instructions. *Collins v. State*, 242 Ga. App. 450, 529 S.E.2d 412 (2000).

In a joint trial where neither defendant testified, the second defendant was entitled to a new trial based on the admission of the first defendant's statement against the second defendant because a Bruton violation occurred and the only evidence directly identifying the second defendant as one of the people at the victim's door in a shooting incident was the first defendant's statement. *Meadows v. State*, 264 Ga. App. 160, 590 S.E.2d 173 (2003).

Confession of co-indictee. — The admission of evidence of a co-indictee's confession, made outside the defendant's presence to a police officer after the defendant's arrest was error. It violated the defendant's sixth amendment right to confront and cross-examine witnesses against the defendant, as well as the provision of O.C.G.A.

§ 24-3-52. *Crawford v. State*, 203 Ga. App. 215, 416 S.E.2d 820 (1992).

Where the statement of a coactor after a crime occurs is merely cumulative of other undisputed evidence in the case and does not directly incriminate the defendant, any error in its admission in high probability does not affect the verdict and is harmless beyond a reasonable doubt. *Harris v. State*, 168 Ga. App. 458, 309 S.E.2d 431 (1983).

Accomplice's conversation with witness.

— Where a police officer testified as to a conversation with the alleged accomplice and what the officer did as a result of that conversation but did not testify as to what the accomplice in fact specifically told the officer about the defendant, there was no violation of the defendant's sixth amendment right to confrontation. *Goff v. State*, 165 Ga. App. 79, 299 S.E.2d 149 (1983).

Since substantial risk exists that instructions to jury will not be effective. — Because of the substantial risk, despite instructions to the contrary, that a jury shall look to incriminating extrajudicial statements in determining a defendant's guilt, admission of the confession of a co-defendant in a joint trial violates the defendant's right of cross-examination secured by the confrontation clause of U.S. Const., amend. 6. *Rachel v. State*, 247 Ga. 130, 274 S.E.2d 475 (1981).

Admission of co-defendant's confession is harmful error. — The admission of the confession of co-defendant who did not take the stand in the joint trial is harmful error under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The admission of the confession without an opportunity for cross-examination violated defendant's guarantee of confrontation of witnesses against the defendant under U.S. Const., amend. 6. *Rachel v. State*, 247 Ga. 130, 274 S.E.2d 475 (1981).

Right of confrontation not violated where defendant's own confession supports it. —

Although evidence of the confession of the co-defendant implicating the defendant cannot be admitted against that defendant at joint trial where the co-defendant does not take stand and is not available for cross-examination, where the testimony presented in the co-defendant's confession is supported by the complaining defendant's own confession, there is no violation of the appellant's right of confrontation. *Butler v.*

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State, 156 Ga. App. 89, 274 S.E.2d 104 (1980).

Where the defendant's own pre-trial statement admitting the defendant's own guilt was identical to the co-defendant's statement, the defendant failed to show how the denial of the motion to sever was a denial of due process. *Dennard v. State*, 263 Ga. 453, 435 S.E.2d 26 (1993), overruled on other grounds by *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772, 2006 Ga. LEXIS 638 (2006).

Admission of co-defendant's statement harmless. — Because the appellant had also confessed, making the incriminating statement of the co-defendants merely cumulative, its admission in violation of the *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), rule was harmless. *Rachel v. State*, 247 Ga. 130, 274 S.E.2d 475 (1981).

Admission of co-defendant's statement to the fellow prisoners referring to a robbery and a shooting by "one of the guys" did not violate defendant's federal or state rights to confront witnesses and did not mandate that defendant be tried separately as the statement did not inculcate defendant. *Sampson v. State*, 279 Ga. 8, 608 S.E.2d 621 (2005).

Admission of co-defendant's statement is harmless where defendant not inculpated by it. — Where the confession of the co-defendant was found to inculcate only the declarant and not the defendant, its admission in violation of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), is harmless. *Rachel v. State*, 247 Ga. 130, 274 S.E.2d 475 (1981).

Severance of defendants. — Neither co-defendant was entitled to a severance where *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) did not apply, since the co-defendants' statements did not directly incriminate each other, and the trial court gave limiting instructions as to the use of such evidence. *Bruton* only excludes statements by a non-testifying co-defendant that directly inculcate the defendant, and *Bruton* is not violated if a co-defendant's statement does not incriminate the defendant on its face and only becomes incriminating when linked with other evidence introduced at trial. *Moss v. State*, 275 Ga. 96, 561 S.E.2d 382 (2002).

Defendant lacked standing to complain of a trial court's decision to sever defendant's trial from defendant's co-indictees at the request of the state based on the fact that defendant's statement to police could not have been redacted so as to delete defendant's implication of the other offenders, and the admission of the statement would have been precluded if the other offenders were tried jointly with defendant; defendant also failed to show harm, as defendant was acquitted of the charges to which the statements of the co-indictees related. *Rhodes v. State*, 267 Ga. App. 673, 601 S.E.2d 139 (2004).

When a defendant charged with malice murder, felony murder, and cruelty to children argued that the trial court violated the sixth amendment confrontation rights by not severing the defendant's trial from that of a codefendant, the court held that even if admission of the codefendant's statements was error, it was harmless; some of the complained-of statements were cumulative of other properly admitted evidence, and other statements were not an important element in the state's case, given the showing that the victim never suffered unusual injuries before moving in with the defendant and that the victim's severe injuries occurred when the defendant was the victim's sole adult caretaker. *Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007).

Where the evidence contained in the confession is found to be merely cumulative, its admission in violation of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), is harmless. *Rachel v. State*, 247 Ga. 130, 274 S.E.2d 475 (1981).

When co-defendant's inculpatory statement admissible. — An admission of an inculpatory statement made by accused's co-defendant did not violate the accused's right of confrontation where the statement was not received until all references to the accused were deleted, and where the accused had a full opportunity to cross-examine co-defendant when the co-defendant took the stand to deny making the inculpatory statement. *United States v. Sims*, 434 F.2d 258 (5th Cir. 1970).

Evidence of a co-defendant's statements did not violate defendant's rights under the confrontation clause since it was not admitted for its truth, but for the limited purpose

of showing context and voluntariness. *Cargill v. Turpin*, 120 F.3d 1366 (11th Cir. 1997), cert. denied, 523 U.S. 1080, 118 S. Ct. 1529, 140 L. Ed. 2d 680 (1998).

Co-defendant's statement meets the standard for admissibility under the confrontation clause when it does not refer to the existence of the defendant and is accompanied by instructions limiting its use to the case against the confessing co-defendant. *Rooks v. State*, 238 Ga. App. 177, 518 S.E.2d 179 (1999).

Trial court did not err in allowing the state to introduce a co-defendant's out-of-court statement without redacting the statement, and in allowing the state to cross-examine the co-defendant using the name of the defendant's two alleged accomplices because, once the co-defendant took the stand and answered questions concerning the co-defendant's statement, even if the co-defendant denounced or recanted that statement, the co-defendant was subject to cross-examination. *Boone v. State*, 250 Ga. App. 133, 549 S.E.2d 713 (2001).

Co-defendant's inculpatory statement inadmissible. — In a trial against three alleged co-conspirators the introduction in evidence of two defendants' incriminating statements denied the third defendant the right to be confronted by these persons and to subject them to cross-examination, where the statements are crucial to the case against the third defendant, their impact is devastating, and there is not sufficient indicia of reliability to excuse confrontation by the declarants. *Knowles v. State*, 246 Ga. 378, 271 S.E.2d 615 (1980).

Admissibility of co-conspirator's declarations under former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5). — Even though an alleged accomplice does not appear at the defendant's trial, the accomplice's statement can be placed before the jury under former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5) without violating the due process or confrontation clauses, if the statement meets certain indicia of reliability, including the fact that it was offered spontaneously and was against the accomplice's penal interest. *Spivey v. State*, 138 Ga. App. 298, 226 S.E.2d 104, cert. denied, 429 U.S. 921, 97 S. Ct. 317, 50 L. Ed. 2d 288 (1976).

The duration of the conspiracy includes its concealment phase, and the application

of former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5) is not subject to objection as a denial of confrontation. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Admission of co-conspirator's statement against defendant after conspiracy has ended. — Where the statement of the co-defendant is made in front of the defendant, the defendant has been arrested, the fact of the choate crime has been revealed, and there is absolutely no showing by the state that a conspiracy to cover up the crime still exists, the criminal project is not still pending, it has been completed, and the introduction of the statements of the co-defendant through the testimony of the detective before whom the statement is made violates former Code 1933, § 38-414 (see O.C.G.A. § 24-3-52) and violates the defendant's right under U.S. Const., amend. 6 to confrontation. *Price v. State*, 239 Ga. 439, 238 S.E.2d 24 (1977).

Statements made to witness by defendant's co-conspirator in defendant's presence. — Where a witness and defendant visited incarcerated co-conspirator and where the co-conspirator gave witness a message written down on a pad which read "don't identify him" (allegedly referring to the defendant), the written message and testimony were admissible and did not violate defendant's confrontation rights. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Testimony of witness whose name is not on indictment. — Constitutional right of accused to be confronted with witnesses is not violated because a witness, whose name does not appear on the indictment, is sworn as a witness for the state and testifies against the accused, where there is no demand for a list of the witnesses whose names appear on the indictment, and no objection is made to the witness testifying. *McCoy v. State*, 74 Ga. App. 889, 41 S.E.2d 830 (1947).

Failure of witness to appear where defendant seeks neither subpoena nor continuance. — Where a witness for the prosecution does not appear, apparently for medical reasons, the failure of this witness to appear does not violate the defendant's right to confront witnesses where there is nothing in

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the record to show that the defendant ever placed the witness under subpoena or that, if the defendant did, a continuance or other relief from the failure to appear was requested. *Glover v. State*, 149 Ga. App. 369, 254 S.E.2d 492 (1979).

Failure to produce informant to testify. — A defendant is not unconstitutionally deprived of the right to confront a witness against the defendant because the state does not produce an informant to testify. The informant, unless called, cannot be termed a “witness” against the defendant. *McAllister v. Brown*, 555 F.2d 1277 (5th Cir. 1977).

State's failure to call witness on its list did not deny the defendant's sixth amendment rights because, under O.C.G.A. § 17-7-191, the defendant could have subpoenaed the witness if deemed necessary to the defendant for impeachment purposes. *Johnson v. State*, 232 Ga. App. 717, 503 S.E.2d 603 (1998).

No right of confrontation as to tipster who neither participates in nor witnesses offense. — Where the state proves to the court's satisfaction that the informer is a pure tipster, who neither participated in nor witnessed the offense, any evidence the informer might offer would be hearsay and inadmissible. Thus the trial court's ruling that the jury could not hear the officer's recitation of the tipster's information, does not violate the defendant's civil rights under 42 U.S.C. § 1983 nor the constitutional right to confront witnesses against the defendant. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Identification of state “decoy” used to purchase contraband. — When the state uses a “decoy” (the purchaser in an illegal sale of contraband), the decoy is a material witness to the offense and the decoy's testimony would be pertinent to the defense of entrapment, but, by disclosing the decoy's identity to the defendant, the state fulfilled its obligation of confrontation. *Wilson v. Hopper*, 234 Ga. 859, 218 S.E.2d 573 (1975).

Failure to disclose identity of intermediary between informer and government. — Refusal to disclose the identity of an intermediary or messenger whose sole mission was to inform the government agent of the

informer's wish to talk with the agent is not a violation of the right to confrontation under U.S. Const., amend. 6. *United States v. Newsome*, 432 F.2d 51 (5th Cir. 1970).

Recording of victim's radio voice transmission. — The appellant's constitutional right of cross-examination and confrontation of witnesses under U.S. Const., amend. 6, Ga. Const. 1945, Art. I, Sec. I, Para. III (see Ga. Const. 1983, Art. I, Sec. I, Para. I), and Ga. Const. 1945, Art. I, Sec. I, Para. V (see Ga. Const. 1983, Art. I, Sec. I, Para. XI, XIV), are not violated where a court allows as evidence the recorded radio voice transmission of a deceased victim made while proceeding to the scene of the homicide, where it is allowed only for the purposes of explaining conduct to the satisfaction of the jury and not for the purpose of proving any fact. *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 431 (1972).

Business record exception is an exception to the hearsay rule, and not a general exception to the confrontation clause. *Adams v. State*, 217 Ga. App. 706, 459 S.E.2d 182 (1995).

Summary of business records. — In a case where a summary of business records is properly admitted and the figures so introduced are relied upon by another witness, there is ordinarily no violation of defendant's right of confrontation. *Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980).

Admissibility of inspection certificates on breath testing devices. — O.C.G.A. § 40-6-392 does not offend a defendant's right of confrontation because the admissibility of inspection certificates on breath testing devices, as provided by subsection (f) of that section, is based on the hearsay exception for business records. *Brown v. State*, 268 Ga. 76, 485 S.E.2d 486 (1997); *Jackson v. State*, 233 Ga. App. 568, 504 S.E.2d 505 (1998).

Admitting into evidence inspection certificates for Intoxilyzer 5000 without testimony from the individual who actually tested the machine was not a denial of defendant's right to confrontation. *Kollman v. State*, 231 Ga. App. 630, 498 S.E.2d 745 (1998).

Admission of self-authenticating certificates of inspection for the Intoxilyzer 5000 used to test defendant's breath was proper, as the certificates were required by O.C.G.A. § 40-6-392(f), they qualified as business

records under O.C.G.A. § 24-3-14, and they did not violate defendant's confrontation rights under U.S. Const., amend. 6. *Neal v. State*, 281 Ga. App. 261, 635 S.E.2d 864 (2006).

In a defendant's prosecution for driving under the influence under O.C.G.A. § 40-6-391, the inspection certificate for the instrument used to conduct the defendant's breath test under O.C.G.A. § 40-6-392(f) was properly admitted because it was not testimonial hearsay and did not violate the defendant's rights of confrontation; it was a business record that was not made in an investigatory or adversarial setting or generated in anticipation of the prosecution of a particular defendant. *Rackoff v. State*, 281 Ga. 306, 637 S.E.2d 706 (2006).

Admission of breath test not in error. — There was adequate foundation to admit printouts of test results from defendant's breath test as business records under O.C.G.A. § 24-3-14(b), in that it was in the regular course of the trooper's business to perform such a test, and these printouts were the result of one of those tests conducted in the regular course of the trooper's duties; consequently, there was no violation of defendant's right of confrontation. *Sisson v. State*, 232 Ga. App. 61, 499 S.E.2d 422 (1998).

Jury view in absence of defendant not a violation of confrontation rights. — A jury view of the premises, relevant to a case, made for the purpose of enabling the jury to better understand the testimony and not made for the purpose of allowing the jury to see evidence introduced in the case, which view is conducted without the presence of the defendant, does not violate the defendant's right of confrontation. *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

Jury view in absence of defendant not a violation of due process. — A jury view of a crime scene in the absence of the accused is not a denial of due process under U.S. Const., amend. 14. *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

Jurors who made an unauthorized visit to the scene of the crime and then presented their findings to the other jurors became, in a real sense, unsworn witnesses against the appellant in violation of U.S. Const., amend. 6. *Watkins v. State*, 237 Ga. 678, 229 S.E.2d 465 (1976).

Waiver of confrontation rights is not necessarily precluded by the failure of the trial court to specifically inform the accused of the accused's right to be present. *State v. Phillips*, 247 Ga. 246, 275 S.E.2d 323 (1981).

Validity of counsel's waiver of right of confrontation. — In order for the waiver by counsel of defendant's right of confrontation to be binding on the defendant, it must be made in the defendant's presence or by the defendant's express authority, or be subsequently acquiesced in by the defendant. *State v. Phillips*, 247 Ga. 246, 275 S.E.2d 323 (1981).

Waiver by defendant absent from trial while free on bail. — Confrontation rights are personal to the accused and are waived when the accused is free on bail and voluntarily absents oneself from the trial. *Byrd v. Ricketts*, 233 Ga. 779, 213 S.E.2d 610, cert. denied, 422 U.S. 1011, 95 S. Ct. 2636, 45 L. Ed. 2d 675 (1975).

Defendant may waive the right to confrontation by voluntarily absenting oneself from the proceedings after the trial begins. The trial begins when jeopardy attaches. *Pollard v. State*, 175 Ga. App. 269, 333 S.E.2d 152 (1985); *Loper v. State*, 191 Ga. App. 515, 382 S.E.2d 212 (1989).

Waiver of confrontation by defendant's absence during cross-examination. — A defendant in custody may waive the right to confrontation when the defendant removes self from the courtroom during cross-examination of a prosecution witness. *State v. Phillips*, 247 Ga. 246, 275 S.E.2d 323 (1981).

Waiver must be knowing and voluntary. — Habeas court's finding that a petitioner's guilty pleas were validly entered was reversed as the waiver forms signed by the petitioner and reviewed with the petitioner by the petitioner's attorneys addressed only the right to be tried by a jury; the waiver forms did not advise the petitioner that the petitioner was waiving the petitioner's right against self-incrimination and the petitioner's confrontation right. *Beckworth v. State*, 281 Ga. 41, 635 S.E.2d 769 (2006).

Because the transcript of an inmate's guilty plea hearing failed to show that the inmate was expressly informed of, and voluntarily waived the privilege against compulsory self-incrimination, an order denying a petition for a writ of habeas corpus was

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reversed, despite the fact that the record showed that the inmate voluntarily waived the right to trial by jury and the right to confront one's accusers. *Hawes v. State*, 281 Ga. 822, 642 S.E.2d 92 (2007).

Trial court erred in removing defendants from the courtroom during the testimony, out of the presence of the jury, of rebuttal witnesses for the state. *Perry v. State*, 216 Ga. App. 749, 456 S.E.2d 89 (1995).

Loss of right to be present at trial through disruptive behavior. — A defendant can lose the right to be present at trial if, after being warned by the judge that the defendant will be removed if the defendant continues the disruptive behavior, the defendant nevertheless insists on acting in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with the defendant in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to act consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. *State v. Phillips*, 247 Ga. 246, 275 S.E.2d 323 (1981).

Defendant lost the right to be present at trial when the defendant became so disorderly, disruptive, and disrespectful to the court that the trial could not be carried on with the defendant in the courtroom. *Raymond v. State*, 168 Ga. App. 487, 309 S.E.2d 669 (1983).

Although the defendant engages in flagrant acts of violence, disobedience and disruptive conduct, it is error to bar the defendant from the courtroom without giving the defendant the opportunity to remain, at the first instance, upon the defendant's agreement to act in a proper manner and to refrain from any similar conduct. *Fletcher v. State*, 168 Ga. App. 521, 309 S.E.2d 824 (1983), *aff'd*, 252 Ga. 498, 314 S.E.2d 888 (1984).

Voluntarily absent defendant. — Defendant's right to confront witnesses under U.S. Const., amend. 6 was violated after the trial judge ordered that the burglary trial proceed in defendant's absence when defendant disappeared before jeopardy attached and before the jury was sworn. *Stacey v. State*, 254 Ga. App. 461, 562 S.E.2d 806 (2002).

Inability to confront witnesses does not deny fair trial where no conviction results. — Defendant was not denied a fair trial, where the defendant was unable to confront the witnesses against the defendant on the charges, because the defendant was not convicted of such charges and, therefore, it was difficult to envision how the defendant could have been harmed by the absence of the witnesses. *Gilmore v. State*, 157 Ga. App. 376, 277 S.E.2d 749 (1981).

Trial judges retain wide latitude to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, or interrogation that is repetitive or only marginally relevant. *Johnson v. State*, 258 Ga. 504, 371 S.E.2d 651 (1988).

Prior out-of-court consistent statements of a witness are admissible where the witness is present in court, under oath, and subject to cross-examination. *Tew v. State*, 179 Ga. App. 369, 346 S.E.2d 833 (1986).

Admission of hearsay not automatic violation of confrontation clause. — A finding that the admitted statements are hearsay does not necessarily require a finding that the confrontation clause has been violated. *Williams v. Melton*, 733 F.2d 1492 (11th Cir.), *cert. denied*, 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 508 (1984).

Admission of homicide victim's statements harmful error. — Habeas petitioner was granted a motion for a new trial based upon the trial court's admission of a homicide victim's statements to a physician because the statements fell under no exception to the hearsay rule and offered a noncumulative, unimpeachable account of central details of the incident, which could have resulted in the defendant's conviction for murder without affording the defendant the right to properly confront the source of the statements. *Howard v. Gavin*, 810 F. Supp. 1269 (S.D. Ga. 1993).

Cross-examination improperly limited. — Trial judge's exclusion of extrinsic evidence of important government witness' prior inconsistent failure to implicate defendant was constitutional error warranting reversal as it impeded investigation of a witness' credibility through the exposure of the witness' potential bias and motivation. *United States v. Sheffield*, 992 F.2d 1164 (11th Cir. 1993).

Res gestae exception may violate right to confrontation. — The res gestae exception

can be applied in an unconstitutional manner; it is necessary to examine the indicia of reliability of evidence sought to be introduced under that exception to ensure that the defendant's sixth amendment rights to confrontation will not be violated by introduction of the evidence. *Williams v. Melton*, 733 F.2d 1492 (11th Cir.), cert. denied, 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 508 (1984).

Res gestae exception does not violate right to confrontation where indicia of reliability are established. — The admission of hearsay evidence if the witness is unavailable, under the *res gestae* exception (§ 24-3-3), did not violate the confrontation rights of the defendant because there was substantial circumstantial evidence that provided the indicia of reliability needed by the jury to evaluate the truth of hearsay declarations. *Williams v. Melton*, 733 F.2d 1492 (11th Cir.), cert. denied, 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 508 (1984).

U.S. Const., amend. 6 restricts the use of otherwise admissible hearsay in two ways. First, the prosecution must show that the out-of-court declarant is unavailable for trial. Second, where the declarant is shown to be unavailable, a hearsay statement may be used only if the circumstances provide sufficient indicia of reliability from which the jury can evaluate the truth. *Williams v. Melton*, 733 F.2d 1492 (11th Cir.), cert. denied, 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 508 (1984).

The confrontation clause does not require the exclusion of hearsay testimony if it is shown that the declarant is unavailable to testify and that the out-of-court statement bears adequate "indicia of reliability." *Williams v. State*, 202 Ga. App. 82, 413 S.E.2d 256 (1991).

Amendment violated only when hearsay declarant unavailable at trial. — U.S. Const., amend. 6 is violated only when the out-of-court hearsay statement is that of a declarant who is unavailable at trial for full and effective cross-examination. *Campbell v. State*, 158 Ga. App. 616, 281 S.E.2d 352 (1981).

Calling of alleged child abuse victim to stand. — O.C.G.A. § 24-3-16 (admissibility of child-victim's statement) is not constitutionally deficient. The defendant need not be placed in the position of calling the alleged victim to the stand in order to exer-

cise the defendant's rights under the sixth amendment. Rather, the court will call the alleged victim at the request of either party, informing the jury that it is the court that has called the child and that both parties will have an opportunity to examine the child. *Eberhardt v. State*, 257 Ga. 420, 359 S.E.2d 908 (1987), cert. denied, 484 U.S. 1069, 108 S. Ct. 1036, 98 L. Ed. 2d 999 (1988).

Where the victim had been called by the state and defendant had an opportunity to cross-examine without having to call the victim to the stand, the application of O.C.G.A. § 24-3-16, governing testimony as to a child's description of sexual contact or physical abuse did not violate the defendant's right to due process to confront the witness. *Lawhorn v. State*, 257 Ga. 780, 364 S.E.2d 559 (1988).

Seating of child-molestation victims. — The mere fact that the trial court used its discretion in allowing child-molestation victims to sit at an angle where they would not have to directly face the defendant in no way violated the constitutional right to confrontation, because the defendant had the full opportunity to confront each victim with a thorough and sifting cross-examination and to expose each victim to the court and jury. *Ortiz v. State*, 188 Ga. App. 532, 374 S.E.2d 92, cert. denied, 188 Ga. App. 912, 374 S.E.2d 92 (1988).

Introduction in evidence of the molestation victim's tape recorded statement did not violate the confrontation clause of the sixth amendment to the United States Constitution where the victim's veracity was put in issue by defendant's denial that any molestation ever took place, by evidence contradicting the victim's testimony and by cross-examination concerning prior conflicting testimony and statements. *Patterson v. State*, 180 Ga. App. 194, 348 S.E.2d 578 (1986).

The admission of videotapes in child molestation cases does not infringe upon a defendant's sixth amendment right to confront witnesses, where the child victim testified. *Frazier v. State*, 195 Ga. App. 109, 393 S.E.2d 262 (1990).

Victim with multiple personality disorder. — The court rejected the defendant's contention that the introduction of testimony by the victim's alternate personalities constituted a violation of defendant's right of

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confrontation where: (1) the trial court gave defense counsel the opportunity to cross-examine the victim's host personality as well as the victim's alternate personalities; (2) the court offered defense counsel the option of attempting to summon alternate personalities directly or of relying on the assistance of the prosecutor; and (3) with the exception of cross-examination of the host personality, each of these opportunities was strategically refused by defense counsel. *Dorsey v. Chapman*, 262 F.3d 1181 (11th Cir. 2001), cert. denied, 535 U.S. 1000, 122 S. Ct. 1567, 152 L. Ed. 2d 489 (2002).

Child's description of sexual contact or physical abuse. — O.C.G.A. § 24-3-16, governing testimony as to a child's description of sexual contact or physical abuse, does not violate the constitutional right to confrontation. *Rayburn v. State*, 194 Ga. App. 676, 391 S.E.2d 780 (1990), cert. denied, 498 U.S. 969, 111 S. Ct. 434, 112 L. Ed. 2d 417 (1990).

Child witness's unresponsiveness to a number of questions as put by defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken, where defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as she was capable of answering. *Bright v. State*, 197 Ga. App. 784, 400 S.E.2d 18 (1990).

Child witness seated with back to defendant. — Testimony by a six-year-old victim who was allowed to testify facing the jury with the victim's back to the defendant so that the defendant could not look the victim in the eye did not violate the constitutional right to confront witnesses against the defendant because the defendant had the opportunity to, and did, thoroughly cross-examine the witness. *Atwell v. State*, 204 Ga. App. 187, 419 S.E.2d 77 (1992).

Not all witnesses need testify. — Defendant was not deprived of the sixth amendment right of confrontation by the state's failure to call one of two police officers who had witnessed a drug offense, where the officer did not testify, nor was any reference made at trial to the contents of any prior statement made by the officer. *Jacobs v. State*, 201 Ga. App. 57, 410 S.E.2d 320 (1991).

Hearsay statement of defendant's former spouse properly admitted. — Admission of a Georgia Bureau of Investigation agent's testimony regarding a statement by defendant's former spouse implicating the defendant in a killing did not violate the defendant's right of confrontation, because the former spouse remarried the defendant before refusing to testify at the trial, and there was a "necessity" that the finder of fact be acquainted with the statement of the only eyewitness to the homicide. *Higgs v. State*, 256 Ga. 606, 351 S.E.2d 448 (1987).

Admission of a spouse's hearsay statement against the defendant improper. — In a murder trial, admission of a spouse's out-of-court statement, ruled not to be a confession, violated the defendant's rights under the confrontation clause; however, and since the remaining evidence against the defendant was so strong that the admission of the spouse's statement was harmless error, the judge's instruction to the jury to disregard the statement was sufficient to cure any error, so that the defendant's motion for a new trial was properly denied. *Ballard v. State*, 252 Ga. 53, 311 S.E.2d 453 (1984).

Testimony by co-defendant which favors defendant. — Where a co-defendant takes the stand and denies making an alleged out-of-court statement implicating the other defendant, and proceeds to testify favorably to the co-defendant, that defendant has been denied no rights protected by U.S. Const., amend. 6 and U.S. Const., amend. 14. *Campbell v. State*, 158 Ga. App. 616, 281 S.E.2d 352 (1981).

The application of former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5) in that, at trial, witnesses were permitted, over a hearsay objection, to testify as to the statements made to them by a deceased person, did not deprive the defendant of the constitutional rights to confrontation under U.S. Const., amend. 6 because the state's evidence was sufficient to prima facie show a conspiracy between the deceased and the defendant and because the statements made by the deceased were made during the concealment stage of the conspiracy. *Timberlake v. State*, 158 Ga. App. 125, 279 S.E.2d 283 (1981).

Officer's testimony explaining the officer's actions. — Police officer's reference to

an interview with a co-defendant did not violate the defendant's right to confrontation, because the reference merely explained the officer's subsequent actions, and no evidence was presented of any statement or confession of the co-defendant that implicated the defendant. *McNeal v. State*, 196 Ga. App. 244, 395 S.E.2d 660 (1990).

Fact that the defendant and the defendant's car matched an informant's descriptions was not offered by the state to establish the truth of those matters, but, rather, it was offered for the limited purpose of explaining why the officer went to the specific parking lot and approached the defendant's car; the officer's testimony referenced the informant's tip only to the extent necessary to provide context or background information, and thus there was no confrontation clause violation. *Little v. State*, 280 Ga. App. 60, 633 S.E.2d 403 (2006).

Hearsay testimony of police officers. — Admission of hearsay testimony of police officers recounting the confessions of purported co-conspirators who did not testify violated defendant's constitutional right to confront witnesses. *Livingston v. State*, 268 Ga. 205, 486 S.E.2d 845 (1997).

Investigator's testimony about information received from silent witnesses did not serve to implicate defendant in the crime and the admission of the testimony did not violate defendant's confrontation rights. *Jenkins v. Byrd*, 103 F. Supp. 2d 1350 (S.D. Ga. 2000).

The trial court properly rejected a pre-trial detainee's petition for habeas relief on grounds that the detainee's constitutional right to confront witnesses was abridged when a detective investigating the charges was permitted to give hearsay testimony at the detainee's preliminary hearing, as the detainee's constitutional right to confrontation applied only to trials, and not to a preliminary hearing, and the hearing involved a more limited scope of determining whether probable cause existed to hold an accused for trial. *Gresham v. Edwards*, 281 Ga. 881, 644 S.E.2d 122 (2007).

Court cannot prohibit cross-examination of prosecution witnesses as to motive. — The trial court errs in granting a motion in limine to prohibit the cross-examination of key prosecution witnesses on their motives in testifying. *Owens v. State*, 251 Ga. 313, 305 S.E.2d 102 (1983).

Trial court abused its discretion when it did not permit defense counsel to question a state witness testifying in exchange for a prison time reduction about the witness's belief on the time the witness was avoiding by testifying and such error was not harmless. *State v. Vogleson*, 275 Ga. 637, 571 S.E.2d 752 (2002).

Cross-examination of co-defendants. — Trial court did not commit error by disallowing any testimony regarding the mandatory minimum sentence for armed robbery, thus restricting the defendant's right to a full cross-examination of co-defendants to reveal their motive to lie; the court merely restricted the defendant from asking questions couched in terms of mandatory minimum sentence and the defendant was free to question co-defendants as to their understanding of the possible sentence as long as the jury was not informed of the mandatory minimum sentence. *Ross v. State*, 231 Ga. App. 506, 499 S.E.2d 351 (1998).

Interest in protecting confidentiality of juvenile offender's record cannot require yielding of so valuable a constitutional right as effective cross-examination for bias of adverse witness. *Arnold v. State*, 163 Ga. App. 10, 293 S.E.2d 501 (1982).

Inability to conduct meaningful cross-examination. — Calling a witness who had notified the court that the witness would not answer any questions to avoid self-incrimination and asking that witness leading questions suggesting the guilt of the defendant deprives the defendant of the right of confrontation as the defendant cannot conduct any meaningful or counteractive cross-examination. *Lawrence v. State*, 257 Ga. 423, 360 S.E.2d 716 (1987).

Discretion of trial court. — The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. *Hines v. State*, 249 Ga. 257, 290 S.E.2d 911 (1982).

The trial court may exercise a reasonable judgment in determining when the subject is exhausted, but, where the trial court cuts off in limine all inquiry on a subject with respect to which the defense is entitled to a reasonable cross-examination, this is an abuse of discretion and prejudicial error. *Hines v. State*, 249 Ga. 257, 290 S.E.2d 911 (1982).

Trial judges retain wide latitude insofar as the confrontation clause is concerned to

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impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Shaw v. State*, 201 Ga. App. 456, 411 S.E.2d 537 (1991).

No right to participate in post-trial examination of confidential informant. — Defendant's sixth amendment confrontation right was not violated by the defendant's and/or defense counsel's exclusion from a post-trial, in camera examination of a confidential informant. *Ponder v. State*, 197 Ga. App. 21, 397 S.E.2d 596 (1990).

Error for court to prohibit cross-examination of warrant affiant. — At a hearing on a motion to suppress, where the state introduces the affidavit upon which a search warrant has been based, it is error for the trial court to totally prevent cross-examination of the affiant by defense counsel. *Miller v. State*, 169 Ga. App. 552, 314 S.E.2d 120 (1984).

Disclosure of evidence favorable to defendant. — The Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), does not establish an inflexible principle that requires the disclosure of informants' identities or of all evidence, but only that which is favorable to a defendant if the evidence is material to guilt or punishment. *Henderson v. State*, 162 Ga. App. 320, 292 S.E.2d 77 (1982).

Even absent a motion under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the prosecutor is under a duty to disclose clearly exculpatory evidence to the defense. *Osborn v. State*, 161 Ga. App. 132, 291 S.E.2d 22 (1982).

If the defense specifically requests disclosure of exculpatory evidence and then requests an in camera inspection because of dissatisfaction with the state's response, the trial court is under a duty to conduct the inspection. *Osborn v. State*, 161 Ga. App. 132, 291 S.E.2d 22 (1982).

Prosecution need not seek out information for defendant. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), which proscribed the suppression of evidence favorable to an accused by the prosecution, does not impose an affirmative

obligation on the prosecution to seek out information for the defense, even if such information is more accessible to the prosecution than to the defense. *Hines v. State*, 249 Ga. 257, 290 S.E.2d 911 (1982).

Where information as to prior convictions is not known to the prosecution nor in its file, denial of defendant's motion for disclosure of state witness' prior convictions does not amount to suppressing of evidence. *Hines v. State*, 249 Ga. 257, 290 S.E.2d 911 (1982).

Admission of interlocking confessions with proper limiting instructions conforms to requirements of U.S. Const., amends. 6 and 14. *Tatum v. State*, 249 Ga. 422, 291 S.E.2d 701 (1982).

Confessions or incriminating statements of co-defendants must be interlocking to a substantial degree inasmuch as juries are expected to heed limiting instructions; slight disparities in statements of co-defendants rarely, if ever, will be so prejudicial as to require exclusion. *Tatum v. State*, 249 Ga. 422, 291 S.E.2d 701 (1982).

Admission of custodial statements made by co-defendants who did not testify at trial in which the phrase "another person" was substituted for the names of the defendants violated the right of confrontation. *Kesler v. State*, 215 Ga. App. 553, 451 S.E.2d 496 (1994). But see *Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998).

Denial of access to witness's letter. — Where a letter contained nothing of an exculpatory or impeaching nature, the district court did not err in finding that the author's "testimony at trial closely tracks the information divulged in the letter," and it was evident from the record that the denial of access to the letter did not restrict the scope of defendant's cross-examination of its author, the state was under no obligation to make the letter accessible to the defense, and the trial court's refusal to order otherwise did not deprive defendant of a fair trial. *Hardin v. Black*, 845 F.2d 953 (11th Cir. 1988).

Co-defendant's statement. — Admission of co-defendant's extrajudicial statement held not to be reversible error. See *Hope v. State*, 164 Ga. App. 665, 297 S.E.2d 88 (1982).

Co-defendant's confession admissible where co-defendant is available for cross-ex-

amination. — The rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), that admission of a co-defendant's confession violates the confrontation clause despite omitting instructions, is inapplicable where a co-defendant, the declarant, testified at trial and was available for cross-examination. *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Admission of statements made by co-defendant to witnesses. — Where the defendant in a murder trial contended that there were two violations of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), i.e., a witness's testimony that the co-defendant told the witness, after the homicide, that "someone named Mark" committed the crime, and the police radio operator's testimony that the co-defendant had identified a third person as one who had helped with killing the co-defendant's spouse, it was held that the witness's testimony was admissible because the witness was a co-conspirator and the statement was made during the concealment phase of the conspiracy, and the radio operator's testimony was admissible because it made no reference whatsoever to the defendant, hence did not implicate the defendant in a *Bruton* sense. *Langley v. State*, 258 Ga. 251, 368 S.E.2d 316 (1988).

Testimony of polygraph examiner. — Failure of the co-defendant to take the stand could not block opinion testimony of a polygraph examiner that the examiner thought the co-defendant was lying when the co-defendant denied presence or assistance in robbery, and the witness was subject to cross-examination. *Martin v. State*, 162 Ga. App. 703, 292 S.E.2d 864 (1982).

Availability of drug samples where notes as to test results destroyed. — In a prosecution for possession of a controlled substance, the testimony of a chemist about the nature of the substance involved was admissible despite the destruction of the witness' notes because the drug samples were themselves available for the defendant to obtain the defendant's own analysis. *United States v. Vaughn*, 736 F.2d 665 (11th Cir. 1984).

Evidentiary prerequisite of certified record of witness' prior conviction. — Trial court did not impermissibly limit defendant's confrontation rights by holding that

defendant could not submit evidence of or question a witness concerning a prior conviction without introducing a certified record of the conviction. *Kimbrough v. State*, 254 Ga. 504, 330 S.E.2d 875 (1985) (murder conviction); *Mincey v. State*, 257 Ga. 500, 360 S.E.2d 578 (1987) (armed robbery conviction).

Waiver of the right to confrontation cannot be presumed from a silent record; the record must show a knowing, intelligent, and voluntary waiver made with the accused's consent. *Aaron v. State*, 172 Ga. App. 700, 324 S.E.2d 564 (1984).

Short absence of defendant not denial of right. — Defendant's right to confrontation of witness was not violated during a short absence when the defendant went to the restroom, because there was no indication in the record that the defendant's absence was of any significance and the defendant's attorney were present at all times. *Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986).

Required procedure for ordering defendant from courtroom after an initial disruptive incident. — Where a defendant, who had not been given a warning prior to being removed from the courtroom because of disruptive behavior, is subsequently brought before the court and evidences no disruptive behavior, the court must inquire as to the defendant's state of mind or warn the defendant of the consequences of further misconduct and inform the defendant that by proper conduct the defendant can regain the right to be present. *State v. Fletcher*, 252 Ga. 498, 314 S.E.2d 888 (1984).

Parents were denied due process in a termination-of-parental-rights proceeding, where they were excluded from an observation room during an interview of their children, even though the parents' attorneys were present in the room, from which location no one would have been seen or heard by the children. *In re M.S.*, 178 Ga. App. 380, 343 S.E.2d 152, aff'd, 181 Ga. App. 33, 351 S.E.2d 253 (1986).

In defendant's prosecution for child cruelty, there was no sixth amendment violation because the mere fact that defendant was

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unable to ask a live-in paramour, who had not been charged in the case, about possible punishment for child cruelty on cross-examination did not diminish defendant's attempt to show the paramour's motive for testifying for the state. *Bosnak v. State*, 263 Ga. App. 313, 587 S.E.2d 814 (2003).

Prejudice held to require new sentencing hearing. — Prejudice from admission of testimony in violation of murder defendant's sixth amendment right of confrontation did not sufficiently infect the guilt-innocence phase to require a new trial but did require a new sentencing hearing, where the testimony portrayed the defendant not as a dominated follower of the defendant's spouse in the crime, but as a willing participant in a plan of perverse sexual activity that ultimately led to the death of the victim. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990).

Defendant's confrontation rights not violated. — Preventing defense counsel from cross-examining a witness as to numerous allegedly unfounded 9-1-1 calls the witness made over the past several years did not violate defendant's rights under the confrontation clause for effective cross-examination, as there was no showing that these alleged 9-1-1 calls were relevant to any issue in the case. *Phyfer v. State*, 259 Ga. App. 356, 577 S.E.2d 56 (2003).

Trial court did not express an opinion in violation of O.C.G.A. § 17-8-57 or of an inmate's rights to confrontation or a fair and impartial jury when it explained to those in the courtroom during jury deliberations in the inmate's trial on drug and weapons offenses that it had received two notes from the jury describing a communication received by a juror that offered the juror a bribe in exchange for changing the juror's vote to not guilty; the trial court's comment did not suggest that the inmate had directed the bribery attempt because it merely reviewed the jurors' notes and did not go beyond them, and it added nothing to that which the jurors already knew. *Greer v. Thompson*, 281 Ga. 419, 637 S.E.2d 698 (2006).

Harmless error. — In a prosecution for false imprisonment and battery of the defen-

dant's estranged spouse, because the spouse refused to testify at trial, the spouse's statements given to deputies who had initially arrived at the crime scene in response to the spouse's 9-1-1 calls were testimonial and their admission infringed upon the defendant's right to confront the witness; however, the 9-1-1 calls themselves were not testimonial, were not prohibited by the confrontation clause, and were admissible as part of the *res gestae* or as an excited utterance, and since other evidence supported the conviction, admission of the statements given to the deputies was harmless error. *Pitts v. State*, 272 Ga. App. 182, 612 S.E.2d 1 (2005), *aff'd*, 280 Ga. 288, 627 S.E.2d 17 (2006).

Admission of a first witness's statement and audiotaped interview under the necessity exception to the hearsay rule violated the Confrontation Clause, but the error was harmless, as: (1) the jury was properly instructed on attempted impeachment; (2) the fact that a second witness told a police officer that the second witness knew nothing about the motel murder was not inconsistent with the second witness's testimony that the defendant said the defendant had killed a man; (3) although a third witness testified that the events related in the third witness's videotaped interview were fabricated, there was considerable reason not to credit that portion of the third witness's testimony; (4) additional evidence demonstrated the defendant's guilt, and corroborated the evidence that was the subject of the attempted impeachment; and (5) the defendant's claim that the jury could have taken the first witness's audiotape as corroboration of the "impeached" testimony was rejected. *Richard v. State*, 281 Ga. 401, 637 S.E.2d 406 (2006).

Cumulative or harmless statement. — Though testimony from an investigating agent relating to statements made by a murder victim's step-parent shortly after the murder were improperly admitted at the defendant's trial for malice murder, the trial court's error in admitting the statements into evidence was harmless, because the hearsay portion of the agent's testimony was cumulative of other admissible evidence. *Gay v. State*, 279 Ga. 180, 611 S.E.2d 31 (2005).

While the Supreme Court of Georgia agreed with the defendant that the use of

hearsay testimony denied the defendant's right to confrontation, said error was harmless in light of the fact that the hearsay was cumulative of testimony already supplied by three other witnesses. *Lynch v. State*, 280 Ga. 887, 635 S.E.2d 140 (2006).

Compulsory Process

Right to offer testimony of witnesses and to compel their attendance is, in essence, the right to present a defense, and a fundamental element of due process of law. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Subpoena, if relevant on any issue, is constitutionally mandated. — Once it is established that a defendant's subpoena of a witness is relevant on any issue, it should be granted as mandated by the due process clause of U.S. Const., amend. 5, and the compulsory process provision of U.S. Const., amend. 6. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Compulsory process applies to those witnesses who are relevant and material, and if the request is not frivolous in nature it should be granted. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

The right of a criminal defendant under U.S. Const., amend. 6 to compulsory process and the right under U.S. Const., amend. 5 to due process are sufficiently pervasive to require the presence of material witnesses in defendant's behalf. *Wingfield v. State*, 159 Ga. App. 69, 282 S.E.2d 713 (1981).

Right of a defendant to have compulsory process may not be sidestepped merely because of inconvenience. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Right to have compulsory process may not be sidestepped because the court considers the witness' testimony cumulative. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th

Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Right to compulsory process is not a guarantee by the state that the witness requested will in fact appear at trial, but only relates to the issuance of the process. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Out-of-state witnesses. — A party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Witnesses who cannot be located within state's jurisdiction. — Neither the state nor federal Constitution obligates the state to compel the attendance of witnesses who cannot be located within its jurisdiction. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Diligence in requesting witness. — Court's refusal to issue a writ of habeas corpus ad testificandum to secure the presence of a witness imprisoned in another county constituted a denial of the appellant's constitutional right to compulsory process because the evidence did not establish that appellant's counsel failed to exercise due diligence in seeking issuance of the writ. *Jackson v. State*, 184 Ga. App. 133, 360 S.E.2d 907 (1987).

Continuance requested to obtain witnesses. — Denial of a continuance requested by the defendant in order to obtain the presence at trial of a material witness was reversible error with respect to the defendant's conviction for possession of a weapon where the defendant denied possession and the witness' testimony was relevant to that issue. *Jackson v. State*, 184 Ga. App. 133, 360 S.E.2d 907 (1987).

Denial of a continuance requested by the defendant in order to obtain the presence at trial of a material witness was harmless error with respect to the defendant's conviction for trafficking in cocaine where the defendant readily admitted that the defendant was in possession of cocaine. *Jackson v. State*, 184 Ga. App. 133, 360 S.E.2d 907 (1987).

Government is under no duty to call witnesses even if they are informers. *United States v. Tatum*, 496 F.2d 1282 (5th Cir. 1974).

Constitution does not require police to provide a defendant with all police investigatory work, and the mere possibility that an

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undisclosed item of information might have helped the defendant or might have affected the outcome of a trial, is not sufficient under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980).

Subpoenas of informants not required where testimony neither exculpatory nor material. — A trial court's refusal to require the state to identify and produce an informant does not wrongfully deprive a defendant of the right to cross-examine witnesses, when the defendant makes no showing of, and does not in any way call in issue, any favorability or materiality of the informant's testimony to the defense. *Bennett v. State*, 153 Ga. App. 21, 264 S.E.2d 516 (1980).

Generalized assertion of privilege yields to a demonstrated, specific need for evidence in a pending criminal trial. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Materiality to defense must be weighed against privilege. — The trial judge must conduct a hearing on the merits of the *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1962) motion and if the judge finds the evidence material under *Brady*, the judge must weigh it against the state's privilege under *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1956). *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980).

Governmental privilege must not deny defendant of anything material to the defense. — Since the government that prosecutes an accused also has the duty to protect the defendant's constitutional rights, it may not undertake prosecution and then invoke its governmental privileges to deprive the accused of anything that might be material to the defense. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Absolute privilege against disclosure in every case involving an informer is impermissible where a *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1962) motion is made, but this error can be cured

by a post-trial hearing before the judge in the trial court. *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980).

Constitutional doctrine of separation of powers may not limit an individual's right to a fair hearing and to present a defense. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Duty of disclosure of evidence obtained by Congress is to be governed by the same rules as applied to the other branches. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Legislative branch may not invoke the privilege of confidentiality at the expense of the accused's right to evidence. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Competing public interests must be accommodated. — When a congressional inquiry and a criminal prosecution cross paths, congressional privilege is not absolute, and Congress must accommodate the public interest in legitimate legislative inquiry with the public interest in securing the witness a fair trial. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Assertion of presidential privilege must yield to the need for evidence in a pending criminal trial and the fundamental demands of due process of law in the fair administration of justice. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

When presidential privilege must yield. — Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the right under U.S. Const., amend. 6 to compulsory process and U.S. Const., amend. 5, right to due process of law require the presidential privilege as to confidential communications to give way where the district court determines after in camera inspection that the material is relevant and

admissible in a criminal trial. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Suppression by the prosecution of evidence favorable to an accused despite a request for it violates due process where the evidence is material either to guilt or to punishment. The evidence is material if it is of sufficient significance to result in the denial of the defendant's right to a fair trial if not disclosed. *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980).

Right to testimony of immunized witnesses. — It is difficult to extrapolate from the sixth amendment guarantee of compulsory process a right to the testimony of an immunized witness. *Dampier v. State*, 249 Ga. 299, 290 S.E.2d 431 (1982).

Denial of use immunity to defense witnesses. — Defendant's compulsory process rights under U.S. Const., amend. 6 and equal protection and due process rights under U.S. Const., amend. 5, were not violated by denial of use immunity to defense witnesses where such immunity was not requested by the defendant in the trial court for one of the witnesses and no prejudice would have resulted had a request been made and denied; and with regard to other witnesses, defendant failed to demonstrate that a grant of immunity was required to preserve fundamental fairness in the trial. *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980).

Failure to grant immunity to a defendant for exculpatory testimony. — Rights to compulsory process of other defendants are not violated by the trial court's failure to grant immunity to a particular defendant for the defendant's alleged exculpatory testimony. *United States v. Herbst*, 641 F.2d 1161 (5th Cir.), cert. denied, 454 U.S. 851, 102 S. Ct. 292, 70 L. Ed. 2d 141 (1981).

State statutes that violate U.S. Const., amend. 6. — U.S. Const., amend. 6 is violated by a state statute that disqualifies persons charged as principals, accomplices or accessories in the same crime from testifying in behalf of one another, while permitting such persons to testify in behalf of the prosecution. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Common-law privilege for confidential marital communications. — U.S. Const., amend. 6 overrides the common-law privilege for confidential marital communica-

tions if the defendant seeks to introduce the testimony of the witness' spouse to the effect that the witness had confessed to the crime. *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981).

Testimony of witness who is in violation of sequestration rules. — Where witnesses in a criminal case have been sequestered, and the defendant thereafter seeks to call as a witness a person who has remained in the courtroom, the testimony of such witness is admissible over objection by the state. *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

Admission of lie detector test results. — Requiring the defendant to obtain an express stipulation of the parties in order for lie detector test results to be admissible does not violate the defendant's right under U.S. Const., amend. 6 to call witnesses in defense. *Jones v. State*, 156 Ga. App. 543, 275 S.E.2d 119 (1980).

Witness testimony based upon ex parte statements. — It is error to make a determination that a prospective witness is incompetent to testify on the basis of ex parte statements. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Denial of continuance where defendant not diligent in securing witness attendance. — A continuance requested by the defendant in order to obtain the presence at trial of a material witness is properly denied if the defendant has not been diligent in attempting to procure the attendance of the absent witness. *Burney v. State*, 244 Ga. 33, 257 S.E.2d 543 (1979).

Evidence may not be excluded as a discovery sanction. — The compulsory process clause of U.S. Const., amend. 6 forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants. *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981).

Exclusion of evidence or witnesses as sanction against defendant. — The compulsory process clause forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants. *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981).

The exclusion of witnesses is an impermissible sanction for the violation of a pretrial discovery order when imposed upon a crim-

Compulsory Process (Cont'd)

inal defendant. *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981).

Exclusion of evidence must be balanced against right to compulsory process. — The exclusion of otherwise admissible evidence or testimony sought to be presented by a criminal defendant must be weighed against the right under U.S. Const., amend. 6 to have compulsory process for obtaining witnesses in the defendant's favor. *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981).

Exclusion of cumulative evidence under Fed. R. Evid. 403. — Exclusion of otherwise admissible evidence or testimony sought to be presented by a criminal defendant, pursuant to Rule 403, Fed. R. Evid., pertaining to exclusion of cumulative evidence, must be weighed against the right under U.S. Const., amend. 6 to have compulsory process for obtaining witnesses in the defendant's favor. *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981).

Technical violations of procedural requirements for compulsory process. — It is not always necessary that the defense comply with every technical procedural requirement before being entitled to compulsory process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Technical violations of procedure should not be allowed to emasculate the efficacy of the constitutionally required compulsory process. *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd on other grounds, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976).

Right to Counsel**1. In General**

Purpose of U.S. Const., amend. 6 is to protect an accused from conviction resulting from the accused's own ignorance of the accused's rights. *Adkins v. Sanford*, 120 F.2d 471 (5th Cir. 1941); *Kent v. Sanford*, 121 F.2d 216 (5th Cir. 1941), cert. denied, 315 U.S. 799, 62 S. Ct. 622, 86 L. Ed. 1200 (1942).

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. *Johnson v.*

Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), overruled on other grounds, *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

The right to counsel embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect the defendant when brought before a tribunal with power to take the defendant's life or liberty. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

The purpose of the sixth amendment counsel guarantee, and hence the purpose of invoking it is to protect the unaided layman at critical confrontations with an expert adversary, the government, after the adverse positions of government and defendant have solidified with respect to a particular alleged crime. *Phillips v. State*, 204 Ga. App. 698, 420 S.E.2d 316 (1992).

Appointment of counsel for a motion to withdraw a guilty plea. — Habeas court properly denied an inmate's motion to withdraw the inmate's guilty plea based on the claim that the inmate's sixth amendment right to counsel was violated when counsel was not appointed on the inmate's behalf during the hearing on the inmate's motion to withdraw the inmate's guilty plea; the new criminal procedure rule imposing an obligation on the state to appoint counsel for a motion to withdraw a guilty plea merely clarified and extended the scope of a well-settled principle of criminal procedure, a defendant's right to representation at critical stages of a prosecution. Accordingly, the rule could not be applied retroactively to the inmate. *Carter v. Johnson*, 278 Ga. 202, 599 S.E.2d 170 (2004).

Presence of counsel is a necessity in criminal trials and is essential to fair trials. *Lee v. Stynchcombe*, 347 F. Supp. 1076 (N.D. Ga. 1972).

Persons charged with serious criminal offenses have a right under U.S. Const., amend. 6 and U.S. Const., amend. 14, to assistance of counsel in their defense. *Shepherd v. Jordan*, 425 F.2d 1174 (5th Cir. 1970).

Indigency required. — Because the defendant was not indigent, the defendant had no right to court appointed counsel. *Everman v. State*, 203 Ga. App. 350, 416 S.E.2d 861 (1992).

Defendant's right to counsel is not superior to state's right to try the defendant for a

criminal offense and does not include the right to manipulate, whether consciously or capriciously, the state's attempt in good course to prosecute the defendant. *Mock v. State*, 163 Ga. App. 320, 293 S.E.2d 525 (1982).

The sixth amendment right to counsel does not give an accused the right to subvert the judicial process. *United States v. Stuckey*, 917 F.2d 1537 (11th Cir. 1990), cert. denied, 498 U.S. 1091, 111 S. Ct. 972, 112 L. Ed. 2d 1058 (1991).

Comparison of right under fifth and sixth amendments. — The events triggering the attachment of a right to counsel under the fifth amendment differ from those which trigger the attachment under the sixth amendment, but once attached, either right may be waived in an essentially identical manner, and subject to the same limitations. *Housel v. State*, 257 Ga. 115, 355 S.E.2d 651 (1987), cert. denied, 487 U.S. 1240, 108 S. Ct. 2915, 101 L. Ed. 2d 946 (1988).

The sixth amendment right to counsel does not depend upon a request by the defendant, although a request for counsel is an important fact if questions arise concerning whether a defendant has waived the right to counsel. *State v. Simmons*, 260 Ga. 92, 390 S.E.2d 43 (1990).

Admission of defendant's statement to a police officer concerning an attempted burglary was proper under the fifth amendment as defendant had only invoked the right to counsel under the sixth amendment in connection with unrelated charges in Fulton County; the defendant never invoked the fifth amendment right for counsel to be present during questioning in connection with the attempted burglary in Henry County. *Smith v. State*, 273 Ga. App. 107, 614 S.E.2d 219 (2005).

Denial of counsel violates U.S. Const., amend. 14. *Walker v. State*, 194 Ga. 727, 22 S.E.2d 462 (1942).

Violation of right to counsel is not harmless error. — The constitutional right to the assistance of counsel is a right so basic to a fair trial that its infraction cannot be treated as harmless error. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), cert. denied, 454

U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Right to counsel in all prosecutions. — Right to private counsel attached in all criminal prosecutions— not merely those resulting in imprisonment or fine; the defendant did not knowingly and intelligently waive the right to counsel because there was no evidence of relinquishment of the right. *Barnes v. State*, 261 Ga. App. 112, 581 S.E.2d 727 (2003).

Right to counsel for misdemeanor prosecutions. — Although the right to counsel extends to misdemeanor prosecutions where imprisonment may result (*Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972)), the Georgia Supreme Court has interpreted *Argersinger* as requiring that a defendant in a misdemeanor criminal prosecution be entitled to counsel only where the defendant is sentenced to actual imprisonment. *Capelli v. State*, 203 Ga. App. 79, 416 S.E.2d 136 (1992).

If the accused is on trial in federal court without counsel, unless the accused has waived the right to counsel, the trial is void. *Bisson v. Howard*, 224 F.2d 586 (5th Cir.), cert. denied, 350 U.S. 916, 76 S. Ct. 201, 100 L. Ed. 803 (1955).

Right not extended to participants in civil disputes. — The constitution provides for effective assistance of counsel for one charged with a criminal offense, not participants in a civil dispute. *Calhoun v. Maynard*, 196 Ga. App. 219, 395 S.E.2d 645 (1990); *Finch v. Brown*, 216 Ga. App. 451, 454 S.E.2d 807 (1995); *Bergmann v. McCullough*, 218 Ga. App. 353, 461 S.E.2d 544 (1995), cert. denied, 517 U.S. 1141, 116 S. Ct. 1433, 134 L. Ed. 2d 555 (1996).

Right not extended to deportation hearing. — Although an alien has a statutory right to counsel at the alien's own expense pursuant to 8 U.S.C. § 1252(b)(4), there is no sixth amendment right to appointed counsel at a deportation hearing. *United States v. Qadeer*, 953 F. Supp. 1570 (S.D. Ga. 1997).

Right to counsel versus right to testify. — Because the federal district court presented the defendant with a choice: either to proceed with counsel with the caveat that the defendant could be kept off the witness stand, if the defendant's attorney so desired, or to proceed pro se, the defendant was

Right to Counsel (Cont'd)**1. In General (Cont'd)**

impermissibly forced to choose between two constitutional rights: the right to testify and the right to counsel. *United States v. Scott*, 909 F.2d 488 (11th Cir. 1990).

Defense counsel was not ineffective in resting the defense case without calling the defendant to the stand, despite the defendant's repeated indications that the defendant wanted to testify, where the defendant was advised of the defendant's right to testify, was advised that the defendant should not exercise that right, and did not protest. *United States v. Teague*, 953 F.2d 1525 (11th Cir.), cert. denied, 506 U.S. 842, 113 S. Ct. 127, 121 L. Ed. 2d 82 (1992).

The district court committed no error in allowing the defendant to testify against the desires of defense counsel and in refusing to question the defendant at length about the defendant's decision. *United States v. Moody*, 977 F.2d 1425 (11th Cir. 1992), cert. denied, 507 U.S. 1052, 113 S. Ct. 1948, 123 L. Ed. 2d 653 (1993).

Allegation of mere lack of counsel insufficient to show denial thereof. — In a habeas corpus petition, allegations to the effect that the defendant entered a plea of guilty to an indictment for a felony offense "without the advice of counsel" are insufficient to charge that the defendant was denied the constitutional right of the privilege and benefit of counsel, since the petition failed to allege that the defendant was unable to employ counsel or that the defendant desired or made any request for counsel or that the court declined to appoint counsel to represent the defendant. *White v. Grimes*, 216 Ga. 335, 116 S.E.2d 561 (1960).

Right to counsel where liberty at stake. — A defendant in a criminal prosecution that may result in deprivation of the defendant's liberty is entitled to the assistance of counsel as guaranteed by U.S. Const., amend. 6. *Blue v. State*, 144 Ga. App. 378, 241 S.E.2d 36 (1977).

Right to adequate representation is afforded to defendant, not counsel. — The right to adequate representation is a right afforded to the defendant and not a palliative afforded to counsel simply to allow counsel the highest and best opportunity to prepare a defense. *Standridge v. State*, 158

Ga. App. 482, 280 S.E.2d 850 (1981).

There is no sixth amendment guarantee of "meaningful relationship" between accused and defense counsel. *Turner v. State*, 199 Ga. App. 836, 406 S.E.2d 512 (1991).

Relationship required for ineffective assistance claim. — Dismissal of a spouse's legal malpractice claim against an attorney arising out of the attorney's representation of the other spouse and their child in three appeals was proper under O.C.G.A. § 9-11-12(b)(6) and did not violate the spouse's sixth and seventh amendment rights, as there was no attorney-client relationship between the spouse and the attorney. *Crane v. Albertelli*, 264 Ga. App. 910, 592 S.E.2d 684 (2003), cert. denied, 543 U.S. 819, 125 S. Ct. 481, 160 L. Ed. 2d 359 (2004).

Denial of a requested continuance, after an attorney volunteered to assume the representation of an accused who had been told the accused was not eligible for appointed counsel, was a denial of assistance of counsel. *Butler v. State*, 198 Ga. App. 217, 401 S.E.2d 43 (1990).

No right to acquiesce in the ineffective assistance in order to build error. — There is no right, constitutional or otherwise, to acquiesce in the ineffective assistance of counsel at trial in order to build error into the record. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

Indigent defendant's right to counsel. — An accused who is unable by reason of poverty to employ counsel is entitled to be defended in all the accused's rights as fully and to the same extent as is an accused who is able to employ the accused's own counsel to represent the accused. *Bridwell v. Aderhold*, 13 F. Supp. 253 (N.D. Ga. 1935), aff'd sub nom. *Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937), rev'd on other grounds, *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 ALR 357 (1938), overruled on other grounds, *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

Lack of counsel for indigent persons being tried for crimes is a deprivation of their constitutional rights. *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964).

The courts have uniformly adopted the practice of assigning counsel to represent indigent criminals in all cases when they were unable to employ counsel to represent

them. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966). For comment, see 18 Mercer L. Rev. 477 (1967).

Indigent defendant in a criminal case is entitled to the assistance of an attorney. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

An impoverished defendant who is unable to employ or arrange for counsel must be afforded an attorney when the defendant requests it in order to meet the constitutional guarantee and to afford due process. *Perry v. State*, 120 Ga. App. 304, 170 S.E.2d 350 (1969).

The right to counsel, guaranteed by U.S. Const., amend. 6 and applicable to the states by virtue of U.S. Const., amend. 14, includes the right to appointed counsel if the defendant is indigent. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

As to inadequacy of "Declaration of Indigency" form indirectly denying the defendant the right to appointed counsel, see *Stapp v. State*, 249 Ga. 289, 290 S.E.2d 439 (1982).

U.S. Const., amend. 6 guarantees to the nonindigent the right to the effective assistance of retained counsel. *Goodwin v. Smith*, 439 F.2d 1180 (5th Cir. 1971).

Distinction between retained and court-appointed counsel as to the degree of protection due to criminal defendants has been abolished. *Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981).

Right to counsel in felony cases. — It is unconstitutional to try a person on a state felony charge unless the person has the assistance of counsel or has validly waived it. *Wren v. United States Bd. of Parole*, 389 F. Supp. 938 (N.D. Ga. 1975).

The right to appointed counsel in misdemeanor cases arises only when a defendant is actually sentenced to a term of imprisonment. *Peters v. State*, 210 Ga. App. 211, 435 S.E.2d 731 (1993).

Classification of offense as petty or serious. — The length of the maximum sentence authorized by a statute proscribing criminal conduct determines the classification of an offense as petty or serious, and to do so all charges against an accused must be cumulated in measuring the possible sentence which could be imposed for the pur-

pose of calculating whether the offense is petty or serious, and where an offense is classified as serious, counsel must be furnished. *Shepherd v. Jordan*, 425 F.2d 1174 (5th Cir. 1970).

Loss of jurisdiction through failure to appoint counsel. — Unless an accused has intelligently and effectively waived the right to counsel, U.S. Const., amend. 6 stands as a jurisdictional bar to a valid conviction and sentence depriving the accused of the accused's life or the accused's liberty. *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), overruled on other grounds, *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998); *Boruff v. United States*, 310 F.2d 918 (5th Cir. 1962).

A court's jurisdiction at the beginning of trial may be lost in the course of the proceedings due to failure to complete the court, as U.S. Const., amend. 6 requires, by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of U.S. Const., amend. 6 is not complied with, the court no longer has jurisdiction to proceed. *Reid v. Sanford*, 42 F. Supp. 300 (N.D. Ga. 1941).

Lack of counsel is a fatal defect unless cured by a showing that the defendant intelligently and voluntarily waived the right thereto. Anything less is not waiver. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

Psychiatric examination. — Defendant's suppression motion was properly denied as to the defendant's psychiatric examination by a state's expert as the defendant's counsel knew of the time, place, scope, and nature of the examination, but chose not to attend; the examination did not violate the defendant's fifth or sixth amendment rights. *Durham v. State*, 281 Ga. 208, 636 S.E.2d 513 (2006).

Re-sentencing. — Defendant's re-sentencing without court-appointed counsel to represent the defendant was affirmed as the trial court was simply instructed to merge the defendant's armed robbery conviction into the defendant's felony murder conviction; as the trial court had no discretion in the matter and its re-sentencing of the defendant was a ministerial act, the re-sentencing was proper. *Robertson v. State*, 280 Ga. 885, 635 S.E.2d 138 (2006).

Right to Counsel (Cont'd)**1. In General (Cont'd)**

Habeas corpus proceedings. — Georgia is not constitutionally required to provide counsel in death penalty habeas corpus proceedings in order to ensure the fundamental fairness of Georgia's death penalty procedures and meaningful access to the courts. *Gibson v. Turpin*, 270 Ga. 855, 513 S.E.2d 186 (1999), cert. denied, 528 U.S. 946, 120 S. Ct. 363, 145 L. Ed. 2d 284 (1999).

There is no right under U.S. Const., amend. 6 to be represented by a nonattorney. *United States v. Bertolini*, 576 F.2d 1133 (5th Cir. 1978); *United States v. Anderson*, 577 F.2d 258 (5th Cir. 1978); *Pfeiffer v. State*, 173 Ga. App. 374, 326 S.E.2d 562 (1985); *Lebrun v. State*, 255 Ga. 406, 339 S.E.2d 227 (1986); *Cruickshank v. State*, 258 Ga. 544, 372 S.E.2d 223 (1988).

While an accused has a right to representation by an attorney and to represent oneself, there is no right to be represented by a non-lawyer third party. *Mercier v. State*, 203 Ga. App. 494, 417 S.E.2d 430 (1992).

No right to chosen counsel. — Although the sixth amendment guarantees every defendant aid of an attorney, that attorney need not be counsel of defendant's choosing. *Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982).

Qualified right to counsel of choice. — The sixth amendment comprehends a qualified right to select and be represented by counsel of choice. The right to counsel of choice belongs solely to criminal defendants possessing legitimate, uncontested assets, and a defendant may not insist on representation by an attorney the defendant cannot afford. *United States v. Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 849, 110 S. Ct. 146, 107 L. Ed. 2d 104, 493 U.S. 876, 110 S. Ct. 213, 107 L. Ed. 2d 166 (1989).

Standing. — Even if the Drug Enforcement Administration agents' actions violated a co-conspirator's right to counsel, defendant had no standing to assert this claim; defendants do not have standing to assert in their own defense the denial of constitutional rights to others. *United States v. Sims*, 845 F.2d 1564 (11th Cir.), cert. denied, 488 U.S. 957, 109 S. Ct. 395, 102 L. Ed. 2d 384 (1988).

Defendant may either represent self or have an attorney. That is all U.S. Const.,

amend. 6 requires. *United States v. Anderson*, 577 F.2d 258 (5th Cir. 1978).

No distinction between retained and appointed counsel, where counsel is denied. — Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish the system of justice, a serious risk of injustice infects the trial itself and, when a state obtains a criminal conviction through such a trial, it is the state that unconstitutionally deprives the defendant of the defendant's liberty. Thus, since the state's conduct of a criminal trial itself implicates the state in the defendant's conviction, there is no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Right of an accused to communicate with someone who will contact an attorney is not included in the right to counsel. *Meyer v. State*, 150 Ga. App. 613, 258 S.E.2d 217 (1979), cert. denied, 445 U.S. 952, 100 S. Ct. 1602, 63 L. Ed. 2d 788 (1980).

Suspect in custody was required to be warned of rights prior to interrogation even though the interrogation involved an offense other than that for which the suspect was in custody. *State v. Rogers*, 173 Ga. App. 653, 327 S.E.2d 782 (1985).

Effect of request for attorney on interrogation. — A sixth amendment right to counsel, like a fifth amendment right to counsel, may be waived by the accused; in either case, once a defendant requests an attorney, all police-initiated interrogation is prohibited, and any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid, but the defendant may initiate further communications with the police. *Housel v. State*, 257 Ga. 115, 355 S.E.2d 651 (1987), cert. denied, 487 U.S. 1240, 108 S. Ct. 2915, 101 L. Ed. 2d 946 (1988).

Law enforcement authorities violated the defendant's right to counsel when they interrogated the defendant knowing that the defendant had previously requested and consulted with an attorney. *Gissendan v. State*, 269 Ga. 495, 500 S.E.2d 577 (1998).

Request must be clear. — Defendant's statements, which did not clearly request counsel, did not prohibit defendant's further questioning or the suppression of sub-

sequent statements on sixth amendment grounds. *Fitz v. State*, 275 Ga. 349, 566 S.E.2d 668 (2002).

Statement obtained without violation of rights. — Defendant's motion to suppress a videotaped statement was properly denied as the sixth amendment right to counsel was offense specific and counsel representing the defendant on unrelated charges did not have to be contacted prior to an interview about a murder; the defendant was advised of the defendant's fifth amendment right to counsel at the initiation of the questioning about the murder and executed a waiver of that right, and at a Jackson-Denno hearing, the defendant's inculpatory statement was found to have been made freely and voluntarily. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Sentencing guidelines. — United States Sentencing Guideline § 3 E1.1(b)(2), which instructs the court to reduce a defendant's sentence for "timely notifying authorities of his intention to plead guilty," is not unconstitutional on its face. *United States v. McConaghy*, 23 F.3d 351 (11th Cir. 1994).

Obtaining incriminating evidence through wired co-defendant violates constitution. — The defendant was denied the assistance of counsel guaranteed by the sixth amendment, where law enforcement officers sought to obtain incriminating information from the defendant through the use of a co-defendant's undisclosed body wire transmitter while the defendant was under indictment and after the defendant had exercised the sixth amendment right to counsel. *Brown v. State*, 199 Ga. App. 18, 404 S.E.2d 154 (1991).

Applicable standard for ineffective assistance of counsel is found in the two-pronged Strickland analysis (*Strickland v. State*, 257 Ga. 230, 357 S.E.2d 85 (1987)); in the absence of one or both prongs, the federal and the Georgia Constitutions authorize a finding that a defendant's sixth amendment right to counsel has not been abridged. *Gordillo v. State*, 255 Ga. App. 73, 564 S.E.2d 486 (2002).

Presumption as to discharge of duties regarding right to counsel. — If any presumption is to be indulged in as a result of silence regarding counsel for the defendant in the record of a state criminal offense, it should be presumed that the court dis-

charged its state and federal duties to the defendant, including those relating to the defendant's right, if any, to the assistance of counsel. *White v. Grimes*, 216 Ga. 335, 116 S.E.2d 561 (1960).

Where the record of the trial does not affirmatively show in a felony case that the accused person of mature age was denied the benefit of counsel, it must be presumed that the trial judge did the judge's duty and that the accused was not denied the right to counsel. *White v. Grimes*, 216 Ga. 335, 116 S.E.2d 561 (1960).

Requiring defendant to indicate lead counsel not error. — It was not error to require a defendant in a criminal case to designate either the defendant or the defendant's attorney as lead counsel where the defendant was not denied the right to participate as co-counsel or required to elect whether to defend self or permit appointed counsel to defend the defendant. *Garvey v. State*, 176 Ga. App. 268, 335 S.E.2d 640 (1985).

Defendant not denied assistance of counsel where co-counsel present and defendant uninjured. — Where none of the statutory requirements necessary for the granting of a continuance are put forth by co-counsel when the case was called, and there is no showing that the defendant was injured by the absence of the defendant's lead counsel, there is no merit in the complaint that the trial court erred in denying the defendant's motion for continuance because of the absence of counsel and that the defendant has been denied the defendant's sixth amendment right to counsel and the defendant's fifth amendment right to due process as guaranteed by the state and federal constitutions. *Blair v. State*, 166 Ga. App. 434, 304 S.E.2d 535 (1983).

Where the defendant moves for a continuance on the ground that the defendant's lead counsel is absent, and the motion is denied, the defendant is not denied the right to counsel where the defendant is represented by another attorney, the defendant's original counsel of record. *Myrick v. State*, 168 Ga. App. 223, 308 S.E.2d 563 (1983).

Defendant not denied assistance of counsel where co-counsel disqualified by court. — Defendant was not deprived of the sixth amendment right to counsel of the defen-

Right to Counsel (Cont'd)**1. In General (Cont'd)**

dant's choice by the trial judge's disqualification of the defendant's co-counsel, where the defendant had told the judge that the defendant wanted to keep the defendant's other counsel "because he's familiar with me and my case." *United States v. Stuckey*, 917 F.2d 1537 (11th Cir. 1990), cert. denied, 498 U.S. 1091, 111 S. Ct. 972, 112 L. Ed. 2d 1058 (1991).

Collateral use in later trials of convictions obtained in violation of right to counsel. — Prior convictions obtained in violation of a defendant's right to appointed counsel where the defendant is indigent cannot be introduced for collateral use in subsequent trials, such as for the purpose of imposing a recidivist sentence. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), has a retroactive effect where records of prior convictions obtained in violation of its standards are introduced for collateral use in subsequent trials, and such convictions, even though obtained prior to *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) cannot be used for the purpose of imposing a recidivist sentence. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

The sixth amendment prohibits the use for enhancement of a sentence of a conviction obtained in a proceeding in which defendant lacked the assistance of counsel. *Greene v. United States*, 880 F.2d 1299 (11th Cir. 1989), cert. denied, 494 U.S. 1018, 110 S. Ct. 1322, 108 L. Ed. 2d 498 (1990).

No federal constitutional right to counsel exists at a pre-indictment lineup. *Phillips v. State*, 204 Ga. App. 698, 420 S.E.2d 316 (1992).

Identification at post-indictment arraignment calendar was not a violation of defendant's right to counsel where it was not a formal line-up, where the identification was incidental to the informal interview of a witness and where the in-court identification was reliable. *Robinson v. State*, 164 Ga. App. 379, 296 S.E.2d 225 (1982).

Defendant was not entitled to free counsel at the arraignment, where it appeared that the defendant was at liberty, employable and

college-educated, and that there was ample time before the case would be set for trial. *Boles v. State*, 178 Ga. App. 508, 343 S.E.2d 729 (1986).

Right of persons who plead guilty. — The right to the assistance of counsel applies to an accused who must decide whether to plead guilty as well as to an accused who stands trial. *Colson v. Smith*, 438 F.2d 1075 (5th Cir. 1971).

The threshold right to the assistance of counsel is no less momentous to an accused who must decide whether to plead guilty than to an accused who stands trial. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Assistance of counsel in entry of plea. — A defendant, who was sentenced as a recidivist to life imprisonment without the possibility of parole, failed to show that defense counsel was ineffective for failing to inform defendant that defendant would likely receive a mandatory sentence of life without parole if defendant rejected a plea offer because defendant failed to show that, when defendant rejected the plea, defendant was amenable to the offer made by the state. *Carson v. State*, 264 Ga. App. 763, 592 S.E.2d 161 (2003).

Court shall not accept a plea of guilty without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971).

Guilty plea freely and voluntarily entered. — Because a trial judge informed defendant of the charges as well as the possible penalties for conviction on those charges, defendant's guilty plea was freely and voluntarily entered. *Hart v. State*, 272 Ga. App. 754, 613 S.E.2d 107 (2005).

That judge "explained his rights" is insufficient to show validity of plea. — A mere recital by the habeas corpus judge, who had also been the sentencing judge, that prior to sentence the judge "explained his rights" to the petitioner is not a sufficient showing that guilty pleas were entered intelligently and voluntarily. *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971).

Use of statements where counsel denied when made. — Neither inculpatory state-

ments nor exculpatory statements such as alibis may be used against an accused if the accused was denied counsel when the statements were made. *Echols v. Caldwell*, 334 F. Supp. 1356 (N.D. Ga. 1971).

Statements to police in absence of counsel by defendant who has counsel. — Where a defendant is known by police to be represented by counsel, it is not the case that anything the defendant says to police in absence of counsel is per se inadmissible, whether “voluntary” or not. *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975).

Suspect voluntarily speaking to police. — Nothing in the sixth amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on the suspect’s own, to speak with police in the absence of an attorney. *Starks v. State*, 262 Ga. 244, 416 S.E.2d 520 (1992).

Defendant acting on advice of deputy sheriff rather than counsel. — Defendant’s right to counsel was not violated because a sheriff’s deputy, without the knowledge of the defendant’s trial counsel, advised the defendant to go to trial. *Hammonds v. State*, 218 Ga. App. 423, 461 S.E.2d 589 (1995).

When conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial. *United States v. Kilrain*, 566 F.2d 979 (5th Cir.), cert. denied, 439 U.S. 819, 99 S. Ct. 80, 58 L. Ed. 2d 109 (1978).

Pretrial detainees are denied meaningful access to their counsel in violation of U.S. Const., amend. 6 if, in the facilities provided for attorney-client conferences, conversation is difficult and privacy is impossible, as where the facilities provided by the prison for attorney-client conferences are partitioned rooms in which the attorney and client, in order to engage in conversation at all, have to converse at a level loud enough to be overheard by other prisoners and prison employees. *Wright v. State*, 250 Ga. 570, 300 S.E.2d 147 (1983).

Electronic surveillance of suspect not in custody. — The rights to remain silent and to have the assistance of counsel do not apply to electronic surveillance of a suspect who is not in custody. *Granese v. State*, 232 Ga. 193, 206 S.E.2d 26 (1974).

Statements of defendant overheard by concealed officers. — Evidence of state-

ments made by the defendant in a conversation overheard by the arresting officers who had concealed themselves, as planned between them and the person with whom the defendant talked, does not amount to evidence given by the defendant involuntarily and without the advice of counsel, and is not coerced from the defendant in violation of the defendant’s rights not to be compelled to be a witness against himself. *Blackwell v. State*, 113 Ga. App. 536, 148 S.E.2d 912 (1966).

Government deliberately violated the defendant’s sixth amendment right to counsel when it surreptitiously recorded the defendant’s telephone conversations with a government informant following the defendant’s indictment and during the period of the defendant’s pretrial detention. *United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990).

Jailhouse informants. — To prove a sixth amendment violation in a jailhouse informant case, a defendant must show that the informant was a government agent and that the informant deliberately elicited incriminating statements from the defendant. *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir.), cert. denied, 516 U.S. 946, 116 S. Ct. 385, 133 L. Ed. 2d 307 (1995).

Interrogation of a witness known to be represented by counsel in another case is permitted. *Drake v. State*, 245 Ga. 798, 267 S.E.2d 237 (1980).

Although *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), stands for the proposition that it violates the accused’s right to counsel for the police to interview the accused outside the defense attorney’s presence once it is known the accused is represented by counsel, that decision does not prohibit questioning where the investigation concerns an offense separate from that in which the accused is known to be represented by counsel. *Spence v. State*, 252 Ga. 338, 313 S.E.2d 475 (1984).

Payment for expert witnesses for indigents. — Defense counsel is not required to pay out of counsel’s own pocket for expert psychiatric witnesses for an indigent defendant. *Bowden v. Zant*, 244 Ga. 260, 260 S.E.2d 465 (1979), cert. denied, 444 U.S. 1103, 100 S. Ct. 1068, 62 L. Ed. 2d 788 (1980).

The exact parameters of an indigent de-

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fendant's constitutional right to expert assistance in the preparation of the defense have not yet been fully developed. The right to counsel is an expanding concept in a developing jurisprudence in the sense that new areas are being brought within its scope as they are reached factually. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), judgment vacated on other grounds sub nom. *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

A defendant does not have a right to effective assistance of an expert witness which is distinct from the right to effective assistance of counsel. *Turpin v. Bennett*, 270 Ga. 584, 513 S.E.2d 478 (1999).

Right to have psychiatrist examine defendant. — Where the defendant has twice been committed to a mental institution, the right to have a psychiatrist appointed to examine the defendant is a right cognate to the effective assistance of counsel under U.S. Const., amend. 6. *United States ex rel. Huguley v. Martin*, 325 F. Supp. 489 (N.D. Ga. 1971).

Defendant does not have constitutional right to counsel during state's psychiatric examination. *Godfrey v. Francis*, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Advance notice and opportunity to consult concerning defendant's psychiatric examination. — While there was no constitutional violation due to defense counsel's absence from the defendant's psychiatric examination, the conviction and sentencing had to be vacated as a result of the lack of advance notice to counsel and of the lack of the opportunity to consult. *Godfrey v. Francis*, 613 F. Supp. 747 (N.D. Ga. 1985), aff'd, 836 F.2d 1557 (11th Cir.), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Refusal to disclose to defendant the statements made to a psychologist by a prosecution witness during hypnotic sessions does not deny the defendant due process of law nor effective assistance of counsel because such statements are inadmissible at trial. *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974).

Denial of appellant's request to use an unofficial court reporter at the appellant's expense does not deprive the appellant of the constitutional right to a fair trial. *Estep v. State*, 129 Ga. App. 909, 201 S.E.2d 809 (1973).

Right to consultation with counsel during recess. — Where defendant had completed the defendant's direct testimony, an order prohibiting consultation with the doctor's counsel about the defendant's ongoing testimony during a weekend recess did not violate the defendant's right to assistance of counsel since the defendant and the defendant's counsel did not indicate a desire to consult over the weekend and no objection to the order was made at the time. *Parker v. State*, 220 Ga. App. 303, 469 S.E.2d 410 (1996).

Consideration of person's prior uncounseled convictions for driving under the influence in determining an appropriate sentence for a subsequent conviction does not violate any constitutional right to counsel because the driving under the influence statute (O.C.G.A. § 40-6-391) is not an enhanced penalty statute since it neither increases the maximum confinement authorized nor converts a misdemeanor offense into a felony. *Moore v. State*, 181 Ga. App. 548, 352 S.E.2d 821, cert. denied, 484 U.S. 904, 108 S. Ct. 247, 98 L. Ed. 2d 204 (1987).

Any contention concerning the violation of the constitutional right of counsel should be made at the earliest practicable moment. *Smith v. State*, 255 Ga. 654, 341 S.E.2d 5, aff'd, 181 Ga. App. 286, 351 S.E.2d 641 (1986).

Denial of right must be raised in trial court. — From the date this opinion is published in the official advance sheets any ineffective counsel challenge will be deemed waived if the new attorney files an amended motion for new trial and does not raise the issue before the trial court so that the challenge can be heard at the earliest practicable moment, i.e., during the hearing on the amended motion, and such cases will no longer be remanded. *Thompson v. State*, 257 Ga. 386, 359 S.E.2d 664 (1987).

Defendant's diligence in obtaining counsel. — Where trial of defendant had been continued in order to accommodate defendant's request to obtain different counsel and defendant had been told when the case

would be tried and warned of the dangers of proceeding without counsel and the defendant appeared without counsel on the date set, before proceeding to trial the court should have made inquiry as to whether defendant's failure to obtain counsel was attributable to the defendant's own lack of diligence. *Hasty v. State*, 210 Ga. App. 722, 437 S.E.2d 638 (1993).

Evidence that defendant made numerous unsuccessful attempts to retain counsel and that the defendant's inability to do so was because of lack of funds demanded a finding of due diligence as a matter of law. *Hasty v. State*, 215 Ga. App. 155, 450 S.E.2d 278 (1994).

Incriminating statements not obtained in violation of right to counsel. See *United States v. Kelly*, 749 F.2d 1541 (11th Cir.), cert. denied, 472 U.S. 1029, 105 S. Ct. 3506, 87 L. Ed. 2d 636 (1985).

Advice concerning testimony by accused. — Despite defendant's contentions that defendant's trial counsel was ineffective in not advising the defendant in any meaningful way about the decision of whether to testify, defendant failed to show any error; furthermore, when asked by the court about whether or not defendant wished to testify, defendant stated that defendant understood defendant's right, had discussed the matter with counsel, and decided in the end not to do so. *Sims v. State*, 278 Ga. 587, 604 S.E.2d 799 (2004).

Admission of non-privileged attorney-client communications. — Defendant's claim of violation of the right to counsel was without merit because the defendant was charged in a one count indictment with failure to appear to begin serving a lawfully imposed sentence and the trial court denied the defendant's motion in limine to prevent the admission of testimony by the defendant's former attorney that the attorney had informed the defendant of the proper surrender date on the ground that such a communication was not protected by the attorney-client privilege. *United States v. Innella*, 821 F.2d 1566 (11th Cir. 1987).

Right with regard to videotaped statement. — Defendant's invocation of the right to counsel with regard to a videotaped statement was an invocation of a limited right only, which the police were required to honor to no greater extent than the express

limits of the reservation. *Ford v. State*, 257 Ga. 461, 360 S.E.2d 258 (1987), cert. denied, 485 U.S. 943, 108 S. Ct. 1124, 99 L. Ed. 2d 284 (1988).

Conversation with government informant. — Regardless of who initiates the conversation, the sixth amendment is violated whenever a government informant actively engages a defendant in conversation that is likely to elicit incriminating statements about the defendant's upcoming trial. *United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990).

In order to establish a prisoner's claim that the state violated the prisoner's right to counsel by using jailhouse informants deliberately to elicit incriminating information from the prisoner in the absence of counsel, the prisoner must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the prisoner. *Depree v. Thomas*, 946 F.2d 784 (11th Cir. 1991).

Burden and standard of proof of lack of benefit of counsel. — When an accused pleads guilty to criminal offenses and afterwards seeks release from prison on the ground that the accused did not at the time they were imposed upon the accused have the benefit of counsel, the accused has the burden of establishing that contention by a preponderance of the evidence. *Cobb v. Dutton*, 222 Ga. 11, 148 S.E.2d 399 (1966).

The burden in a habeas corpus proceeding is on the petitioner to demonstrate that the petitioner was unaware of the disadvantages to be encountered by lack of counsel. *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

Denial of a requested continuance, after an attorney volunteered to assume the representation of an accused who had been told the accused was not eligible for appointed counsel, was denial of counsel. *Butler v. State*, 198 Ga. App. 217, 401 S.E.2d 43 (1990), cert. denied, 198 Ga. App. 897, 401 S.E.2d 43 (1991).

Federal abstention. — The court of appeals abstained from exercising its equitable jurisdiction to hear a class action claim that Georgia's indigent defense system was inherently incapable of providing constitutionally

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adequate services and that the system therefore violated the sixth, eighth, and fourteenth amendments to the United States Constitution. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

2. When Right Attaches**Stages at which right attaches generally. —**

It is the right of a defendant to have counsel with the defendant at every stage during the trial of a case. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), *aff'd*, 131 F.2d 110 (5th Cir. 1942), *cert. denied*, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943); *Leverette v. State*, 104 Ga. App. 743, 122 S.E.2d 745 (1961).

The mandate of U.S. Const., amend. 6 that every accused in a criminal prosecution has the right to the assistance of counsel for the defense at every critical stage of the case as an essential component of due process in a trial in a state court compels every agency of government concerned with the operation of the courts to acknowledge the necessity for and implement the means by which this necessary public purpose must be accomplished. The provisions of the state Constitution make the same demand. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, *cert. denied*, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

An accused requires the guiding hand of counsel at every step in the proceedings against the accused. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

The accused's right to counsel includes the benefit of counsel at all the critical stages of the case and sufficiently prior to the trial for adequate preparation. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973).

Attachment of right in felony cases generally. — The right of a person accused of a felony to the aid of counsel at all critical stages of proceedings designed to bring the accused to trial is fundamental and must be protected by the state. This doctrine requires counsel at least at the stage of arraignment in noncapital cases as well as in capital felony cases. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, *cert. denied*, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

The right of a person accused of a felony

to the aid of counsel at all critical stages of criminal proceedings, before trial, and prosecute an appeal provided by state law, is fundamental and must be protected by the state. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, *cert. denied*, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966). For comment, see 18 Mercer L. Rev. 477 (1967).

A person charged with a felony in a state court has an unconditional and absolute constitutional right to a lawyer. This right attaches at the pleading stage of the criminal process, and may be waived only by voluntary and knowing action. *Boyd v. Dutton*, 405 U.S. 1, 92 S. Ct. 759, 30 L. Ed. 2d 755 (1972).

At the very least, every person charged with a felony has an unconditional and absolute constitutional right to have available the services of an attorney at every stage of the trial. *Bradley v. State*, 135 Ga. App. 865, 219 S.E.2d 451 (1975).

When right commences. — Right to counsel under U.S. Const., amend. 6 and U.S. Const., amend. 14, attaches only at or after the time that adversary judicial proceedings have been initiated against a person. *West v. State*, 229 Ga. 427, 192 S.E.2d 163 (1972).

Right to counsel attaches only after the onset of formal prosecutorial proceedings. *Mitchell v. Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972); *Hicks v. States*, 256 Ga. 266, 347 S.E.2d 589 (1986).

Right to counsel does not arise until adversary judicial proceedings are commenced. *Brown v. State*, 181 Ga. App. 130, 351 S.E.2d 520 (1986).

Where a custodial interrogation took place prior to any adversarial proceedings being initiated, the sixth amendment right to counsel had not attached. *Beck v. State*, 235 Ga. App. 707, 510 S.E.2d 368 (1999).

Because the right to counsel does not attach until "trial-type confrontations with prosecutor" begins, a defendant may not invoke the right to counsel under the defendant where no prosecutor is present and there are no issues to resolve except to set a date for a "confrontation." *Ross v. State*, 254 Ga. 22, 326 S.E.2d 194, *cert. denied*, 472 U.S. 1022, 105 S. Ct. 3490, 87 L. Ed. 2d 623 (1985).

The right to counsel attaches only at or after formal adversary proceedings. *McCounly v. State*, 191 Ga. App. 266, 381 S.E.2d 552 (1989).

Right not extended to probation revocation proceedings. — Probationer had no U.S. Const., amend. 6 right to counsel at a revocation proceeding because it was not a stage of a criminal prosecution, and only had a more limited due process right to counsel under U.S. Const., amend. 14; trial court's flawed reasoning for refusing to appoint counsel for the defendant in a probation revocation proceeding was harmless because the defendant admitted to having committed another crime, did not claim any reasons justifying or mitigating the violations, capably spoke for the defendant, and failed to show a lack of fundamental fairness. *Banks v. State*, 275 Ga. App. 326, 620 S.E.2d 581 (2005).

Effect of execution of eligibility form for court-appointed counsel. — Defendant's execution of an "eligibility affidavit form," essentially a financial statement made for the purpose of informing county indigent defense program of an accused's financial condition, constituted a request for court-appointed counsel once judicial proceedings were initiated and did not constitute an invocation of the right to counsel for fifth amendment purposes; thus, a statement given to police while in custody was not taken in violation of defendant's constitutional rights because at the time the defendant completed the form, no adversarial criminal proceeding had been initiated against the defendant and no sixth amendment concerns had come into play. *State v. Hatcher*, 264 Ga. 556, 448 S.E.2d 698 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 291 (1995).

An application for appointment of counsel prior to the initiation of an adversarial judicial proceeding against defendant did not constitute the invocation of the right to counsel for fifth amendment purposes. *Turner v. State*, 267 Ga. 149, 476 S.E.2d 252 (1996).

Defendants' right to counsel is not superior to state's right to try the defendant. — The sixth amendment right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990).

Indigents must be furnished counsel at every critical stage of criminal proceedings, including the first appeal, under U.S. Const.,

amend. 6 and U.S. Const., amend. 14. *Thorton v. Ault*, 233 Ga. 172, 210 S.E.2d 683 (1974).

Indigents must be informed of the right to counsel during any critical stage preceding trial. — What will be a critical stage will vary from case to case and circumstance to circumstance. *Lumpkin v. Smith*, 309 F. Supp. 1325 (N.D. Ga. 1970), rev'd on other grounds, 439 F.2d 1084 (5th Cir. 1971).

No attorney required where request ambiguous. — Defendant's motion to suppress inculpatory custodial statements that defendant made after the defendant was informed of the defendant's Miranda rights and signed a waiver of the defendant's rights was properly denied where the defendant did not unequivocally request an attorney and any ambivalent statements made by the defendant were not deemed assertions of the defendant's right; there was no constitutional requirement under U.S. Const., amend. 6 for the detective to ask clarifying questions following the defendant's ambiguous request for the attorney. *Braham v. State*, 260 Ga. App. 533, 580 S.E.2d 256 (2003).

Denial of defendant's suppression motion as to defendant's videotaped statement was proper as the statement was ambiguous as to whether defendant invoked defendant's right to counsel and after the disputed invocation of defendant's right to counsel, defendant agreed to answer questions; the trial court's interpretation of the disputed statement was not clearly erroneous, and even if the admission of the videotaped statement was in error, it would not warrant reversal because the statement was cumulative of other evidence. *Christopher v. State*, 262 Ga. App. 257, 585 S.E.2d 107 (2003).

Assertion by accused of right. — If an accused asserts the right to counsel during custodial interrogation, the accused is not subject to further interrogation by the authorities until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. *Ford v. State*, 257 Ga. 461, 360 S.E.2d 258 (1987), cert. denied, 485 U.S. 943, 108 S. Ct. 1124, 99 L. Ed. 2d 284 (1988).

Because the defendant advised a justice of the peace that the defendant would get the defendant's own attorney rather than have the state appoint one for the defendant, the

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defendant thereby "asserted" the defendant's right to counsel, and any waiver of the right to counsel for a subsequent police-initiated interrogation was invalid. *Fleming v. Kemp*, 837 F.2d 940 (11th Cir. 1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1764, 104 L. Ed. 2d 200 (1989).

What constitutes custodial interrogation.

— The custodial interrogation which requires investigating officers to advise the person interrogated of constitutional rights to counsel and against self-incrimination is that interrogation which occurs after the investigation has focused on an accused. *Boutwell v. State*, 256 Ga. 63, 344 S.E.2d 222 (1986).

Non-custodial polygraph examination.

— Stipulation permitting the admissibility of polygraph examination results was valid though secured without advice of counsel since defendant was not in custody for *Miranda* purposes at the time the stipulation was obtained or the test administered. *Brown v. State*, 209 Ga. App. 314, 433 S.E.2d 321 (1993).

Mere verbal arrest does not constitute an "adversary judicial proceeding" and, therefore, does not trigger U.S. Const., amend. 6's right to counsel. *Jarrell v. Balkcom*, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985).

Adversarial judicial proceedings do not commence with the issuance of an arrest warrant, because an arrest warrant is issuable in an ex parte proceeding. *Ford v. State*, 256 Ga. 375, 349 S.E.2d 361 (1986).

Bright-line rule that prohibits police-initiated interrogations after a defendant has asserted the fifth amendment right to counsel also applies when a defendant has asserted the sixth amendment right to counsel at an arraignment or similar proceedings. *Collins v. Zant*, 892 F.2d 1502 (11th Cir.), cert. denied, 449 U.S. 1103, 101 S. Ct. 990, 66 L. Ed. 2d 829 (1981).

Right to counsel during investigative stage of proceedings. — U.S. Const., amend. 6 does not give to the accused the absolute right to the services of a lawyer during the investigative stage of the proceedings against the accused. *Sims v. State*, 221 Ga. 190, 144

S.E.2d 103 (1965), rev'd on other grounds, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593, later appeal, 223 Ga. 465, 156 S.E.2d 65, rev'd on other grounds, 389 U.S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967).

Defendant was not deprived of counsel in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 when defendant made statements to police in the murder case after the defendant had been assigned counsel on a theft charge that occurred in a different county hours after the murder; the appointment of counsel in the theft case did not extend to the murder case, as they were not closely related, and the theft involved different victims from the murder, occurred well after the murder, and occurred at a different location than the murder. *Chenoweth v. State*, 281 Ga. 7, 635 S.E.2d 730 (2006).

U.S. Const., amend. 6 guarantees the right to counsel at a critical pretrial confrontation where the results might well determine the fate of an accused and where the absence of counsel might derogate from the accused's right to a fair trial. *Baier v. State*, 124 Ga. App. 334, 183 S.E.2d 622 (1971).

Pretrial, post-indictment corporeal identification is a critical stage in a criminal prosecution at which U.S. Const., amend. 6 entitles the accused to the presence of counsel. *Foster v. State*, 156 Ga. App. 672, 275 S.E.2d 745 (1980).

To require a line-up in the absence of counsel and in the absence of an intelligent waiver violates U.S. Const., amend. 6. *Schmidt v. United States*, 380 F.2d 22 (5th Cir. 1967); *Ford v. State*, 227 Ga. 279, 180 S.E.2d 545 (1971).

Defendant does not have a right under U.S. Const., amend. 6 to counsel at a preindictment line-up. *Disby v. State*, 238 Ga. 178, 231 S.E.2d 763 (1977); *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978); *Young v. State*, 243 Ga. 546, 255 S.E.2d 20 (1979); *Johnson v. State*, 153 Ga. App. 398, 265 S.E.2d 331 (1980); *Davis v. State*, 155 Ga. App. 511, 271 S.E.2d 648 (1980); *Arnold v. State*, 155 Ga. App. 569, 271 S.E.2d 702 (1980); *Davis v. State*, 176 Ga. App. 650, 337 S.E.2d 431 (1985); *Snider v. State*, 200 Ga. App. 12, 406 S.E.2d 542 (1991); *Campbell v. State*, 206 Ga. App. 456, 426 S.E.2d 45 (1992).

Where, at the time a witness observed the defendant in a physical lineup, adversarial criminal proceedings had not begun, defendant was not entitled to counsel at the lineup proceeding. *Lee v. State*, 165 Ga. App. 549, 301 S.E.2d 906 (1983).

The defendant does not have the right to have counsel present at the lineup if the lineup takes place prior to indictment and, therefore, prior to the commencement of adversary judicial proceedings. *Harris v. State*, 168 Ga. App. 159, 308 S.E.2d 406 (1983).

Where defendant enumerated as error the failure of the state to provide the defendant with counsel at the physical lineup, it was held that the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment—because the initiation of such proceedings marks the commencement of the “criminal prosecutions” to which alone the explicit guarantees of the sixth amendment are applicable. *Houston v. State*, 187 Ga. App. 335, 370 S.E.2d 178 (1988).

Defendant, who had been charged with crimes against a first victim, but who had not been charged with crimes committed on second and third victims, did not have any right to counsel at a lineup at which the defendant was identified by the second and third victims. *Ferguson v. State*, 211 Ga. App. 218, 438 S.E.2d 682 (1993).

Defendant has a constitutional right to have counsel present at a post-indictment lineup. *Philpot v. State*, 128 Ga. App. 243, 196 S.E.2d 358 (1973).

Presence of counsel at a line-up at or after the beginning of adversary judicial proceedings is required. *Godbee v. State*, 232 Ga. 259, 206 S.E.2d 432 (1974).

Presence of counsel not required during investigatory stages of the case. *Godbee v. State*, 232 Ga. 259, 206 S.E.2d 432 (1974); *Jones v. State*, 232 Ga. 771, 208 S.E.2d 825 (1974), cert. denied, 419 U.S. 1115, 95 S. Ct. 795, 42 L. Ed. 2d 814 (1975).

Failure to provide counsel in a line-up held prior to either an indictment or commitment hearing is not error. *Painter v. State*, 237 Ga. 30, 226 S.E.2d 578 (1976).

Failure to provide counsel in a line-up held prior to either an indictment or com-

mitment hearing does not invalidate a conviction. *Hunt v. Hopper*, 232 Ga. 53, 205 S.E.2d 303 (1974).

Where the line-up is the result of a witness' prior identification, any error in not appointing counsel to be present is harmless. *Philpot v. State*, 128 Ga. App. 243, 196 S.E.2d 358 (1973).

Request for consent to search. — Because a request for a consent to search is not a trial-like confrontation where the absence of counsel poses a threat of substantial prejudice to the accused like that posed by the absence of counsel at a pretrial lineup, or a pretrial interrogation, but is instead more analogous to a request for other types of physical evidence, such as handwriting exemplars and blood samples, a consent to search situation is not a critical stage of the proceedings against an accused to which the right of counsel attaches. *United States v. Hidalgo*, 7 F.3d 1566 (11th Cir. 1993).

Absence of counsel from pretrial photographic identification. — A defendant's rights under U.S. Const., amend. 6 are not violated because defense counsel is not present at a pretrial photographic identification. *Morrison v. State*, 129 Ga. App. 558, 200 S.E.2d 286 (1973); *United States v. Gidley*, 527 F.2d 1345 (5th Cir.), cert. denied, 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110 (1976).

Out-of-court photographic identification in defendant's absence. — There is no established constitutional right to counsel at an out-of-court photographic identification where the defendant is not present. *Carter v. State*, 157 Ga. App. 445, 278 S.E.2d 93 (1981).

Preindictment photographic identification does not require presence of counsel. *Carter v. State*, 157 Ga. App. 445, 278 S.E.2d 93 (1981).

No right during appearance of witness before grand jury. — A witness has no constitutional or legal right to have counsel with the witness when the witness appears before a grand jury. *In re Earnest*, 90 F.R.D. 698 (M.D. Ga. 1981).

Constitutional rights are not denied where fingerprints are taken in the absence of counsel. *Ward v. United States*, 486 F.2d 305 (5th Cir. 1973), cert. denied, 416 U.S. 990, 94 S. Ct. 2398, 40 L. Ed. 2d 768 (1974).

Taking of fingerprints is not a critical stage at which the accused is entitled to the

Right to Counsel (Cont'd)**2. When Right Attaches (Cont'd)**

presence of counsel. *Wilson v. State*, 158 Ga. App. 174, 279 S.E.2d 345 (1981).

Psychiatric examination where insanity defense not put forth. — The defendant was not deprived of the right to counsel at a “critical stage” of the proceedings against the defendant, a psychiatric examination, where the psychiatrist’s later trial testimony was merely a comment on the defendant’s sanity at the time of the crime, a legal presumption which the defendant never rebutted through the use of the insanity defense. *Cape v. Francis*, 741 F.2d 1287 (11th Cir. 1984), cert. denied, 474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 245 (1985).

Defendant’s first-appearance hearing before a magistrate was not a critical stage of prosecution within the context of the sixth amendment right to counsel, and the defendant was therefore not entitled to the presence of counsel at the hearing. *State v. Simmons*, 260 Ga. 92, 390 S.E.2d 43 (1990).

Voice identification procedure. — Where the defendant and others are requested by investigating officers to speak into a telephone for the purpose of identifying by the defendant’s voice which of them had made obscene telephone calls, and where the suspects comply, the situation does not amount to a critical stage of the defendant’s prosecution and the defendant is neither entitled to receive warning of the defendant’s rights under U.S. Const., amend. 6 or U.S. Const., amend. 5, nor are the defendant’s rights violated. *Bradford v. State*, 118 Ga. App. 457, 164 S.E.2d 264 (1968), cert. denied, 394 U.S. 1020, 89 S. Ct. 1644, 23 L. Ed. 2d 46 (1969).

Preindictment voice identification procedure conducted in the absence of counsel does not violate a defendant’s rights under the defendant. *Evans v. State*, 235 Ga. 396, 219 S.E.2d 725 (1975); *Arnold v. State*, 155 Ga. App. 569, 271 S.E.2d 702 (1980).

Substitution of other counsel for suspect’s own counsel at line-up. — Although the right to counsel at a line-up usually means a right to the suspect’s own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel’s presence may eliminate the hazards which render the line-up a critical stage for the presence of the suspect’s own counsel.

Summerville v. State, 226 Ga. 854, 178 S.E.2d 162 (1970).

When courtroom identification by witness who made pretrial identification in absence of counsel is admissible. — Courtroom identification by a witness to whom the accused is exhibited in the absence of counsel before trial must be excluded unless it can be established that the evidence had an independent origin or that the error in admitting the identification was harmless. *Baier v. State*, 124 Ga. App. 334, 183 S.E.2d 622 (1971); *Carmichael v. State*, 228 Ga. 834, 188 S.E.2d 495 (1972); *Powers v. State*, 126 Ga. App. 113, 189 S.E.2d 893 (1972); *Gates v. State*, 229 Ga. 796, 194 S.E.2d 412 (1972); *Mitchell v. Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972).

Immediacy and definiteness of an identification based on a description given within an hour of the crime can be sufficient to purge an in-court identification by a witness of the primary taint of line-up where the defendant is exhibited without benefit of counsel. *Powers v. State*, 126 Ga. App. 113, 189 S.E.2d 893 (1972).

Failure to provide counsel at a probable cause hearing may not be raised after conviction by petitioners for writ of habeas corpus. *State v. Houston*, 234 Ga. 721, 218 S.E.2d 13 (1975).

Commitment hearing is a critical stage of criminal proceedings and the defendant is entitled to counsel. *State v. Houston*, 234 Ga. 721, 218 S.E.2d 13 (1975).

Preliminary hearing is a critical stage of the state’s criminal process at which the accused is as much entitled to aid of counsel as at the trial itself. *State v. Houston*, 134 Ga. App. 36, 213 S.E.2d 139, aff’d, 234 Ga. 721, 218 S.E.2d 13 (1975); *Middlebrooks v. State*, 135 Ga. App. 411, 218 S.E.2d 110 (1975), rev’d on other grounds, 236 Ga. 52, 222 S.E.2d 343 (1976).

Indigent defendant’s constitutional rights are violated if the defendant is denied appointed counsel at the preliminary hearing and the defendant suffers prejudice on the trial of the defendant’s case as a result. *Dismuke v. State*, 127 Ga. App. 835, 195 S.E.2d 259 (1973).

Waiver of right to counsel at preliminary hearing. — A defendant waives any objection to the court’s failure to appoint counsel to represent the defendant at a preliminary

hearing by the counsel's failure to object to such failure before or during the trial. *Strickland v. United States*, 447 F.2d 1341 (5th Cir. 1971).

Arraignment is a critical stage in a criminal case. — The absence or lack of counsel at such time is a violation of the right of the accused to due process. In such cases courts do not stop to determine whether prejudice resulted. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

Assistance of counsel in determining how to plead. — A defendant is entitled to effective assistance of counsel in determining how to plead and in making the plea, and can attack the conviction collaterally if the defendant is not given this right. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979).

Trial court erred in convicting defendant of incest, O.C.G.A. § 16-6-22; at a guilty plea hearing, the prosecutor alleged that defendant had sexual intercourse with the defendant's step-sibling, and sexual intercourse between step-siblings was not included in the crime of incest under O.C.G.A. § 16-6-22(a)(3). Further, the defendant received ineffective assistance of counsel at the plea hearing pursuant to U.S. Const., amend. 6, because if counsel had informed the defendant that the state could not as a matter of law prove the offense of incest because the defendant's relationship to the victim was not included within the statutory scheme for such offense, the defendant would not have pled guilty and would have insisted on going to trial. *Shabazz v. State*, 259 Ga. App. 339, 577 S.E.2d 45 (2003).

No need to appoint counsel where defendant pleads guilty. — There is no necessity for the court to appoint an attorney to represent a defendant when the defendant intelligently pleads guilty to an indictment which the defendant understands. *Adkins v. Sanford*, 120 F.2d 471 (5th Cir. 1941).

Interrogation of incarcerated defendant. — Where a defendant has been confined in a cell for nearly three months and interrogation is directed at obtaining evidence to be used in prosecuting the defendant, this is a time when legal advice is critical to the defendant and there is, therefore, a duty of the interrogators to determine if the defendant has counsel and whether the defendant

wants counsel present during the interrogation. Breach of this duty violates U.S. Const., amend. 6 and U.S. Const., amend. 5. *Clifton v. United States*, 341 F.2d 649 (5th Cir. 1965).

Statements made to parties which are not law enforcement officers or agents of the state do not trigger an accused's right to counsel. *Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685, *cert. denied*, 459 U.S. 981, 103 S. Ct. 317, 74 L. Ed. 2d 293 (1982).

Statements to witness visiting defendant. — That FBI was aware that the witness was visiting the defendant and paid the witness' travel expenses for these visits, without more, did not make such witness an agent for the government, and, therefore, the defendant had no right to have counsel present during such visits. *Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982).

Circumstances under which the government obtained statements from the defendant were not the functional equivalent of government interrogation, where the statements occurred because the defendant's relative, in a private capacity, urged the defendant to speak and the defendant agreed. *United States v. Gaddy*, 894 F.2d 1307 (11th Cir. 1990).

Right extends to stages when guilty plea might be entered. — U.S. Const., amend. 6's guarantee of counsel has been extended to the earlier stages of criminal proceedings when a guilty plea might be entered. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981) (but see *Adkins v. Sanford*, 120 F.2d 471 (5th Cir. 1941)).

Right to counsel at hearings on motion to withdraw a guilty plea. — Defendant was entitled to a re-hearing on the defendant's motion to withdraw a guilty plea where no inquiries or findings were made by the trial judge as to the defendant's right to or waiver of counsel under the U.S. Const., amend. 6 at the motion hearings. *Horne v. State*, 254 Ga. App. 207, 561 S.E.2d 491 (2002).

The trial court held a hearing on defendant's motion to withdraw a guilty plea, but did not appoint an attorney to represent defendant or inform defendant of the right to counsel; thus, defendant's constitutional right to counsel during the plea proceedings was denied. *Kennedy v. State*, 267 Ga. App. 314, 599 S.E.2d 290 (2004).

Transfer hearings under former Code 1933, § 24A-2501 (see O.C.G.A. § 15-11-30.2)

Right to Counsel (Cont'd)**2. When Right Attaches (Cont'd)**

are critically important proceedings affecting important rights of the juvenile. While hearing need not conform with all of the requirements of a criminal trial or even of the usual administrative hearing, the hearing must measure up to the essentials of due process and fair treatment. *R.S. v. State*, 156 Ga. App. 460, 274 S.E.2d 810 (1980).

Right to inspect juvenile's records and files in former Code 1933, § 24A-2501 (see O.C.G.A. § 15-11-30.2) transfer proceeding. — While former Code 1933, §§ 24A-3501 and 24A-3502 (see O.C.G.A. §§ 15-11-79 and 15-11-82) both require the consent of the court to inspect a juvenile's records and files, a juvenile's right to effective assistance of counsel limits the court's discretion to withhold such consent from counsel representing the juvenile in a critically important transfer proceeding under former Code 1933, § 24A-2501 (see O.C.G.A. § 15-11-30.2). *R.S. v. State*, 156 Ga. App. 460, 274 S.E.2d 810 (1980).

Not only are a juvenile and the juvenile's counsel entitled to know what information in the juvenile's records and files the court relied upon in its adverse decision to transfer jurisdiction from the juvenile court, but they are also entitled to view those records and files considered but not relied upon by the juvenile judge. *R.S. v. State*, 156 Ga. App. 460, 274 S.E.2d 810 (1980).

No right to be present at government's pretrial conference with witnesses. — Counsel for the defendant has no right to be present when counsel for the government holds pretrial conferences with prospective witnesses. *United States v. Ervin*, 436 F.2d 1331 (5th Cir. 1971).

Preliminary juror orientation. — The preliminary juror orientation session was not a "stage of the trial" or a "critical stage of the proceedings," such as would require reversal based solely upon the absence of the appellant or the appellant's counsel. *Bowden v. State*, 202 Ga. App. 802, 415 S.E.2d 527 (1992).

Evidentiary suppression hearing. — Defendant can waive the right to be present at a suppression hearing and that right can be waived by the defendant's counsel if the waiver is made in defendant's presence, or

with the defendant's express authority, or if the defendant subsequently acquiesces to the waiver made by counsel. *McGinnis v. State*, 208 Ga. App. 354, 430 S.E.2d 618 (1993).

Permitting appointed counsel to leave the courtroom during the state's argument does not deprive a defendant of the right to counsel in violation of U.S. Const., amend. 6 where no actual prejudice is shown. *Bryant v. Caldwell*, 484 F.2d 65 (5th Cir. 1973), cert. denied, 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974).

Absence of an attorney from the courtroom when the verdict is returned and sentence imposed has no effect whatever upon the right of the defendant to move for a new trial or to appeal from the judgment and does not violate U.S. Const., amend. 6. *Kent v. Sanford*, 121 F.2d 216 (5th Cir. 1941), cert. denied, 315 U.S. 799, 62 S. Ct. 622, 86 L. Ed. 1200 (1942).

Right of counsel to be present and to poll the jury upon the return of the verdict is a material right, and in the absence of a waiver by the defendant or defense counsel, or at least of the implied waiver resulting from voluntarily absenting oneself in such manner as not to be easily located, a new trial should be granted. *Duke v. State*, 104 Ga. App. 494, 122 S.E.2d 127 (1961).

Absence of counsel during subsequent jury poll. — Where defense counsel is present at the first poll of the jury and fails to apprise the court of any defect in the polling procedure, absence of defense counsel at the post-sentence poll, held after realization that two jurors had inadvertently not been polled, of two jurors inadvertently omitted in original poll is not violative of any of appellant's constitutional rights to counsel or due process. *Hargett v. State*, 151 Ga. App. 532, 260 S.E.2d 406 (1979).

Effect of probated sentence on right to counsel. — Appellate court erred in affirming trial court's conviction of defendant on driving on a revoked license charge on the ground that defendant was not entitled to appointed counsel since defendant was not actually given a prison sentence but was instead given a probated sentence as the right to counsel was triggered when defendant, who was indigent, was given a probated or suspended sentence. *Barnes v. State*, 275 Ga. 499, 570 S.E.2d 277 (2002).

Presence of counsel at sentencing. — Accused is entitled to the assistance of counsel at sentence, and if counsel for the accused is not present when the accused is sentenced to be executed, the constitutional right to the assistance of counsel at all stages of the proceedings is violated. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), *aff'd*, 131 F.2d 110 (5th Cir. 1942), *cert. denied*, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

At a presentence hearing, proof that defendant was represented by counsel at trials resulting in prior convictions is not required as a condition for the *prima facie* right to introduce the record of those convictions. *Philpot v. State*, 128 Ga. App. 243, 196 S.E.2d 358 (1973).

Absence of counsel during jury charge. — The defendant is not denied the sixth amendment right to counsel by the court, after inquiring into the jury's numerical breakdown, recharging the jury as to the desirability of reaching a verdict outside the presence of the defendant's counsel, where counsel is voluntarily absent from the courtroom, the charge is brief, counsel fails to demonstrate any error in the charge given, and opportunity is afforded counsel to object to the charge and perfect the record in any manner counsel sees fit. *Millwood v. State*, 166 Ga. App. 292, 304 S.E.2d 103 (1983).

Consultation with defendant during cross-examination properly refused. — Where, during the state's cross-examination of the defendant, the prosecutor paused to refer to the prosecutor's notes and, as the prosecutor did, the defense attorney requested to consult with the defendant, but the court refused counsel's request, and the prosecutor immediately resumed the questioning, there was neither infringement of defendant's right to counsel nor abuse of discretion by the trial judge. *Robinson v. State*, 258 Ga. 279, 368 S.E.2d 513 (1988).

Sentencing of an accused is a critical stage and counsel must be present. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

Lack of counsel after the death sentence is imposed deprives the accused of the vital constitutional right to counsel and renders the trial and sentence void. *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964).

Habeas corpus petitioner who was sen-

tenced to death was entitled to a new sentencing trial because petitioner received ineffective assistance of counsel in the sentencing phase of petitioner's trial when petitioner's counsel did not present available mitigation evidence from expert and lay witnesses or pursue other such evidence that was available through the exercise of reasonable diligence. *Head v. Thomason*, 276 Ga. 434, 578 S.E.2d 426, *cert. denied*, 540 U.S. 957, 124 S. Ct. 409, 157 L. Ed. 2d 294 (2003).

Proceeding to revoke a probated sentence is not a criminal proceeding. *Dutton v. Willis*, 223 Ga. 209, 154 S.E.2d 221 (1967).

There is no right to counsel at probation revocation hearing. *Dutton v. Willis*, 223 Ga. 209, 154 S.E.2d 221 (1967); *Reece v. Pettijohn*, 229 Ga. 619, 193 S.E.2d 841 (1972); *Mercer v. Hopper*, 233 Ga. 620, 212 S.E.2d 799 (1975), criticized, *Hunter v. State*, 139 Ga. App. 676, 229 S.E.2d 505 (1976). For comment, see 27 *Mercer L. Rev.* 325 (1975).

A probationer has no sixth amendment right to counsel at a revocation proceeding, but has only a more limited due process right to counsel under the fourteenth amendment. *Vaughn v. Rutledge*, 265 Ga. 773, 462 S.E.2d 132 (1995).

A probationer has no sixth amendment right to counsel at a revocation proceeding because it is not a stage of a criminal prosecution. *Kitchens v. State*, 234 Ga. App. 785, 508 S.E.2d 176 (1998).

Where statute provides for benefit of counsel at such a hearing. *Dutton v. Willis*, 223 Ga. 209, 154 S.E.2d 221 (1967).

On certiorari. — There is no constitutional right to representation of counsel on certiorari. The constitutional right extends only through the prosecution of a direct appeal. *Paino v. State*, 263 Ga. 456, 435 S.E.2d 24 (1993).

Prisoners have a constitutional right of access to the courts. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), *cert. denied*, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

States must protect prisoner's right of access to the courts by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), *cert. denied*, 439

Right to Counsel (Cont'd)**2. When Right Attaches (Cont'd)**

U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979); *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461, cert. denied, 449 U.S. 1057, 101 S. Ct. 631, 66 L. Ed. 2d 511 (1980).

Legal assistance to prisoners. — If meaningful access to the courts is to include law libraries, there is no reason why it should not also include lawyers appointed at the expense of the state. Just as a library may assist some inmates in filing papers which contain more than the bare factual allegations of injustice, appointment of counsel would assure that the legal arguments advanced are made with some degree of sophistication. Likewise in instances of demonstrated need there is no convincing reason why it should not include fees of lay and expert witnesses, investigative expenses, and other fees and costs. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

Indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. States must forego collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial and in appeals as of right. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

Constitutional mandate of U.S. Const., amend. 6 can be satisfied through various constitutionally acceptable methods or means, provided that any plan must be evaluated as a whole to ascertain its compliance with constitutional standards. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

Economic factors may be considered, for example, in choosing the methods used to provide meaningful access, but the cost of protecting a constitutional right cannot justify its total denial. Thus, neither the avail-

ability of jailhouse lawyers nor the necessity for affirmative state action is dispositive; the inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

Offering to appoint counsel fully satisfies the requirement that prisoners may not be denied effective access to the courts. — Neither the government nor the prison officials are required to allow prisoners to pick and choose the means of access most convenient to them, irrespective of the burden this places on prison administration, expense, and discipline. *Lee v. Stynchcombe*, 347 F. Supp. 1076 (N.D. Ga. 1972).

A prisoner has the right to waive representation by counsel, and having knowingly exercised that right, the prisoner cannot claim that the prisoner has been denied due process or the equal protection of the laws. *Lee v. Stynchcombe*, 347 F. Supp. 1076 (N.D. Ga. 1972).

Validity of regulation barring inmates from giving each other legal assistance. — Unless and until the state provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation barring inmates from furnishing such assistance to other prisoners. *Lepiscopo v. United States*, 469 F.2d 650 (5th Cir. 1972).

Prison's requirement that a paralegal who interviews prisoners be employed by an attorney is not an unjustifiable restriction on the right of access to the courts. *Reed v. Evans*, 455 F. Supp. 1139 (S.D. Ga. 1978), aff'd, 592 F.2d 1189 (5th Cir. 1979).

Constitutional right of counsel does not apply in a habeas corpus proceeding, which is not a criminal prosecution. *Chadwick v. Smith*, 227 Ga. 753, 182 S.E.2d 896 (1971); *Hatton v. Smith*, 228 Ga. 378, 185 S.E.2d 388 (1971), cert. denied, 407 U.S. 921, 92 S. Ct. 2466, 32 L. Ed. 2d 807 (1972); *Brown v. Holland*, 228 Ga. 628, 187 S.E.2d 246 (1972); *Dixon v. Caldwell*, 228 Ga. 658, 187 S.E.2d 292 (1972); *Wayman v. Caldwell*, 229

Ga. 2, 189 S.E.2d 74 (1972); *Moore v. Caldwell*, 229 Ga. 132, 189 S.E.2d 396 (1972); *Nolley v. Caldwell*, 229 Ga. 441, 192 S.E.2d 151 (1972); *Wyatt v. Caldwell*, 229 Ga. 597, 193 S.E.2d 607 (1972); *Grace v. Caldwell*, 231 Ga. 407, 202 S.E.2d 49 (1973); *Moye v. Hopper*, 234 Ga. 230, 214 S.E.2d 920 (1975); *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Dismissal of an inmate's habeas petition without a hearing was proper as the petition failed to state any viable claim for pre-conviction habeas corpus relief since: (1) the inmate was not entitled to appointed counsel in the habeas corpus proceeding; (2) the habeas court was not required to make a determination of the inmate's mental state as it was an issue to be addressed in the context of the criminal prosecution; and (3) the inmate did not seek issuance of the writ on the ground that the inmate had tendered proper bail in connection with the inmate's then-pending prosecution on the criminal charge. *Britt v. Conway*, 281 Ga. 189, 637 S.E.2d 43 (2006).

Nor to appeal from denial of habeas corpus. — There is no constitutional or statutory right to the assistance of appointed counsel on appeal of the denial of habeas corpus. *Yates v. Brown*, 235 Ga. 391, 219 S.E.2d 729 (1975).

State is not required to pay an indigent petitioner's expenses in habeas corpus proceedings. *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461, cert. denied, 449 U.S. 1057, 101 S. Ct. 631, 66 L. Ed. 2d 511 (1980).

No right to state funds for experts or investigators. — A defendant has no right to receive or spend state funds for the appointment of experts or investigators in habeas corpus proceedings, even in death penalty cases. *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Proceedings before selective service board. — There is no right to counsel under U.S. Const., amend. 6 in the noncriminal administrative proceedings before the selective service board. *Camp v. United States*, 413 F.2d 419 (5th Cir.), cert. denied, 396 U.S. 968, 90 S. Ct. 451, 24 L. Ed. 2d 434 (1969).

Company level disciplinary hearing. — There is no independent legal right to coun-

sel or other aspects of due process at a company level disciplinary hearing. *Clark v. Seaboard Coast Line R.R.*, 332 F. Supp. 380 (N.D. Ga. 1970).

DUI tests. — There is no right to have counsel present when a person is asked to submit to a chemical test and when the person is asked to comply with the implied consent law. *Bowman v. Palmour*, 209 Ga. App. 270, 433 S.E.2d 380 (1993).

In a prosecution for driving under the influence under O.C.G.A. § 40-6-391, a defendant is not entitled to the advice of counsel before deciding whether to submit to a breath test under the Georgia Implied Consent Law; the right to counsel under U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XIV does not come into play until the proceedings reach a critical stage, and the breath test is not such a stage because it does not signal the beginning of a formal adversary hearing and because a lawyer can add little to the warnings required from the officer administering the test by O.C.G.A. § 40-6-392(a)(4). *Rackoff v. State*, 281 Ga. 306, 637 S.E.2d 706 (2006).

Effect of criminal charges in multiple jurisdictions. — Admission of the defendant's statement to a police officer concerning an attempted burglary was proper under the sixth amendment as the defendant had only invoked the sixth amendment right to counsel in connection with unrelated charges in Fulton County; the defendant's sixth amendment right to counsel had not attached when the defendant was interviewed on the attempted burglary in Henry County. *Smith v. State*, 273 Ga. App. 107, 614 S.E.2d 219 (2005).

3. Appointment, Retention, and Dismissal

Extent of amendment's protection. — U.S. Const., amend. 6 generally protects a defendant's decision to select a particular attorney. *State v. Fleming*, 245 Ga. 700, 267 S.E.2d 207 (1980).

Due process requires reasonable opportunity to retain counsel of choice. — Due process requirements guarantee to a defendant unable to employ counsel the right to have counsel appointed by the court, but no less do they entitle an accused who is able to employ counsel a reasonable opportunity to obtain representation of the defendant's choice, and the defendant is not compelled

Right to Counsel (Cont'd)**3. Appointment, Retention, and Dismissal (Cont'd)**

to accept court-appointed defenders instead of an attorney in whom the defendant reposes greater confidence, merely to speed the trial by a day or two. *Foote v. State*, 136 Ga. App. 301, 220 S.E.2d 786 (1975).

The Constitution requires opportunity to consult and prepare defense. — The Constitution requires that a fair opportunity shall be afforded such counsel to consult the client and to prepare a defense against the charge. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), *aff'd*, 131 F.2d 110 (5th Cir. 1942), *cert. denied*, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

Indigency as prerequisite to right. — Because the defendant did not meet the standard for indigency, the court had no obligation to appoint counsel for the defendant notwithstanding the defendant's efforts to obtain representation. *Everman v. State*, 203 Ga. App. 350, 416 S.E.2d 861 (1992).

Arbitrary dismissal of defendant's counsel of choice. — While the right to select a particular person as counsel is not an absolute right, the arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel. *State v. Fleming*, 245 Ga. 700, 267 S.E.2d 207 (1980).

Defendant has no constitutional right to pick or choose a court-appointed attorney, but is entitled to have the appointed attorney render reasonably effective assistance. *Lepiscopo v. United States*, 469 F.2d 650 (5th Cir. 1972); *Harris v. State*, 138 Ga. App. 388, 226 S.E.2d 462 (1976); *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, *cert. denied*, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980).

A criminal defendant is not entitled to have counsel of the defendant's choosing appointed. *Graham v. State*, 172 Ga. App. 660, 324 S.E.2d 518 (1984).

Although U.S. Const., amend. 6 guarantees every defendant aid of an attorney, that attorney need not be counsel of the defendant's choosing. *Robinson v. State*, 182 Ga. App. 423, 356 S.E.2d 55 (1987).

An indigent defendant has no right to compel the trial court to appoint an attorney of the defendant's own choosing. Where the attorney whose assistance the defendant sought was not a member of the bar of this

state, neither the attorney nor the defendant had a constitutional right to demand that the attorney be allowed to represent the defendant. It was, rather, a matter governed by the trial court's sound exercise of discretion. *Lipham v. State*, 257 Ga. 808, 364 S.E.2d 840, *cert. denied*, 488 U.S. 873, 109 S. Ct. 191, 102 L. Ed. 2d 160 (1988).

Where the defendant requested that the court discharge the defendant's appointed counsel and appoint another, the court did not err when it determined that counsel had prepared adequately to defend the defendant and told the defendant that the defendant could either continue with the current counsel or continue *pro se*. *Battle v. State*, 234 Ga. App. 143, 505 S.E.2d 573 (1998).

Appointment of attorney is left to the sound discretion of the court. *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, *cert. denied*, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980).

Defendant entitled to choose counsel of the defendant's choice. — U.S. Const., amend. 6, while not providing an absolute right, guarantees a defendant a fair opportunity to secure counsel of the defendant's choice. *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), *cert. denied*, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984).

Discharge of appointed attorney in mid-trial. — Defendant did not have an absolute right to discharge appointed counsel in mid-trial and demand that the trial court either appoint the defendant another attorney or allow the defendant to hire another attorney. *Cotton v. State*, 223 Ga. App. 288, 477 S.E.2d 425 (1996).

Request by a trial judge that an attorney represent an indigent defendant is tantamount to a demand with which the attorney must necessarily comply, but the attorney's professional services, work product, and necessary out-of-pocket expenses in providing competent representation are not required by the Constitution to be compensated. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, *cert. denied*, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966). For comment, see 18 Mercer L. Rev. 477 (1967).

A court may issue a valid order compelling a lawyer to represent an indigent. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, *cert. denied*, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966). For comment, see

18 Mercer L. Rev. 477 (1967).

Appointment of counsel to assist retained counsel. — It is not a denial of due process for a trial court to appoint and tender to a defendant additional counsel to assist the regularly employed counsel of defendant's own selection. *Andrews v. Robertson*, 145 F.2d 101 (5th Cir. 1944), cert. denied, 324 U.S. 874, 65 S. Ct. 1013, 89 L. Ed. 1427 (1945).

Because a murder defendant's retained counsel had an almost total lack of criminal trial experience, the trial court acted within its discretion to require the defendant either to retain a more experienced attorney or accept the appointment of one. *Lynd v. State*, 262 Ga. 58, 414 S.E.2d 5 (1992).

Because a defendant failed to argue or show actual prejudice by the trial court's requirement that the defendant's previously appointed attorney remain present at the defense table after retaining new counsel only one week prior to trial, the trial court did not err in denying the defendant's motion to withdraw the guilty plea entered to possessing cocaine and speeding. *Cole v. State*, 284 Ga. App. 246, 643 S.E.2d 733 (2007).

Trial court's order that only one attorney argue for the state and one attorney for appellant does not violate an appellant's rights under U.S. Const., amend. 6 and U.S. Const., amend. 14. *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Appointment of counsel where defendant unable to retain desired counsel. — After being afforded a continuance to obtain counsel, a defendant cannot reject appointed counsel and insist that the preliminary hearing be further delayed while the defendant tries to obtain the services of one particular, prominent attorney who has not agreed to take the case. *Eiland v. State*, 246 Ga. 112, 268 S.E.2d 922 (1980).

Where competent counsel is provided for a defendant who is financially unable to employ an attorney, the defendant is not denied effective assistance of counsel. *Willingham v. State*, 134 Ga. App. 144, 213 S.E.2d 516 (1975).

If the defendant advises appointed counsel that the defendant has employed another attorney, the defendant becomes responsible for the lack of preparation, if any, in the

handling of the case when it is tried. *Tootle v. State*, 135 Ga. App. 840, 219 S.E.2d 492 (1975).

Trial judge does not have a duty to attempt to force unwanted counsel upon a defendant who has resolutely declared a purpose to dismiss that counsel. *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

Court failed to make finding of indigence or diligence. — Where it appeared that the trial court never inquired into defendant's indigence or diligence in securing counsel, and did not exercise its discretion, the case would be remanded for such purpose. *Livingston v. State*, 221 Ga. App. 563, 472 S.E.2d 317 (1996).

Trial court did not err in refusing to allow a nonlawyer to represent defendant at trial. *Robinson v. State*, 182 Ga. App. 423, 356 S.E.2d 55 (1987).

Refusal to appoint lawyers who had previously represented defendant. — Trial court abused its discretion in refusing to appoint the two lawyers who had previously represented defendant and appointing new local counsel for the retrial of defendant's capital case. *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989).

Failure to timely obtain counsel despite opportunity to do so. — If the accused has means to employ counsel, and is out upon bond, and has opportunity to secure counsel, and neglects or refuses to do so, the court is under no obligation or duty to appoint counsel to represent the defendant. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

The defendant must be afforded benefit of counsel, and this includes time sufficient for counsel to prepare for trial, but where the defendant is apprised of the charge at a previous term of court and fails and neglects to procure counsel or ask the court to do so for the defendant there is no error in refusing a request for additional time on the ground that the counsel has had insufficient time to prepare the defense. It is the defendant's duty to employ an attorney to aid in the preparation of the defense sufficiently in advance of the trial of the case. *Duke v. State*, 104 Ga. App. 494, 122 S.E.2d 127 (1961).

Request for continuance to obtain counsel. — The facts of a particular case deter-

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mine whether or not the denial of a request for continuance to obtain counsel is a violation of a person's guarantee under U.S. Const., amend. 6. *United States v. Casey*, 480 F.2d 151 (5th Cir.), cert. denied, 414 U.S. 1045, 94 S. Ct. 550, 38 L. Ed. 2d 336 (1973).

When continuance to obtain counsel may be denied. — It is not error for the trial court to refuse to grant a continuance in order to obtain the services of counsel where the defendant had ample time to employ counsel, had made no real attempt to employ counsel prior to trial, was represented by appointed counsel and there was no evidence in the record that defendant's appointed counsel had inadequate time to prepare for trial. *Miller v. State*, 156 Ga. App. 469, 274 S.E.2d 818 (1980).

A court does not abuse its discretion in requiring the appointed counsel to proceed with the trial of the case where counsel is the only counsel recognized by the court as representing the defendant, and there is no direct evidence that any other counsel is privately employed to represent defendant in the case. *Arnold v. State*, 156 Ga. App. 248, 274 S.E.2d 640 (1980).

A defendant will not be permitted to use the change of counsel as a dilatory tactic in requesting a continuance. *Standridge v. State*, 158 Ga. App. 482, 280 S.E.2d 850 (1981).

A defendant by the defendant's own misconduct, may, by repeated continuances giving rise to a valid conclusion that delay is the actual motivation, ultimately forfeit the right to yet another delay solely for the purpose of allowing the final counsel the opportunity to make trial preparations. *Standridge v. State*, 158 Ga. App. 482, 280 S.E.2d 850 (1981).

Trial court did not abuse its discretion in denying defendant's motion for a continuance to select defendant's own counsel; defendant's court-appointed counsel was ready for trial, and defendant did not express any interest in retaining defendant's own counsel during the six months preceding trial. *Flowers v. State*, 275 Ga. 592, 571 S.E.2d 381 (2002).

Where the discharge of counsel is untimely and designed as a dilatory tactic, counsel's appointment does not contribute

to the defendant's conviction and is therefore constitutionally harmless. *Harris v. State*, 138 Ga. App. 388, 226 S.E.2d 462 (1976).

Right to discharge appointed counsel and have another appointed. — An indigent criminal defendant does not have an absolute right to discharge one court-appointed counsel and have another substituted in former counsel's place. A request of this sort addresses itself to the sound discretion of the trial court. *Garrett v. State*, 159 Ga. App. 27, 282 S.E.2d 683 (1981).

A criminal defendant is not entitled to the appointment of another attorney as a matter of right whenever the defendant expresses dissatisfaction with the present attorney. *Todd v. State*, 261 Ga. 766, 410 S.E.2d 725 (1991), cert. denied, 506 U.S. 838, 113 S. Ct. 117, 121 L. Ed. 2d 73 (1992).

Just because defendant experienced distrust or loss of confidence in the appointed counsel did not entitle defendant to new counsel or show that counsel could not provide defendant with effective representation. *Middlebrooks v. State*, 255 Ga. App. 541, 566 S.E.2d 350 (2002).

An indigent defendant does not have right to change or refuse court-appointed counsel. See *Cobble v. State*, 199 Ga. App. 29, 404 S.E.2d 134, cert. denied, 199 Ga. App. 905, 404 S.E.2d 134 (1991).

Sentencing before appointment of substitute counsel. — Even though sentencing occurred after the district court's grant of defendant's motion for substitute counsel but before appointment of substitute counsel, defendant was adequately represented by counsel, since all parties believed at the time of the sentencing hearing that the assistant public defender was still defendant's counsel; the assistant public defender acted like the defendant's counsel, and the district court treated the assistant public defender like the defendant's counsel. *Poole v. United States*, 832 F.2d 561 (11th Cir. 1987), cert. denied, 488 U.S. 817, 109 S. Ct. 54, 102 L. Ed. 2d 33 (1988).

Delay due to illness of counsel. — The right to be represented by a particular attorney is not absolute when it would unduly delay and require the adjournment of a trial because of counsel's illness. *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, cert. denied, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980).

State court may not deny a defendant the counsel of the defendant's choice. — A state court has no right under the Constitution to deny a defendant the right to counsel of the defendant's own choosing. *Andrews v. Robertson*, 145 F.2d 101 (5th Cir. 1944), cert. denied, 324 U.S. 874, 65 S. Ct. 1013, 89 L. Ed. 1427 (1945).

A defendant's right to counsel of the defendant's choice is not absolute and must yield to the higher interest of the effective administration of the courts. The right is specifically limited by the trial court's power and responsibility to regulate the conduct of attorneys who practice before it. *United States v. Kitchin*, 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S. 843, 100 S. Ct. 86, 62 L. Ed. 2d 56 (1979).

Failure to procure counsel after repeated urgings to do so. — Because the defendant was repeatedly urged by the trial court to retain counsel and the defendant's sole attempt to acquire representation by counsel terminated in counsel's voluntary withdrawal from the case, after which the defendant made no further efforts to obtain legal assistance, the trial court did not deny the defendant the defendant's constitutional right to counsel. *DeShazor v. Board of Dirs.*, 157 Ga. App. 491, 277 S.E.2d 779 (1981).

Trial court did not err in directing the defendant's attorney to remain during trial, where the defendant did not request to proceed pro se and did not indicate that the defendant intended to employ a licensed attorney to represent the defendant at trial. *Robinson v. State*, 182 Ga. App. 423, 356 S.E.2d 55 (1987).

Representation by out-of-state counsel. — A defendant, although guaranteed the right to counsel by both the federal and state Constitutions has no guarantee that the defendant can be represented by out-of-state counsel. *Williams v. State*, 157 Ga. App. 494, 277 S.E.2d 781 (1981).

U.S. Const., amend. 6 should not be interpreted to allow a defendant to sanction a lawyer's breach of ethical duties, when such duties serve the public interest as well as the client's. *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, cert. denied, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980).

U.S. Const., amend. 6 should not be interpreted to allow a defendant to use it as a manipulative or subversive device. — The

freedom to choose one's counsel may not be used as a device to manipulate or subvert the orderly procedure of the courts or the fair administration of justice. *United States v. Casey*, 480 F.2d 151 (5th Cir.), cert. denied, 414 U.S. 1045, 94 S. Ct. 550, 38 L. Ed. 2d 336 (1973).

When attorney may be disqualified for improper conduct. — An attorney may be disqualified from representing a client only if there is a reasonable possibility that some specifically identifiable impropriety actually occurred and, in light of the interests underlying the standards of ethics, the social need for ethical practice outweighs the party's right to counsel of the party's choice. *United States v. Kitchin*, 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S. 843, 100 S. Ct. 86, 62 L. Ed. 2d 56 (1979).

Determination of whether the defendant's right under U.S. Const., amend. 6 overrides the danger posed by improper conduct of the defendant's attorney is committed to the trial court's discretion. *United States v. Kitchin*, 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S. 843, 100 S. Ct. 86, 62 L. Ed. 2d 56 (1979).

Disqualification of defense counsel where former prosecutor now in private practice with defense counsel. — Because a former assistant United States attorney involved in the development of a criminal action against the defendant prior to leaving a position for private practice with the defendant's counsel of record, the United States is entitled to the disqualification of the defendant's counsel, because the danger to the confidentiality of the government's communications and the danger to public trust in the lawyer-client relationship outweigh the defendant's right to counsel of the defendant's own choice. *United States v. Kitchin*, 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S. 843, 100 S. Ct. 86, 62 L. Ed. 2d 56 (1979).

Suspension of attorney from practice of law does not violate constitutional rights of clients, since right to counsel does not mean right to counsel of one's own choosing in every situation. In re *Stoner*, 246 Ga. 581, 272 S.E.2d 313 (1980).

Ineffective representation. — Defendant should have been allowed to withdraw defendant's guilty plea to serious injury by vehicle as defense counsel's failure to prepare and investigate the case, including failing to in-

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vestigate the defendant's claim that another person may have been driving the vehicle at the time of the collision, and the counsel's performance at the plea hearing, in which counsel stated that the defendant was driving the vehicle, demonstrated a complete lack of advocacy so as to deny defendant the sixth amendment right to counsel. *Heath v. State*, 258 Ga. App. 612, 574 S.E.2d 852 (2002).

4. Conflicts of Interest and Joint Representation

Where a constitutional right to counsel exists, there is a correlative right to representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981).

Conflict of interest violates defendant's rights under U.S. Const., amend. 6 and U.S. Const., amend. 5. — An attorney, whether retained or appointed, laboring under an actual conflict of interest in the representation of an accused, fails to accord the accused effective assistance of counsel as guaranteed by the due process clause of U.S. Const., amend. 5 and U.S. Const., amend. 6. *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978).

Constitutional infirmities found in multiple representation of co-defendants may violate U.S. Const., amend. 6 or the due process clause. For that reason, relief can be granted. *Dean v. State*, 247 Ga. 724, 279 S.E.2d 217 (1981).

Conflict may impair effectiveness of otherwise competent counsel. — The right under U.S. Const., amend. 6 to counsel implies much more than a minimum level of professional competence. Even otherwise competent trial lawyers may sometimes find themselves in a position in which they are unable to render effective assistance of counsel. Thus, where defense counsel in a criminal trial represents one of several clients with conflicting interests, counsel's effectiveness as a vigorous advocate for a particular defendant may be impaired by counsel's commitment to other clients. *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978).

Trial court abused its discretion in deny-

ing an assigned public defender's motion to withdraw as counsel for the indigent criminal defendant pursuant to Ga. Unif. Super. Ct. R. 4.3, as the defendant's anticipated filing of a federal action against the public defender and the public defender's office presented a potential conflict of interest that was sufficient to bar further representation under Ga. St. Bar R. 4-102(d):1.7; failure to allow withdrawal in such a situation could violate the defendant's sixth amendment right to effective assistance of counsel, which included representation without conflicts. *Odum v. State*, 283 Ga. App. 291, 641 S.E.2d 279 (2007).

Actual conflict adversely affecting attorney's performance required for habeas corpus relief. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), arguably requires a two-pronged showing to justify habeas relief on account of an attorney's conflict of interest: Not only (1) that there was an actual conflict of interest, but also (2) that the conflict of interest adversely affected the attorney's performance. *Anglin v. Green*, 639 F. Supp. 490 (S.D. Ga. 1986), *aff'd*, 853 F.2d 930 (11th Cir. 1988), *cert. denied*, 488 U.S. 1031, 109 S. Ct. 841, 102 L. Ed. 2d 973 (1989).

Court may not impair right to counsel by ordering simultaneous representation of conflicting interests. — The assistance of counsel guaranteed by U.S. Const., amend. 6 contemplates that such assistance be unimpaired by a court order requiring one lawyer to simultaneously represent conflicting interests. *White v. United States*, 396 F.2d 822 (5th Cir. 1968).

Mere physical presence of an attorney does not fulfill U.S. Const., amend. 6's guarantee when the advocate's conflicting obligations have effectively sealed the advocate's lips on crucial matters. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), *cert. denied*, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Amendment implicated when defense attorney is in situation inherently conducive to divided loyalties. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), *cert. denied*, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Attorney's representations as to conflict are to be seriously considered. — The representations of an attorney, as an officer of the court, that the attorney perceives a po-

tential conflict should be given very serious consideration. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), cert. denied, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Joint representation of co-defendants is not a per se violation of U.S. Const., amend. 6. — An actual, not merely hypothetical or speculative, conflict must be demonstrated before it can be said that an accused has been deprived of effective assistance of counsel. *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978).

Multiple representation is not per se unconstitutional. *Dean v. State*, 247 Ga. 724, 279 S.E.2d 217 (1981).

Single representation of multiple defendants raises no per se presumption of conflict of interest or prejudice. *Hamilton v. State*, 255 Ga. 468, 339 S.E.2d 707 (1986).

No simultaneous right to counsel and pro se representation. — Defendant does not have a right to simultaneous representation by counsel and self-representation. *Snell v. State*, 203 Ga. App. 27, 416 S.E.2d 360 (1992).

Conflict of interest not automatically established. — The mere fact that one lawyer represents more than one co-defendant does not automatically establish a conflict of interest. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), cert. denied, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Conflict presumed when attorney represents defendants over objection. — There is a presumptive conflict of interest when one attorney is required to represent multiple defendants over their objection; however, if the defendants do not object to the multiple representation by the attorney until after trial, there is no benefit of a presumption and the defendants must show that an actual conflict of interest existed that impaired their attorney's performance on their behalf. *Rautenberg v. State*, 178 Ga. App. 165, 342 S.E.2d 355 (1986).

Mere possibility of conflict of interests is insufficient to impugn a criminal conviction amply supported by competent evidence. *Montgomery v. State*, 156 Ga. App. 448, 275 S.E.2d 72 (1980); *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981), overruled on other grounds, *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982), but see, *Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996).

Duty of court to determine adequacy. — When defendants make timely objections to joint representation, they need not show an actual conflict of interest when a trial court fails to inquire adequately into the basis of the objection. In such circumstances the trial court has failed to discharge its constitutional duty to determine whether the defendants are receiving adequate assistance of counsel; reversal, therefore is automatic. *Hamilton v. Ford*, 969 F.2d 1006 (11th Cir. 1992), cert. denied, 507 U.S. 1000, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993).

Whenever a trial court improperly requires joint representation over timely defense objection, reversal is automatic. *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, cert. denied, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980); *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52 (1981); *Wilson v. State*, 257 Ga. 352, 359 S.E.2d 661 (1987).

Whenever a defendant establishes the lawyer's unconstitutional multiple representation, that is, where an actual conflict of interest is objected to before or during trial, prejudice need not be demonstrated. *Dean v. State*, 247 Ga. 724, 279 S.E.2d 217 (1981).

Actual conflict must be shown where defendant fails to object at trial. — In order to establish a constitutional violation of right to effective assistance of counsel in a noncapital case, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected the defendant's lawyer's performance. Until a defendant shows that the defendant's counsel actively represents conflicting interests, the defendant has not established the constitutional predicate for the defendant's claim of ineffective assistance. *Munford v. Seay*, 241 Ga. 223, 244 S.E.2d 857 (1978); *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185 (1980); *Montgomery v. State*, 156 Ga. App. 448, 275 S.E.2d 72 (1980); *Acierio v. State*, 176 Ga. App. 600, 337 S.E.2d 39 (1985).

In order to establish a violation of U.S. Const., amend. 6, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected the lawyer's performance. *Dean v. State*, 247 Ga. 724, 279 S.E.2d 217 (1981); *Keen v. State*, 164 Ga. App. 81, 296 S.E.2d 91 (1982).

In order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that

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an actual conflict of interest adversely affected the lawyer's performance. "Actual conflict" means more than the bare possibility that a conflict might have developed. *Kennedy v. State*, 177 Ga. App. 543, 340 S.E.2d 204 (1986); *Stephens v. State*, 214 Ga. App. 183, 447 S.E.2d 26 (1994).

When conflict of interest is raised in a post-conviction proceeding, the petitioner must show actual conflict that caused defense counsel's performance to be adversely affected. *Wharton v. Thomas*, 256 Ga. 76, 343 S.E.2d 694 (1986).

The fact that both defendants were represented by the same counsel does not by itself constitute a ground for reversal. A defendant who raises no objection at trial must demonstrate that an actual conflict of interest existed that adversely affected the attorney's performance. *Lawrence v. State*, 187 Ga. App. 211, 369 S.E.2d 531 (1988).

Defendant failed to show that the defendant's attorney impaired the defendant's defense for the benefit of the defendant's spouse's or that an actual conflict of interest existed, where there was no evidence that the defendant and the defendant's spouse had inconsistent defenses or that another plausible strategy was available to trial counsel. *United States v. Solomon*, 856 F.2d 1572 (11th Cir. 1988), cert. denied, 489 U.S. 1070, 109 S. Ct. 1352, 103 L. Ed. 2d 820 (1989).

In order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected the lawyer's performance. *Dill v. State*, 193 Ga. App. 213, 387 S.E.2d 424 (1989).

Defendant failed to show how, because the lawyer's partner had been related by marriage to the victim's parent and represented the victim's parent in the probate of the victim's estate, such conflict caused divided loyalties, compromised the attorney's representation of the defendant, or influenced the defendant's decision to plead guilty. *Jackson v. State*, 271 Ga. 705, 523 S.E.2d 871 (1999).

Speculative conflict is insufficient. — The mere fact that one lawyer represents more

than one co-defendant does not automatically establish a conflict of interest, an actual rather than a speculative conflict of interest must be shown before the constitutional guarantee of effective assistance of counsel is implicated. Such a constitutional implication occurs when a defense attorney is placed in a situation inherently conducive to divided loyalties. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), cert. denied, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

A conflict of interest by an attorney must be actual rather than merely speculative to support relief and not every conceivable conflict is so egregious as to amount to violation of U.S. Const., amend. 6. Even joint representation of co-defendants need not be a per se constitutional violation. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), judgment vacated on other grounds sub nom. *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

For a conflict of interest to cause representation to fail U.S. Const., amend. 6's standards, the Eleventh Circuit requires that the conflict be actual, not speculative. *Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981), cert. denied, 456 U.S. 1011, 102 S. Ct. 2307, 73 L. Ed. 2d 1308 (1982).

Actual rather than speculative conflict of interest must be shown before the constitutional guarantee of effective assistance of counsel is implicated. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), cert. denied, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

New counsel to handle ineffective counsel claim. — Defendant was entitled to new counsel to represent the defendant on the defendant's ineffective counsel claim, and the trial court erred in appointing a member of the same public defender's office as the defendant's trial attorney. *Kennebrew v. State*, 267 Ga. 400, 480 S.E.2d 1 (1996).

What constitutes actual conflict. — An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing. *Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981), cert. denied, 456 U.S. 1011, 102 S. Ct. 2307, 73 L. Ed. 2d 1308 (1982).

In representing co-defendants, an actual conflict of interest exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing. *United States v. Carter*, 721 F.2d 1514 (11th Cir.), cert. denied, 469 U.S. 819, 105 S. Ct. 89, 83 L. Ed. 2d 36 (1984).

Representation of co-defendant seeking different results constitutes an actual conflict. — Since the same attorney represented two co-defendants, siblings who were indicted for murder, one of whom wanted to proceed to trial and the other desiring to plead guilty, an obvious conflict of interest arose. Where the sibling who contended to be innocent pled guilty, because the state offered a plea agreement whereby it would not seek the death penalty only if both siblings pled guilty, that sibling was denied the right to effective assistance of counsel. *Ford v. Ford*, 749 F.2d 681 (11th Cir.), cert. denied, 474 U.S. 909, 106 S. Ct. 278, 88 L. Ed. 2d 243 (1985).

Failure of a trial attorney representing multiple co-defendants to adopt a strategy of shifting blame among the defendants may well give rise to an actual conflict of interest, but to do so the strategy must have been an option realistically available to trial counsel. *United States v. Mers*, 701 F.2d 1321 (11th Cir.), cert. denied, 464 U.S. 991, 104 S. Ct. 481, 78 L. Ed. 2d 679 (1983).

Actual conflict in plea bargaining efforts. — The trial attorney who represented the defendant and the co-defendant, who successfully worked out a plea bargain for the co-defendant, which required that the co-defendant testify for the state in the criminal case against the defendant, but which plea bargain never materialized, labored under an actual conflict of interest that adversely affected the attorney's performance, since the attorney was precluded from effective plea bargaining on behalf of the defendant. *Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985).

When counsel representing multiple defendants negotiates a plea bargain conditioned upon more than one pleading guilty, that attorney has suffered a conflict of interest that per se adversely affects the representation of each defendant affected. A showing that a defendant was allowed to plead guilty

upon the condition that another defendant represented by the same attorney also plead guilty is a per se showing of ineffective assistance of counsel that rises to the level of an unconstitutional deprivation of the right to counsel. *Tarwater v. State*, 259 Ga. 516, 383 S.E.2d 883 (1989).

No conflict in plea bargaining efforts. — Joint representation did not prevent effective plea bargaining on behalf of either of two defendants, where a deal could not be negotiated for one defendant because the defendant refused to testify against the other defendant, and the state was unwilling to bargain with the other defendant. *Smith v. Newsome*, 876 F.2d 1461 (11th Cir. 1989).

Actual conflict in immunity agreement. — An actual conflict of interest, in violation of U.S. Const., amend. 6, occurred when the defendant's pretrial counsel, while representing two persons under suspicion for a murder, reached an informal understanding with the prosecutor that the other client would not be prosecuted in exchange for the other client's testimony against the defendant. *Burden v. Zant*, 24 F.3d 1298 (11th Cir. 1994).

Conflict of interest from joint representation must be actual to warrant reversal. — To warrant reversal, a conflict of interest brought about by an attorney's representation of multiple co-defendants must be actual rather than hypothetical. *United States v. Mers*, 701 F.2d 1321 (11th Cir.), cert. denied, 464 U.S. 991, 104 S. Ct. 481, 78 L. Ed. 2d 679 (1983).

Defendant who shows that a conflict of interest actually affected the adequacy of the representation need not demonstrate prejudice in order to obtain relief. *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978); *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, cert. denied, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980).

Since where an attorney is confronted with a conflict of interest between co-defendants prejudice must be presumed and, except under the most extraordinary circumstances, the error cannot be considered harmless and reversal would be automatic. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), cert. denied, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Judge's knowledge of conflict need not be shown. — Ineffective representation by a

Right to Counsel (Cont'd)**4. Conflicts of Interest and Joint Representation (Cont'd)**

lawyer laboring under a conflict of interest renders the trial fundamentally unfair whether the judge knew of the conflict or not. Unlike most due process cases under U.S. Const., amend. 14, no state action in the form of a state official's knowledge of the wrongdoing need be shown. A deprivation of due process results when the judgment reached in such a trial is enforced. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), cert. denied, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Disqualification of an attorney from representing co-defendants must be raised prior to trial, otherwise any disqualification could result in manufactured error. *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 632 (1981), overruled on other grounds, *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982).

Failure to provide separate counsel after notice of conflict is error. — Error will result only if a judge, after notice of potential conflict between co-defendants, does not undertake to ensure that each defendant is represented by separate counsel. *Stevenson v. State*, 143 Ga. App. 813, 240 S.E.2d 123 (1977).

Representation of multiple defendants. — Single defense counsel cannot effectively represent multiple defendants with conflicting interests. *Collins v. State*, 144 Ga. App. 102, 240 S.E.2d 597 (1977).

Trial counsel was not ineffective because counsel initially represented second defendant as well as third defendant where counsel withdrew from representing both defendants after counsel sensed a potential conflict. *Baggs v. State*, 265 Ga. App. 282, 593 S.E.2d 734 (2004).

Defendant was not denied effective assistance of counsel based on the fact that defendant and co-defendant were represented by different attorneys from the same public defender's office; reversal was not required as no actual conflict of interest developed and defendant did not show that the fact that the attorneys were from the same office adversely affected the attorney's performance. *Burns v. State*, 274 Ga. App. 687, 618 S.E.2d 600 (2005), aff'd, 281 Ga. 338, 638 S.E.2d 299 (2006).

Upon a review of the specific statements identified by the defendant supporting a conflict of interest claim between the defendant and the co-defendant, who were represented by two separate attorneys with the public defender's office, no evidence of antagonism was found, as the specific statements identified merely amounted to mutual expressions of indifference over the outcome of the criminal charges and not "finger pointing" as alleged by the defendant's counsel; hence, counsel from the same public defender's office were not automatically disqualified from their respective representations. *Burns v. State*, 281 Ga. 338, 638 S.E.2d 299 (2006).

Counsel representing prosecution witness raises potential conflict. — The rules governing alleged conflicts arising from joint representation of co-defendants apply with equal force to alleged conflicts arising from defense counsel's representation of a prosecution witness in unrelated matters. *Mitchell v. State*, 261 Ga. 347, 405 S.E.2d 38 (1991).

Representation of persons with inconsistent interests. — A defendant's right to the effective assistance of counsel under U.S. Const., amend. 6 is violated if over the defendant's objection the defendant is represented by an attorney also charged with the representation of a co-defendant whose interests are inconsistent with the defendant's, but to justify separate counsel, the conflict may not be merely theoretical or speculative, but must have some substantial basis in fact. *Davis v. State*, 129 Ga. App. 796, 201 S.E.2d 345 (1973); *United States v. Johnson*, 569 F.2d 269 (5th Cir.), cert. denied, 437 U.S. 906, 98 S. Ct. 3096, 57 L. Ed. 2d 1137 (1978).

Simultaneous representation of county and criminal defendant. — An actual conflict of interest would arise from defense counsel's simultaneous representation of the defendant and Jones County, because it was counsel's duty to defend against suits challenging the constitutionality of the county jury commission's procedures in selecting grand and traverse jury pools, which situation arose in litigation occurring at the same time that the defendant was being tried in Jones County. *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984).

Representation by court's law clerk. — Defendant's appointed counsel represented

defendant in same court in which counsel was a full time law clerk; therefore, an actual conflict of interest existed warranting reversal of defendant's convictions. *Sallie v. State*, 269 Ga. 446, 499 S.E.2d 897 (1998).

Simultaneous representation of defendant and state's witness. — No conflict of interest stemmed from an attorney's simultaneous representation of both a capital defendant and a state's witness charged with a noncapital offense arising out of the events at issue in the capital trial. *Zant v. Hill*, 262 Ga. 815, 425 S.E.2d 858, cert. denied, 510 U.S. 930, 114 S. Ct. 342, 126 L. Ed. 2d 307 (1993).

Counsel seeking election as prosecutor. — A defendant may wish to proceed with counsel holding other, even prosecutorial, offices because of perceived benefits to the defendant. *Jones v. Ivory*, 255 Ga. 20, 334 S.E.2d 666 (1985) (defendant knew of counsel's campaign for office of district attorney).

Joint representation at committal hearing harmless. — Even if an accused was technically denied the sixth amendment right to counsel at a "committal hearing" because counsel who represented the co-defendants had not in fact agreed to represent the accused, this denial was harmless error beyond a reasonable doubt because the evidence produced during the hearing was nothing more than an inventory of the completed investigation and nothing more than would have been revealed by the usual voluntary, informal discovery conference. *Fleming v. Zant*, 560 F. Supp. 525 (M.D. Ga. 1983), aff'd sub nom. *Fleming v. Kemp*, 748 F.2d 1435 (11th Cir. 1984), cert. denied, 475 U.S. 1058, 106 S. Ct. 1286, 89 L. Ed. 2d 593 (1986).

Where defendants agree to one counsel, any error deemed induced and impermissible. — Where a group of defendants confirm that they have discussed the case thoroughly with their counsel, and each states that there are no conflicts of interest, and each of them also states that they are satisfied to proceed with one counsel representing all of them, if any error occurs, it is induced by the defendants' statements and induced error is impermissible. Accordingly, it is not error under the circumstances to allow one attorney to represent all of the defendants, and the multiple representation does not result in ineffective assistance of

counsel. *Shirley v. State*, 166 Ga. App. 456, 304 S.E.2d 468 (1983).

Partners representing defendant and co-defendant. — Appointment of two partners to represent defendant and the defendant's co-indictee in their respective murder trials did not infect the representation by defendant's counsel so as to constitute an active representation of competing interests, because counsel's decision not to make a "lesser culpability" argument on appeal was in no way attributable to the partnership. *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987).

Trial court did not err in finding that the defendant received adequate representation at trial, although the defendant's trial attorney had represented the state's informant in unrelated matters before and after trial. *Dill v. State*, 193 Ga. App. 214, 387 S.E.2d 425 (1989).

Where co-defendants assert antagonistic defenses, but the trial judge denies the defendant's motion for separate trial, defendant is not denied the right to effective counsel or to confront the witnesses, despite co-defendants' ability to assert the privilege against self-incrimination on cross-examination in a joint trial, unless defendant can show that the defendant is prejudiced. *Cain v. State*, 235 Ga. 128, 218 S.E.2d 856 (1975).

Minor inconsistencies in the accounts related by co-defendants to counsel, as their individual versions of what actually occurred, will not necessarily create a conflict which justifies separate counsel. *Davis v. State*, 129 Ga. App. 796, 201 S.E.2d 345 (1973).

Attorney's representations as to existence of conflict. — The representations of an attorney, as an officer of the court, that the attorney perceives a potential conflict should be given very serious consideration. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), cert. denied, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Professional judgment of counsel as to need for separate counsel. — Where failure of appointed counsel to ask for separate representatives for each of the accused occurs, it must be assumed to have stemmed from their professional judgment that it was better not to get into an antagonistic fight with co-defendants and there is no failure to

Right to Counsel (Cont'd)**4. Conflicts of Interest and Joint Representation (Cont'd)**

provide counsel such as would deprive a criminal court, even under our civil jurisprudence, of jurisdiction to proceed to judgment and sentence. *Bisson v. Howard*, 224 F.2d 586 (5th Cir.), cert. denied, 350 U.S. 916, 76 S. Ct. 201, 100 L. Ed. 803 (1955).

Where defense counsel has it within counsel's power to void a proceeding against counsel's client and, because of counsel's representation of another is not completely free to exercise this power, counsel most assuredly has a directly conflicting interest. *Collins v. State*, 144 Ga. App. 102, 240 S.E.2d 597 (1977).

Conflict where defense counsel also represents a witness. — The reason a conflict of interest exists in a situation in which defense counsel is simultaneously representing a witness, even though the witness is not a co-defendant at trial, is that defense counsel might not be vigorous enough in cross-examination of such a witness. *Lemley v. State*, 245 Ga. 350, 264 S.E.2d 881 (1980).

Counsel's affiliations. — The defendant was not denied the right to counsel in the defendant's capital murder prosecution based on allegations that the defendant's attorneys had conflicts of interest in that they had co-hosted a fund-raising event with the county district attorney and county solicitor general, and that the attorneys were co-owners of an office building with another attorney who had contracted with the district attorney to collect child support for the county. *Henry v. State*, 269 Ga. 851, 507 S.E.2d 419 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

That appellant is jointly indicted and tried with a co-defendant who is additionally alleged in the indictment to have been convicted of prior similar offenses, where the indictment is read to the jury during the guilt determination phase of the trial, and where both defendants are represented by the same attorney, is not in itself prejudicial to appellant to an extent requiring reversal of the conviction. *Davis v. State*, 129 Ga. App. 796, 201 S.E.2d 345 (1973).

Where the death penalty is sought against any one defendant, the defendant and the

co-defendants must be provided with separate and independent counsel. *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, cert. denied, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980).

Penalty may be imposed despite joint representation, if no prejudice shown. — Where there is no timely defense objection nor is there any objection by the state, and no material prejudice has been demonstrated, the fact that the appellant's attorney is appointed to represent both the appellant and the appellant's co-defendants does not prevent imposition of the death penalty. *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981), overruled on other grounds, *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982).

Representation of co-defendants in death penalty cases. — In *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185 (1980), the Supreme Court of Georgia, by the authority of its supervisory power over the bar of this state, created a broad rule in cases in which the death penalty is sought. Under the rule of *Fleming*, the same attorney shall not represent co-defendants in cases in which the death penalty is sought. *Fleming v. State* was decided June 9, 1980, and, in that it is based on the court's supervisory power, is prospective only. *Brown v. State*, 247 Ga. 298, 275 S.E.2d 52, cert. denied, 454 U.S. 882, 102 S. Ct. 366, 70 L. Ed. 2d 192 (1981), overruled on other grounds, *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982).

Trial court need not advise a defendant of the right to separate counsel in the event of a conflict of interest between co-defendants, where there is neither objection, claim, nor notice to the court of any alleged conflict between the interests of the defendants. *United States v. Boudreaux*, 502 F.2d 557 (5th Cir. 1974).

Procedure upon motion for separate counsel. — If a trial counsel who has been appointed to represent two or more criminal defendants makes a timely motion to have separate counsel appointed, the trial court must either appoint separate counsel or take adequate steps to determine if the risk of a conflict of interests is too remote to warrant separate counsel. *Lemley v. State*, 245 Ga. 350, 264 S.E.2d 881 (1980).

Waiver of right to separate counsel. — The right to separate appointed counsel

where multiple defendants have conflicting interests is a right the defendant is entitled to waive. *Collins v. State*, 144 Ga. App. 102, 240 S.E.2d 597 (1977).

Inquiry as to attorneys' fees. — Where the record clearly indicated that lawyers representing co-defendants in this case also represented co-defendants in a previous case and that the defendant provided fees to all counsel in the previous case even though the defendant was not a party in the previous case, the appearance of impropriety and possible conflicts of interest were pervasive, thereby warranting the district court to inquire as to the source of attorney's fees. *United States v. Sims*, 845 F.2d 1564 (11th Cir.), cert. denied, 488 U.S. 957, 109 S. Ct. 395, 102 L. Ed. 2d 384 (1988).

Defense counsel, not court, initiates inquiry. — Nothing in the legal precedents suggest that this provision requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. *Craddock v. State*, 173 Ga. App. 133, 325 S.E.2d 804 (1984).

Right to counsel not violated by attorney's internal investigation. — Attorneys from a law firm conducting an internal investigation for the corporation did not violate the defendant employee's constitutional right to counsel. The attorneys were not acting as de facto government agents during their internal investigation of the defendant's employer, and, in addition, the attorneys indeed advised the defendant of the defendant's rights. Therefore, the defendant's statement which tended to inculcate the defendant violated no duty or privilege and was admissible. *United States v. Calhoun*, 859 F. Supp. 1496 (M.D. Ga. 1994), aff'd, 97 F.3d 518 (11th Cir. 1996), cert. denied, 522 U.S. 806, 118 S. Ct. 44, 139 L. Ed. 2d 11 (1997).

No ineffective assistance of counsel for conflict of interest in representing rape co-defendants where testimony of one was subsequently helpful to other on issue of consent. *Yeck v. Goodwin*, 985 F.2d 538 (11th Cir. 1993).

5. Duties and Effectiveness of Counsel

Right to counsel is the right to effective counsel. *Harrell v. State*, 139 Ga. App. 556,

228 S.E.2d 723 (1976); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907, cert. denied, 444 U.S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979).

The guarantee of the assistance of counsel to a criminal defendant requires that such representation must be effective. *Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. 1981).

A defendant is entitled not to perfect representation but to reasonably effective assistance. *Foreman v. State*, 200 Ga. App. 400, 408 S.E.2d 178 (1991).

Defense counsel's failure to reserve exceptions to the jury charge was a conscious decision, was a matter of trial strategy, and did not constitute ineffective assistance of counsel as, although defense counsel was not asked why counsel did not object to the omission of a previously-requested charge on impeachment by crime of moral turpitude, the record showed that defense counsel felt that the witness had been impeached by other means. *Botelho v. State*, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

Ineffective assistance of counsel claim failed where trial counsel's decision not to challenge the search of defendant's residence was based on the fact that the lessor, a person other than defendant, had given permission to search the home; thus, counsel felt counsel did not have standing or sufficient ground to challenge the search. In addition, defendant failed to demonstrate how a motion challenging the search warrant would have been successful and thus, failed to show prejudice. *Allen v. State*, 268 Ga. App. 519, 602 S.E.2d 250 (2004).

Physical presence alone fails to satisfy the mandate of U.S. Const., amend. 6. — The right to counsel means no less than the right to effective counsel. *United States v. Woods*, 487 F.2d 1218 (5th Cir. 1973).

Effective assistance is that which assures due process. — Effective assistance does not mean that a defendant is entitled to have the best counsel appointed, or any particular counsel, but it does mean that the defendant must have such assistance as will assure the defendant due process of law. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977).

Due process of law requires that the court-appointed counsel be competent to serve and give more than casual or perfunctory service. Lip service only will not do. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), aff'd, 131 F.2d 110 (5th Cir. 1942),

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

cert. denied, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

Effective representation involves more than courtroom conduct by the advocate. — Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. This means that in most cases a defense attorney should interview not only the defense's own witnesses but also those that the government intends to call, when they are accessible. *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976).

Counsel must be acquainted with law and facts. — An attorney cannot render reasonably effective assistance unless the attorney has become acquainted with the law and facts of the case. *United States v. Woods*, 487 F.2d 1218 (5th Cir. 1973).

Counsel must evaluate defenses and discuss case with client. — Constitutionally effective counsel must make an informed evaluation of possible defenses and have a meaningful discussion of the case with the client. *Dixon v. Balkcom*, 614 F.2d 1067 (5th Cir. 1980).

Evaluating defenses and discussing the case with the client are the cornerstones of the effective assistance of counsel. *Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. 1981).

Counsel must provide client the basis for informed choice. — Effective assistance of counsel embodies a requirement that the defendant be afforded an understanding of the law in relation to the fact, and counsel's advice must permit the accused to make an informed and conscious choice. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979).

U.S. Const., amend. 6 guarantees neither successful counsel, nor the best counsel available, nor counsel free from tactical errors or errors of judgment. *Pitts v. Hopper*, 402 F. Supp. 119 (N.D. Ga. 1974), *aff'd*, 520 F.2d 941 (5th Cir. 1975).

Right to plan defense in private. — Effective assistance of counsel involves the right of counsel and the client to plan defense strategy and tactics in private and independent of interference by the court. *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976).

Use of a private investigator who assists in the preparation of the defense as a paid informant for the FBI, does not by itself constitute a denial of a fundamental right to a fair trial and effective assistance of counsel. *United States v. Zarzour*, 432 F.2d 1 (5th Cir. 1970).

Intrusion by the government upon the confidential relationship between a criminal defendant and the defendant's attorney, either through surreptitious electronic means or through an informant, is a violation of the right to counsel under U.S. Const., amend. 6. *United States v. Zarzour*, 432 F.2d 1 (5th Cir. 1970).

Determination as to whether such investigator has given prosecution information about defense. — When private investigator hired to assist in preparation of accused's defense is an informant for the FBI, an in camera inspection of the government's files should be made to determine whether any information concerning the accused's case was transmitted to the prosecution in violation of the accused's rights under U.S. Const., amend. 6 and to order disclosure of such information to the accused. *United States v. Zarzour*, 432 F.2d 1 (5th Cir. 1970).

No right to gender preference. — There was no showing that defendant was not provided with reasonably effective assistance of counsel just because the defendant was denied a request for a male defense attorney in a prosecution for rape and kidnapping. *Johnson v. State*, 208 Ga. App. 453, 430 S.E.2d 821 (1993).

Failure to make effective appointment violates U.S. Const., amends. 5 and 14. — The necessity of counsel is so vital and imperative that the failure of the trial court to make an effective appointment of counsel is likewise a denial of due process within the meaning of U.S. Const., amends. 5 and 14. *Bridwell v. Aderhold*, 13 F. Supp. 253 (N.D. Ga. 1935), *aff'd* sub nom. *Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937), *rev'd* on other grounds, *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 ALR 357 (1938), *overruled* on other grounds, *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

Judges should maintain proper standards of performance by attorneys. — If the right to counsel guaranteed by the United States Constitution is to serve its purpose, defendants cannot be left to the mercies of incom-

petent counsel, and judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

There is presumption that legal services are performed in a skillful manner and the presumption may be overcome only by competent expert testimony showing that such services were not performed in an ordinarily skillful manner. *Gotschalk v. State*, 160 Ga. App. 769, 287 S.E.2d 107 (1982).

Presumption regarding performance of counsel. — There is a strong presumption that trial counsel's performance falls within the wide range of professional assistance, and that any challenged action by trial counsel might be considered sound trial strategy. *Ferrell v. State*, 261 Ga. 115, 401 S.E.2d 741 (1991), cert. denied, 502 U.S. 927, 112 S. Ct. 343, 116 L. Ed. 2d 282 (1991).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Stevens v. State*, 199 Ga. App. 563, 405 S.E.2d 713 (1991).

Counsel has a duty to make reasonable investigations, however, the defendant must overcome the presumption that, under the circumstances the challenged action might be considered sound trial strategy. *Carver v. State*, 203 Ga. App. 197, 416 S.E.2d 810, cert. denied, 203 Ga. App. 905, 416 S.E.2d 810 (1992).

In evaluating an attorney's performance for purposes of considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

In a prosecution for false imprisonment, aggravated assault, and aggravated battery, defendant failed to establish that the alleged deficient performance of the trial council prejudiced the defense; the assistance rendered by defendant's trial counsel fell within the broad range of reasonably effective assistance which members of the bar in good standing are presumed to render. *Grier v. State*, 276 Ga. App. 655, 624 S.E.2d 149 (2005).

No ineffectiveness of counsel was shown in a defendant's malice murder trial by the trial

counsel's purported bolstering of the testimony of a detective who was a prosecution witness; when, after pointing out inconsistencies and contradictions in the testimony of a witness whose statements the detective had relied upon in concluding that the defendant was responsible for the murder, the trial counsel asked the detective whether, in light of those matters, the detective believed the witness, the trial counsel was engaging in trial strategy intended to undermine the testimony of the witness rather than seeking to bolster that testimony. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

When issue must be raised. — Any contention concerning a violation of the constitutional right of effective assistance of counsel must be made at the earliest practicable moment, and the counsel whose proficiency is under attack should be given an opportunity to be heard. *Lynn v. State*, 181 Ga. App. 461, 352 S.E.2d 602 (1986).

The proceeding in which an out-of-time appeal is sought is the proper time to raise the issue of ineffective assistance of counsel. *Ponder v. State*, 260 Ga. 840, 400 S.E.2d 922 (1991).

A claim of ineffective assistance of counsel may not be asserted in an out-of-time appeal unless appellate counsel pursues a motion for new trial, subsequent to the grant of the out-of-time appeal, in which the issue is raised and resolved by means of an evidentiary hearing. *Ponder v. State*, 260 Ga. 840, 400 S.E.2d 922 (1991).

Habeas corpus petitioner's claim of ineffective assistance of trial counsel was waived, because the petitioner's appellate counsel, who was not the petitioner's trial counsel, failed to assert it on direct appeal, and the petitioner failed to demonstrate cause for the failure to raise the claim and prejudice arising therefrom. *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991).

If there is new counsel appointed or retained, the new counsel must raise the ineffectiveness of previous counsel at the first possible instance in the legal proceedings. *Ryan v. Thomas*, 261 Ga. 661, 409 S.E.2d 507 (1991).

A member of a law firm may not, by his or her failure to raise an ineffective assistance claim against a fellow member of the firm, bar the rights of a defendant to ever raise that issue. To hold otherwise would permit

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one member of the firm to shield a fellow member against accusations of ineffectiveness at the expense of the rights of the defendant. *Ryan v. Thomas*, 261 Ga. 661, 409 S.E.2d 507 (1991).

Attorneys in a public defender's office are to be treated as members of a law firm for the purposes of raising claims of ineffective assistance of counsel. As such, different attorneys from the same public defenders office are not to be considered "new" counsel for the purpose of raising ineffective assistance claims under *White v. Kelso*, so that a defendant's right to raise such a claim may not be barred by the failure of a succession of attorneys from the same public defender's office to raise it. *Ryan v. Thomas*, 261 Ga. 661, 409 S.E.2d 507 (1991).

Failure to raise a claim of ineffectiveness of counsel by motion for new trial before appeal, when there was an adequate opportunity to do so, was a procedural bar to raising the claim at a later date; overruling *Sixayaketh v. State*, 261 Ga. 690, 410 S.E.2d 113 (1991); *Dozier v. State*, 217 Ga. 835, 459 S.E.2d 463 (1995); *King v. State*, 208 Ga. App. 77, 430 S.E.2d 640 (1993). *Glover v. State*, 266 Ga. 183, 465 S.E.2d 659 (1996); *Clay v. State*, 232 Ga. App. 541, 502 S.E.2d 267 (1998).

Appellant's new appellate counsel who participated in a motion for new trial, but did not raise the issue of the effectiveness of appellant's trial counsel, barred appellant from asserting this argument. *Smith v. State*, 263 Ga. 224, 430 S.E.2d 579 (1993).

Defendant could claim ineffective assistance of counsel at the defendant's motion for new trial for the first time on appeal, since the attorney was initially retained to represent the defendant at the motion and, therefore, the claim was presented at the earliest practicable moment. *Rucker v. State*, 268 Ga. 406, 489 S.E.2d 844 (1997).

Defendant's ineffective assistance of counsel claim was waived as defendant's original post-conviction counsel moved for a new trial, but did not raise an ineffective assistance of trial counsel claim; defendant's claim that defendant's original post-conviction counsel was deficient in fail-

ing to raise an ineffective assistance claim below had to be addressed in a habeas corpus proceeding. *Mullins v. State*, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Defendant's case was remanded for an evidentiary hearing on the defendant's ineffective assistance of counsel claims as it was not clear when the defendant took over the defendant's own representation and the defendant's appeal might have been the defendant's first opportunity to raise the defendant's ineffective assistance of counsel claims, and as the defendant's claims could not be resolved by examining the appellate record. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Because defendant failed to provide any citations to either the law or the record, let alone an application of authority to that record amounting to legal argument, in support of an ineffective assistance of counsel assertion, this issue was deemed abandoned on appeal. *Gore v. State*, 272 Ga. App. 156, 611 S.E.2d 764 (2005).

Trial court's denial of the defendant's new trial motion was proper because the defendant did not raise the issue of the trial counsel's ineffectiveness at the first available opportunity, as the defendant's having filed a notice of appeal divested the trial court of jurisdiction over such a motion, and moreover, the motion was untimely filed pursuant to O.C.G.A. § 5-5-40(a); there was no evidence that overcame the presumption of effective assistance of counsel pursuant to U.S. Const., amend. 6, as defendant could not substantiate the allegations solely from the record and he declined the opportunity to have the counsel testify. *Carter v. State*, 275 Ga. App. 846, 622 S.E.2d 60 (2005).

As the defendant was represented during the motion for new trial following criminal conviction by one of the two counsel who had assisted the defendant before and during the trial, and the claim of ineffective assistance of counsel under U.S. Const., amend. 6 was not raised in the motion or at the hearing, new appellate counsel raised the claim at the earliest practicable time by noting it in the direct appeal; thus, a remand was proper in order to have a hearing on the claim. *Warren v. State*, 281 Ga. App. 490, 636 S.E.2d 671 (2006).

Ineffective counsel may not be asserted in out-of-time appeal. — A claim of ineffective

assistance of counsel may not be asserted in an out-of-time appeal unless appellate counsel pursues a motion for new trial, subsequent to the grant of the out-of-time appeal, in which the issue is raised and resolved by means of an evidentiary hearing. *Holt v. State*, 205 Ga. App. 40, 421 S.E.2d 131 (1992).

Effectiveness issue not addressed for first time on appeal. — The issue of effectiveness of counsel is not to be addressed for the first time on appeal. *Smith v. State*, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

The right to claim ineffective assistance of counsel is waived by the failure to raise it at the trial level, i.e., at the “earliest practicable moment.” *Battle v. State*, 195 Ga. App. 542, 394 S.E.2d 788 (1990).

There is no indication from the record that the issue of ineffective assistance of counsel was ever raised in the trial court where appellate counsel had ample opportunity to raise the issue before the trial court. Over 15 months elapsed between the appointment of appellate counsel and the hearing on the motion for new trial during which appellate counsel could have raised this argument. Thus, having failed to do so, appellant is barred from asserting this argument here. *Martin v. State*, 204 Ga. App. 782, 420 S.E.2d 645 (1992).

Trial court’s denial of defendant’s request to appoint new counsel for purposes of the defendant’s appeal was based on the policy of the public defender’s office not to appoint new counsel for that purpose, and defendant’s right to assert a violation of the right to effective assistance of counsel under U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XIV was not waived, as the defendant could raise that issue in a habeas corpus proceeding. *Garland v. State*, 283 Ga. App. 622, 642 S.E.2d 320 (2007).

Waiver of claim of ineffective assistance. — A defendant does not waive the claim of ineffective assistance of counsel by responding to trial court’s inquiries pursuant to paragraphs (a)(7) and (b)(4) of the Unified Appeal Procedure under Rule 34.3 by silence or expression of one or more objections to the defendant’s counsel’s performance. *Grace v. State*, 262 Ga. 485, 422 S.E.2d 176 (1992).

Because the defendant failed to raise an ineffective assistance of counsel claim at the

first practicable opportunity, specifically when newly appointed counsel filed an amended motion for a new trial, the claim was waived. *Simmons v. State*, 281 Ga. 437, 637 S.E.2d 709 (2006).

Defendant’s ineffective assistance of counsel claim based on appointed counsel’s failure to file any motions or to appear at any hearing or trial was waived; further, appointed counsel made an appearance and retained counsel entered an appearance a month later, the defendant was never unrepresented, and the defendant was not prejudiced by appointed counsel’s inaction. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

Defendant’s ineffective assistance of counsel claim based on trial counsel’s failure to object when the state called witnesses who were not “properly placed on the witness list” was waived; all of the witnesses’ names were included in investigative reports given to the defendant, one witness was included in the second additional list under her maiden name, and trial counsel interviewed two other witnesses. The defendant was not surprised by the witnesses and trial counsel’s failure to object to their testimony did not so prejudice the defense that the defendant was deprived of a fair trial. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

Rules of practice governing pro se counsel. — Post-judgment practice involves strict compliance with rules of practice and procedure, and pro se parties are generally bound by the same rules of practice and procedure as a lawyer. *Weber v. State*, 203 Ga. App. 356, 416 S.E.2d 868 (1992).

Pro se defendants have no ineffective assistance of counsel claim. — Because the defendant elected to handle the defendant’s own representation, the defendant could not assert a claim of ineffective assistance of counsel. *Daughtry v. State*, 225 Ga. App. 45, 482 S.E.2d 532 (1997).

Distinction exists between lack of effective assistance and denial of that right. — There is a distinction to be made between the lack of effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel. It is the latter that opens a judgment to challenge by habeas corpus. *Johnson v.*

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

Smith, 295 F. Supp. 835 (N.D. Ga. 1968), aff'd, 414 F.2d 645 (5th Cir. 1969), cert. denied, 397 U.S. 951, 90 S. Ct. 975, 25 L. Ed. 2d 133 (1970).

There is a distinction between retained and appointed counsel, for purposes of gauging counsel's effectiveness. *Allen v. Hopper*, 234 Ga. 642, 217 S.E.2d 156 (1975).

Standard for appointed counsel is more stringent than for retained counsel. *Allen v. Hopper*, 234 Ga. 642, 217 S.E.2d 156 (1975).

Test for asserting ineffective assistance of counsel claim. — When a defendant asserts a claim of ineffective assistance, the test is whether there is a reasonable probability the jury would have reached a different verdict, absent the error of counsel. *Gross v. State*, 262 Ga. 232, 416 S.E.2d 284 (1992).

Defendant did not show that the trial counsel performed deficiently and that any alleged deficient performance prejudiced the defense, and, thus, did not establish ineffective assistance of counsel, as: (1) the trial court's alleged failure to give a curative instruction regarding a remark a witness made that bolstered the victim's credibility was not error since defense counsel had asked the question to which the remark was made and did not object, which meant defendant could not challenge the failure to give the instruction as error; and (2) the victim's comment to a witness shortly after having sex with defendant was admissible as *res gestae* evidence and, thus, defense counsel could not be ineffective for failing to object to it. *Drummond v. State*, 275 Ga. App. 86, 619 S.E.2d 784 (2005).

To determine effectiveness, totality of circumstances must be examined. — Claims of ineffective assistance of counsel require the court to inquire into the actual performance rendered by counsel based on the totality of the circumstances. *Young v. Zant*, 506 F. Supp. 274 (M.D. Ga. 1980), rev'd on other grounds, 677 F.2d 792 (11th Cir. 1982).

A determination whether reasonably effective assistance of counsel was rendered must be based on the totality of the circumstances and the entire record. *Mitchell v. Hopper*, 538 F. Supp. 77 (S.D. Ga. 1982), supplemented by 564 F. Supp. 780 (S.D. Ga.

1983), aff'd in part, rev'd in part sub nom. *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985), aff'd in part sub nom. *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir.), rev'd in part sub nom. *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986), cert. denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987), 500 U.S. 960, 111 S. Ct. 2276, 114 L. Ed. 2d 727 (1991).

Effective counsel need not be errorless counsel, nor should counsel be judged ineffective by hindsight; the appropriate methodology for determining whether there has been effective assistance is to examine the totality of the circumstances in the record. *Dodd v. Williams*, 560 F. Supp. 372 (N.D. Ga. 1983).

Measure of reasonable effectiveness at time of service. — Appellant was not denied effective assistance of counsel because appointed counsel conducted extensive cross-examination, made appropriate objections to the presentation of the state's case in chief, and was faced with overwhelming evidence of the appellant's guilt through the testimony of numerous eyewitnesses. The effectiveness of counsel cannot be measured fairly by the results of a criminal trial or appeal, but is measured upon the reasonable effectiveness of counsel at the time the services were rendered. *White v. State*, 174 Ga. App. 443, 330 S.E.2d 381 (1985).

The effectiveness of counsel cannot be measured fairly by the results of a criminal trial or appeal, but upon the reasonable effectiveness of counsel at the time the services were rendered. *Keese v. State*, 174 Ga. App. 739, 331 S.E.2d 88 (1985); *Gross v. State*, 262 Ga. 232, 416 S.E.2d 284 (1992).

Performance reviewed in light of type of proceeding. — The rules laid down in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), provide the appropriate framework for evaluating a claim of ineffective assistance of counsel in the context of a probation revocation hearing, but the court must review counsel's performance in light of the particular type of proceeding involved. *United States v. Wren*, 682 F. Supp. 1237 (S.D. Ga. 1988).

Actions of counsel assessed in context of information reasonably available at time. — In assessing counsel's conduct, the habeas corpus court must view counsel's actions in the context of the information that was reasonably available to counsel at the time of

the defendant's trial. *Mitchell v. Hopper*, 564 F. Supp. 780 (S.D. Ga. 1983), aff'd, 762 F.2d 886 (11th Cir. 1985), cert. denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987).

Whether counsel has rendered adequate assistance is a mixed question of fact and law requiring application of legal principles to the historical facts of the case. *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), cert. denied, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984).

Question of fact and law. — Whether defense counsel has rendered adequate assistance is a mixed question of fact and law that requires the application of legal principles to the historical facts of the case. *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

Absent a clearly erroneous determination, the Court of Appeals will defer to the district court's findings on such primary facts as what the attorney did or did not do during the course of the trial, but the Court of Appeals will apply its own judgment to the question of whether that conduct constituted ineffective assistance. *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

Claim cannot be raised by counsel who participated in trial. — Defense counsel was precluded from presenting a claim of ineffective assistance of counsel concerning a trial in which counsel participated due to the ethical prohibition against a lawyer acting as a witness. *Tweedell v. State*, 218 Ga. App. 518, 462 S.E.2d 181 (1995).

Defense counsel is precluded from presenting a claim of ineffective assistance of counsel concerning a trial in which counsel participated, due to the ethical prohibition against a lawyer acting as a witness. *Harrison v. State*, 201 Ga. App. 577, 411 S.E.2d 738 (1991).

Trial strategy. — There is a strong presumption that trial counsel's performance falls within the wide range of reasonable professional assistance and any challenged action by trial counsel might be considered sound trial strategy. *Stephens v. State*, 265 Ga. 120, 453 S.E.2d 443 (1995).

Defendant's trial counsel did not render ineffective assistance by failing to

cross-examine the victim of defendant's attempted armed robbery as to the victim's disciplinary record at the fast-food restaurant where the crime was committed in order to show that the victim had a reason to fabricate the crime, as the decision not to cross-examine was one of trial strategy and defendant failed to show prejudice. *Silver v. State*, 276 Ga. App. 801, 625 S.E.2d 81 (2005).

As it was a trial strategy for defendant's counsel to admit that the defendant violated the defendant's probation from a prior conviction, but that defendant was not on trial for the violation of probation and the state had failed to prove the other offense, and that theory was not patently unreasonable, there was no ineffective assistance of counsel. *Copeland v. State*, 276 Ga. App. 834, 625 S.E.2d 100 (2005).

State death row inmate's federal habeas corpus petition was denied where trial counsel was not ineffective for introducing as mitigation evidence at the sentencing phase an independent mental health expert's opinion that the inmate suffered from anti-social personality disorder; although that testimony could be a "two-edged sword," counsel's strategy was to emphasize that the inmate's poor impulse control, which led to the murder of a woman and a child, were not the inmate's fault and that the inmate did not act with premeditation. *Ford v. Schofield*, F. Supp. 2d , 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

Right to remain silent was trial tactic. — Defendant failed to meet the burden of showing ineffective assistance during his criminal trial, as defendant failed to show that the evidence elicited from a police detective affected the outcome of the trial, and counsel's decision not to object to testimony that defendant had invoked the right to remain silent was a trial tactic. *Dunson v. State*, 275 Ga. App. 515, 621 S.E.2d 525 (2005).

Failure to pursue voluntary intoxication defense. — Because declining to spend time and energy delving into murder defendant's drug use was a reasonable course, defense counsel performed in a way that was constitutionally acceptable when they did not investigate and did not present evidence of PCP's effects. *Rogers v. Zant*, 13 F.3d 384 (11th Cir.), cert. denied, 513 U.S. 899, 115 S.

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

Ct. 255, 130 L. Ed. 2d 175 (1994).

Admission of defendant's guilt. — Counsel's admission to the jury during opening and closing arguments that defendant caused the victim's death, made in order to maintain credibility with the jury for the purpose of avoiding the death sentence, did not constitute representation which fell below an objective standard of reasonableness. *Parker v. Turpin*, 60 F. Supp. 2d 1332 (N.D. Ga. 1999), *aff'd sub nom. Parker v. Head*, 244 F.3d 831 (11th Cir. 2001).

Trial counsel was not ineffective in making opening statements in which trial counsel, notwithstanding defendant's pleas of not guilty, effectively admitted defendant's guilt as to the terroristic threats and battery charges. *Mallon v. State*, 266 Ga. App. 394, 597 S.E.2d 497 (2004).

Trial court's finding that defendant received effective assistance of counsel was not clearly erroneous as there was evidence that defense counsel advised defendant of the 10-year mandatory minimum sentence under O.C.G.A. § 17-10-6.1, and defendant failed to show error or prejudice from the state's reading of preliminary instructions to the jury. *Richardson v. State*, 265 Ga. App. 711, 595 S.E.2d 565 (2004).

Failure to challenge indictment. — Despite an inmate's claim to the contrary in a petition for habeas relief, trial counsel was not ineffective in not contesting the failure of the indictment to state venue, by inducing the inmate's guilty plea, in failing to advise the inmate of the inmate's Boykin rights, by failing to object to the prosecutor's conduct at the plea hearing, and by failing to advise the inmate about parole eligibility. *Wright v. Hall*, 281 Ga. 318, 638 S.E.2d 270 (2006).

Matters of strategy. — Trial counsel was not ineffective in handling the DNA evidence as: (1) counsel stipulated to the DNA evidence as part of its strategy to reduce the number of state's witnesses; (2) the defendant remembered having sexual relations with the defendant's spouse; (3) counsel discussed the chain of custody with the State and was satisfied that the chain of custody could be established; and (4) in light of the overwhelming evidence against the defen-

dant, the defendant failed to establish that the results of the proceeding would have been different if the lawyer had not stipulated as to the DNA evidence. Furthermore, evidence of the sexual history of the defendant's spouse was properly excluded under the Georgia Rape Shield Statute, O.C.G.A. § 24-2-3, as the defendant was charged with the aggravated assault of the defendant's spouse in conjunction with a rape charge; trial counsel was not ineffective for failing to argue that evidence of the prior sexual history of the defendant's spouse was admissible. *Osterhout v. State*, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

Because the trial court did not commit reversible error when it granted the state's motion in limine, permitted a police officer to explain the officer's conduct under O.C.G.A. § 24-3-2, and allowed the state to introduce evidence of defendant's prior misdemeanor convictions under O.C.G.A. § 24-9-20(b) and O.C.G.A. § 24-2-2, defendant failed to show that counsel's trial strategies constituted ineffective assistance. *Harris v. State*, 279 Ga. 522, 615 S.E.2d 532 (2005).

Trial counsel was not ineffective in failing to object to every instance of hearsay because such was made as a strategic decision not to object in order to avoid alienating a jury that would ultimately determine whether to impose a death sentence upon defendant; moreover, defendant failed to show that any prejudice resulted by counsel's conduct. *Buttram v. State*, 280 Ga. 595, 631 S.E.2d 642 (2006).

Defendant failed to establish a claim of ineffective assistance of counsel based on trial counsel's failure to object to certain hearsay because defense counsel testified at the hearing on the motion for new trial that the decision not to raise numerous objections, including objections to hearsay, was a tactical one; because defense counsel believed that most of the evidence was consistent with the defense, counsel chose to follow a strategy of allowing the jury to focus on that defense, rather than a strategy of disrupting the flow of the testimony with numerous technical objections, and stated further that defense counsel was "not a big fan of objecting to hearsay anyway. If you catch it too late and then stand up, then they get to hear it two or three times." *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

Defendant did not receive ineffective assistance of counsel because counsel failed to subpoena two witnesses as the witnesses were present at trial and counsel and the defendant decided that the witnesses would not be called because the information they would have provided elicited during the cross-examination of a state's witness; the failure to call the witnesses was a reasonable strategic decision that did not constitute deficient performance. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Defense counsel's decision to pursue an accident defense was an informed strategic choice and was not ineffective assistance of counsel as the decision was not due to a misunderstanding of the law or the facts of the case; rather, counsel consulted with the defendant and learned that the defendant contended that the gun accidentally discharged. There was no evidence that the defendant pointed the gun at the victim before the shooting occurred and there was no dispute as to how the fatal injury was inflicted. *Mayberry v. State*, 281 Ga. 144, 635 S.E.2d 736 (2006).

Trial counsel was not ineffective for opening the door to allow the state to introduce evidence of a defendant's past juvenile adjudication for child molestation as: (1) trial counsel was aware of the defendant's juvenile adjudication prior to the trial and made a strategic decision to call a witness to testify regarding the defendant's good character; (2) the witness consistently testified that the witness knew nothing about such an incident; (3) in light of the witness's lack of knowledge and the state's failure to introduce a certified copy of the prior juvenile adjudication, trial counsel successfully objected to the state making any mention of the prior adjudication during its closing argument, and the trial court gave a special limiting instruction to ensure that the jury would not consider any impeachment evidence in making its determination. *Redman v. State*, 281 Ga. App. 605, 636 S.E.2d 680 (2006).

Because trial counsel's failure to request an adequate charge on the limits to consideration of the defendant's prior conviction for felony firearms possession did not raise a reasonable probability that but for counsel's deficient performance, the outcome of the trial would have been different, the defen-

dant's ineffective assistance of counsel claim failed. *Holsey v. State*, 281 Ga. 177, 637 S.E.2d 32 (2006).

Because the defendant: (1) failed to show prejudice by trial counsel's failure to call certain witnesses at trial; (2) failed to raise allegations of ineffectiveness regarding the state's grant of immunity to a witness and regarding the admission of an audiotape; and (3) abandoned any error regarding the admission of a videotape of the crime scene, the defendant failed to show that trial counsel was ineffective. *McNeal v. State*, 281 Ga. 427, 637 S.E.2d 375 (2006).

No ineffectiveness of counsel was shown in a defendant's malice murder trial by three instances of asserted errors by the defendant's trial counsel which the defendant contended resulted from lack of understanding of the law on the part of the trial counsel; the defendant did not show that the trial counsel's alleged failure to object to the admission of certain evidence, to make a proper challenge to the jury venire, or to follow proper procedure in obtaining funds for an investigator had any negative impact on the defense, and therefore the defendant failed to show that but for the deficient performance, the outcome of the trial would have been different. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

In a defendant's appeal of convictions for murder, felony murder, and aggravated assault, the defendant failed to rebut the presumption that defense counsel's conduct fell within the range of reasonable professional assistance as to defense counsel introducing the fact that the defendant was on probation at the time of the murder, which defense counsel chose to do in order to offer an explanation to the jury of why the defendant was afraid to report the victim's death to the police; even though a different attorney might have chosen a different trial strategy, that did not equate to ineffective assistance of counsel. *Warbington v. State*, 281 Ga. 464, 640 S.E.2d 11 (2007).

Trial court did not clearly err in determining that counsel's decision not to use a witness's pre-trial testimony was proper, and not evidence of counsel's ineffectiveness, when there was an available witness who could testify that that testimony was perjured, as such was not an unreasonable decision no competent attorney would make

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

under the circumstances presented. *Walker v. State*, 281 Ga. 521, 640 S.E.2d 274 (2007).

A defendant did not show that trial counsel was ineffective with regard to a witness, and counsel's actions were the result of a reasonable trial strategy; a component of the defense was that an investigator was persecuting the defendant because the defendant had rebuffed the investigator's sexual advances, and trial counsel did not wish to ask the witness about a discussion with the investigator because it would emphasize to the jury that at an earlier stage in the investigation than suited this theory, the investigator had information implicating the defendant. *Conway v. State*, 281 Ga. 685, 642 S.E.2d 673 (2007).

A defendant failed to establish that the defendant received ineffective assistance of counsel where defense counsel's decision not to seek a severance of certain theft by receiving and drug charges from the defendant's prosecution on malice murder and armed robbery charges, and counsel's decision not to present the defendant's mother as an alibi witness due to a prior inconsistent statement, were both reasonable tactical decisions. *Horne v. State*, 281 Ga. 799, 642 S.E.2d 659 (2007).

In a trial for malice murder, felony murder, and cruelty to children, a defendant was not denied effective assistance of counsel because the defendant's attorney failed to move to sever the defendant's trial from that of the defendant's codefendant and failed to object to the prosecutor's allegedly improper closing argument; trial counsel testified that counsel did not seek a severance so that the jury would focus its outrage on the codefendant rather than the defendant, and the prosecutor's use of phrases such as "I think" and "I know" did not amount to an impermissible statement of personal opinion. *Jackson v. State*, 281 Ga. 705, 642 S.E.2d 656 (2007).

Tactical decisions by trial counsel. — Counsel's "all-or-nothing" defense to rape charge (denial of the charge) was presumed to be a strategic decision and therefore not evidence of unprofessional conduct or ineffective assistance. *Scott v. State*, 223 Ga. App. 479, 477 S.E.2d 901 (1996).

Trial counsel were not ineffective for failing to object to the cross-examination of the defendant's psychologist that brought out instances of the psychologist's past professional misconduct, where the attorneys made the tactical decision that the prosecutor was hurting the state's case by picking on the witness. *Henry v. State*, 269 Ga. 851, 507 S.E.2d 419 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Defense counsel's failure to object to a rape victim's fiancé's testimony about how the fiancé tried to help the victim overcome the victim's drug addiction was part of counsel's trial strategy to portray the victim as an addict who willingly exchanged sexual favors for drugs; defendant's claim of ineffective assistance therefore failed. *Brown v. State*, 260 Ga. App. 77, 579 S.E.2d 87 (2003).

Trial court did not clearly err in denying defendant's motion for a new trial based on a claim of ineffective assistance of counsel where defendant alleged that a prospective witness told counsel that a child victim said that nothing happened, and trial counsel testified that the prospective witness advised the counsel that a child victim would not testify against defendant because the witness was afraid of defendant, and that the witness's testimony was not necessary; deciding which defense witnesses are to be called is a matter of trial strategy and tactics, and tactical errors do not constitute ineffective assistance of counsel. *Tanner v. State*, 259 Ga. App. 94, 576 S.E.2d 71 (2003).

Defendant's 16 challenges to trial counsel's assistance were rejected as they were decisions made after thorough investigation and client consultation, and all involved trial strategy; the decisions concerned: (1) which witnesses to call; (2) whether to put on evidence so as to preserve the final word in closing argument; (3) how to conduct cross-examinations; (4) what motions to file; and (5) what objections to make. *Rowe v. State*, 263 Ga. App. 367, 587 S.E.2d 781 (2003).

Felony murder conviction for the defendant shooting the victim following a prolonged argument concerning an attempted drug sale was affirmed because the defendant failed to prove that defense counsel was ineffective because defense counsel's decision not to enlarge a photograph of defen-

dant's claimed wound and introduce it into evidence was a reasonable strategic or tactical decision nor was counsel's failure to subpoena a detective in order to obtain a diagram of the crime scene ineffective as the information that the defendant sought to obtain and introduce into evidence was submitted into evidence by the testimony of other witnesses and a videotape of the crime scene. *Sellers v. State*, 277 Ga. 172, 587 S.E.2d 35 (2003).

Counsel's decision not to use evidence of appellant's purported cocaine intoxication that conflicted with appellant's plea of not guilty was a matter of trial strategy within the exclusive province of the lawyer after consultation with the client, and fell within the bounds of reasonable professional conduct. The trial court did not err when it determined that trial counsel's decision not to use the psychiatric evidence did not constitute ineffective assistance of counsel. *Prince v. State*, 277 Ga. 230, 587 S.E.2d 637 (2003).

Defendant convicted of aggravated assault did not show that defense counsel provided ineffective assistance by: (1) failing to object to the admission of defendant's prior convictions after defendant placed defendant's character in issue; (2) failing to object to the admission, at sentencing, of defendant's prior convictions, which had been used at trial for impeachment, as the convictions were properly admitted; and (3) making a strategic decision not to request a jury instruction on the defense of accident, which defendant did not raise until defendant's own testimony, and any ineffective assistance arising from counsel's failure to investigate defendant's prior guilty pleas used to enhance defendant's sentence, which may have been involuntary, was rendered moot by the vacation of defendant's sentence. *Carswell v. State*, 263 Ga. App. 833, 589 S.E.2d 605 (2003).

Trial court properly denied defendant's claim of ineffective assistance of counsel since defense counsel met with defendant seven times, disagreed with defendant's assertion that certain defense witnesses were improperly dressed for court, rejected certain witnesses to avoid entering into evidence defendant's prior convictions, and made several other tactical decisions about the conduct of defendant's defense. *Anderson v. State*, 264 Ga. App. 362, 590 S.E.2d 729 (2003).

Defendant did not show defendant was deprived of effective assistance of counsel because defense counsel did not call two character witnesses as counsel said the two witnesses would only have offered character evidence, the state could easily have discredited their testimony, counsel did not want to lose closing argument by introducing evidence other than defendant's testimony, and the decision not to call these witnesses was trial strategy. *Martin v. State*, 266 Ga. App. 392, 597 S.E.2d 445 (2004).

Trial counsel's use of a videotaped police interview did not constitute ineffective assistance but was a tactical decision made to support the defense theory. *Robinson v. State*, 278 Ga. 31, 597 S.E.2d 386 (2004).

Where the defendant asserted that the defendant was denied effective assistance of trial counsel in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 because trial counsel failed to call witnesses who gave testimony at the hearing on the defendant's motion for a new trial that contradicted testimony for the state with regard to the timing of the defendant's arrest, the argument failed; defense counsel did not call the witnesses as a matter of trial strategy after defense counsel interviewed the witnesses and determined that their testimony was cumulative and potentially harmful to the defendant. Furthermore, the defendant's assertion that the defendant was denied effective assistance of trial counsel based on trial counsel's failure to call witnesses who would have testified that the defendant told the owner of the vehicle where the vehicle could have been found after the defendant had allegedly stolen the vehicle, was not error as the witnesses' testimony would have been inadmissible hearsay under O.C.G.A. § 24-3-1. *Sexton v. State*, 268 Ga. App. 736, 603 S.E.2d 66 (2004).

Defendant argued that counsel was ineffective for failing to present evidence in support of defendant's coercion defense, failing to sever the trial from the co-defendant, and failing to voir dire certain parties; however, all these claims either lacked merit or were part of counsel's trial strategy thereby making counsel's services effective. *Treadwell v. State*, 272 Ga. App. 508, 613 S.E.2d 3 (2005).

Defendant's counsel was not ineffective in defendant's criminal trial, as the decision to

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waive opening argument was a tactical decision, the decision not to request jury charges was based on counsel's determination that the applicable law was adequately covered, counsel's failure to interview one witness was not shown to have prejudiced defendant's case, and there was no showing that a request for a continuance would have been necessary; tactical trial decisions did not constitute ineffective assistance. *Polk v. State*, 275 Ga. App. 467, 620 S.E.2d 857 (2005).

Errors of judgment and tactical errors do not constitute denial of effective assistance of counsel. *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976); *Bishop v. State*, 155 Ga. App. 611, 271 S.E.2d 743 (1980); *Hudson v. State*, 156 Ga. App. 281, 274 S.E.2d 675 (1980); *McCloud v. State*, 174 Ga. App. 672, 331 S.E.2d 54 (1985); *Brenneman v. State*, 200 Ga. App. 111, 407 S.E.2d 93 (1991).

Because the appellant's counsel negotiated a favorable pretrial agreement that the appellant rejected, conducted extensive and appropriate cross-examination of state witnesses, presented witnesses on the appellant's behalf, in addition to the appellant's testimony, made an opening statement and closing argument and there was overwhelming evidence against the appellant, including a positive identification and the appellant's confession, the attorney did an excellent job in representing the appellant; errors of judgment and tactical errors do not constitute denial of effective assistance of counsel. *Moore v. State*, 174 Ga. App. 460, 330 S.E.2d 397 (1985).

Errors of judgment and tactical errors do not establish ineffective assistance. *Clarington v. State*, 178 Ga. App. 663, 344 S.E.2d 485 (1986).

Record did not show that counsel's decisions concerning the extent of counsel's voir dire examination and whether or not to interpose challenges were not reasonable tactical decisions. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Decisions as to what objections to make and when to make them are matters within

the trial counsel's discretion, and the strategic choices of counsel do not establish ineffective assistance, even if in hindsight these strategic choices are proven to be erroneous. *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

Defendant, charged with aggravated assault, was not prejudiced by counsel's pursuit of an insanity defense at trial, rather than one of self-defense, where none of the witnesses other than defendant gave any indication that defendant was defending self in the incident. *Prophitt v. State*, 191 Ga. App. 5, 381 S.E.2d 83 (1989).

Trial strategy and tactics do not equate with ineffective assistance of counsel. *Lee v. State*, 199 Ga. App. 246, 404 S.E.2d 598, cert. denied, 199 Ga. App. 906, 404 S.E.2d 598 (1991).

Trial counsel was not ineffective in failing to require the court reporter to take down certain portions of the trial, failing to question witnesses further, refusing to accept the trial court's offer to give a limiting instruction on deposition testimony, failing to object to certain testimony, and failing to preserve pretrial interviews with a key witness, as each alleged deficiency was a strategic or tactical decision. *Herndon v. State*, 235 Ga. App. 258, 509 S.E.2d 142 (1998).

Defendant failed to establish a claim of ineffective assistance of counsel because defense counsel's failure to object to the admission of a witness's pretrial statement to police was not ineffective assistance of counsel as admission of the statement was proper; the defendant also failed to show that defense counsel's failure to object to opinion evidence given by police officers was not the result of a reasonable trial strategy on counsel's part, or that the result of the trial would have been different had counsel objected. Finally, the defendant failed to show that defense counsel's cooperating in the introduction of a witness's prior testimony was anything other than a decision made in the reasonable exercise of professional judgment. *Cummings v. State*, 280 Ga. 831, 632 S.E.2d 152 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to object when the state allegedly presented the hearsay statements of a nontestifying codefendant to a second codefendant and to an

acquaintance of the defendant's that inculpated the declarant in the offenses; the defendant was unable to prove that the defendant was prejudiced, as the strength of the evidence against the defendant included the defendant's statements to the codefendant, an acquaintance and to the police admitting to shooting the victim, and the evidence included the murder weapon that was recovered from the defendant. *Chenoweth v. State*, 281 Ga. 7, 635 S.E.2d 730 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to object to the trial court's questions concerning juror bias; trial counsel had no obligation to object, as the trial court's general questions to each of the allegedly biased jurors were not improper. *Chenoweth v. State*, 281 Ga. 7, 635 S.E.2d 730 (2006).

Counsel was not ineffective where tactics used were for trial strategy. — Trial tactics which had the effect of revealing to the jury the defendant's prior criminal record do not establish ineffective assistance of counsel. *Williams v. State*, 202 Ga. App. 494, 414 S.E.2d 716 (1992).

Failure to obtain defendant civilian clothes via a request for a continuance was construable as sound trial strategy and not ineffective assistance of counsel. *Walker v. State*, 210 Ga. App. 139, 435 S.E.2d 259 (1993).

At the new trial hearing, both defense counsels testified that they discussed their trial strategy with the defendant who agreed with their ultimate tactics. The appellate court should not second guess those decisions and defendant was not entitled to a new trial based on ineffective assistance of counsel. *Nihart v. State*, 227 Ga. App. 272, 488 S.E.2d 740 (1997).

Trial counsel's questioning of investigator to show investigator's bias against defendant was not ineffective assistance even though it divulged defendant's previous arrest by the inspector and defendant's refusal to give a statement when arrested. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

Defendant failed to prove that defendant was prejudiced by the absence of certain evidence, as the evidence did not go to whether the defendant, in fact, assaulted the victim. Furthermore, defense counsel's fail-

ure to object to allegedly improper statements during closing argument was a matter of trial strategy and did not prejudice the defendant. *Clonts v. State*, 260 Ga. App. 143, 579 S.E.2d 1 (2002).

Defendant's conviction for molesting the defendant's minor child as part of Wiccan sexual rituals had to be affirmed, even though the defendant argued that the defendant received ineffective assistance of counsel, as the defendant did not provide the appellate court with evidence that any of the deficiencies the defendant alleged, even if assumed to be true, actually prejudiced the defendant's coercion defense in any way; too, the bulk of the defendant's allegations involved issues of trial strategy, which could not serve as the basis for the reversal of the defendant's conviction. *Laymon v. State*, 261 Ga. App. 488, 583 S.E.2d 165 (2003).

Where defendant's trial counsel failed to interview an eyewitness, met with defendant three times before trial, failed to request a curative instruction that the jury was not to infer guilt from defendant's disruptive behavior in the courtroom, failed to move for a mistrial, and failed to request a charge on the lesser included offense of possession of stolen property at defendant's burglary trial, such were matters of trial strategy that the court refused to second-guess and, therefore, ineffective assistance of counsel was not shown. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Where defense counsel informed the trial court that counsel and defendant had agreed, as a matter of trial strategy, not to call character witnesses in case the state had any character impeachment witnesses, defendant's claim that this was ineffective assistance was rejected; decisions about which witnesses to call were a matter of trial strategy. *Weathersby v. State*, 263 Ga. App. 341, 587 S.E.2d 836 (2003).

Defendant did not show the defendant received ineffective assistance of counsel when defendant's trial counsel did not subpoena two alibi witnesses, because the testimony of these witnesses would have been cumulative of witnesses who testified, so defendant did not show that defendant was prejudiced by counsel's actions. *Jefferies v. State*, 267 Ga. App. 694, 600 S.E.2d 753 (2004).

Because defense counsel's trial strategy,

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tactics, and tactical errors did not constitute ineffective assistance of counsel and because defendant did not establish that the deficiency prejudiced the defense, the trial court's denial of defendant's motion for a new trial was not clearly erroneous. *Ford v. State*, 272 Ga. App. 798, 613 S.E.2d 234 (2005).

Defendant failed to prove ineffective assistance of counsel, in violation of U.S. Const., amend. 6, because counsel's decision not to seek severance of an offense in the defendant's multi-count criminal trial and the decision not to call the defendant's spouse as a witness, were matters which were within the counsel's trial strategy and did not constitute ineffectiveness; the prosecutor's closing arguments were within the wide latitude given for that purpose, and a failure to object thereto was also not ineffectiveness. *Level v. State*, 273 Ga. App. 601, 615 S.E.2d 640 (2005).

Defendant failed to establish that defense counsel's failure to object to a prosecutor's questions about specific instances of misconduct was ineffective assistance since trial counsel testified that, knowing that the state had no evidence of prior crimes to introduce, defense counsel's trial strategy was to show that the type of acts for which the defendant stood accused were "totally out of character," and since counsel further testified that the counsel did not object to the two questions at issue because defense counsel believed that the door to that line of questioning had been opened and because the state possessed no evidence that could be introduced to harm the defendant. *Harris v. State*, 279 Ga. App. 570, 631 S.E.2d 772 (2006).

Defendant failed to establish a claim of ineffective assistance of counsel based on counsel's decision to not put up evidence because trial counsel testified that, as agreed to by the defendant, it was defense counsel's strategy to not put up evidence in order to preserve the right to closing argument; with regards to the defendant's accusations that a county solicitor general had some motive to commit the murders at issue, defense counsel also testified that defense counsel be-

lieved that it would not be productive to attempt to blame an elected official on the basis of weak evidence and supposition. *Griffin v. State*, 280 Ga. 683, 631 S.E.2d 671 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to object when the state placed the defendant's character at issue by introducing evidence of the defendant's use of crack cocaine after the crime; the state presented evidence that the defendant acted erratically after the crime, suggesting nervousness about the defendant's involvement in the crime, and the defendant and defense counsel strategically chose not to object to the crack cocaine evidence because it provided an alternative reason for the defendant's nervous behavior. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 2007 U.S. LEXIS 2212 (U.S. 2007).

Trial counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to join the objection tendered by the codefendant's counsel to the prosecutor's closing argument that allegedly improperly shifted the burden of proof to the three defendants; trial counsel's decision not to add an objection on top of the codefendant's objection was neither deficient performance nor prejudicial, as the trial counsel had already objected once, the codefendant's objection to the statement had already been overruled, and the trial counsel testified that the trial counsel was prepared to argue extensively about the burden of proof and the judge's instructions on the burden of proof during the trial counsel's closing argument. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 2007 U.S. LEXIS 2212 (U.S. 2007).

Defendant did not receive ineffective assistance of counsel due to counsel's failure to object to testimony concerning the defendant's initial statement denying knowledge of a murder as counsel testified that counsel did not object because the testimony bolstered the defense theory that the initial statement was true and that the defendant had given a subsequent inculpatory statement only after being threatened by a co-indictee; the decision was a reasonable strategic decision and did not constitute

deficient performance. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Supreme Court of Georgia rejected the defendant's five ineffective assistance of counsel claims as lacking merit because the defendant failed to show that trial counsel's trial tactics and investigation were deficient, counsel explained that choices as to when and when not to object were part of the overall defense trial strategy, the defendant failed to show prejudice by permitting the state to elicit speculation that the person who killed the victim could be the person who called an anonymous tip line to suggest various suspects, and any claims not raised in the defendant's motion for a new trial were waived. *Lynch v. State*, 280 Ga. 887, 635 S.E.2d 140 (2006).

A murder defendant did not show ineffective assistance of counsel; trial counsel chose not to call two eyewitnesses because counsel did not consider their testimony strong enough to justify the loss of the right to conclude closing argument, which was a well recognized trial tactic at the time. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Trial tactics used after consultation with client. — Activities that are properly described as trial tactics that are within the exclusive province of the lawyer after consultation with the client do not equate to ineffective assistance of counsel. *Warner v. State*, 155 Ga. App. 495, 271 S.E.2d 636 (1980); *Scott v. State*, 157 Ga. App. 608, 278 S.E.2d 49 (1981).

Trial counsel who consulted with defendant and acted pursuant to an informed strategic choice which comported with defendant's feelings about the defense was not ineffective. *Van Alstine v. State*, 263 Ga. 1, 426 S.E.2d 360 (1993).

Trial counsel's compliance with the client's instructions not to contact family members was reasonable because counsel feared that if counsel did not, counsel would lose the defendant's cooperation in the defense strategy. *Hance v. Zant*, 981 F.2d 1180 (11th Cir.), cert. denied, 510 U.S. 920, 114 S. Ct. 317, 126 L. Ed. 2d 263 (1993).

Defense counsel did not give ineffective assistance of counsel in failing to call certain witnesses as which witnesses to call was in the exclusive province of the attorney, after consultation with the client; defense counsel conferred with defendant after counsel indi-

cated that counsel wanted to call defendant's accomplices as witnesses and explained to defendant that defendant had the right to testify, defendant testified, and the only further mention of the witnesses was by the trial judge, who directed that the witnesses be brought to the courtroom, after which the defense rested, without calling the witnesses. *Reynolds v. State*, 267 Ga. App. 148, 598 S.E.2d 868 (2004).

Disagreement, in retrospect, with trial tactics. — The fact that the defendant's attorney made decisions during the trial with which the defendant and the defendant's current counsel now disagree, does not require a finding that the original representation of defendant was so inadequate as to amount to a denial of effective assistance of counsel. *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976).

Commission by retained counsel of acts which may retrospectively appear to be errors of judgment, if made in good faith, do not constitute a denial of effective representation. *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976).

Where trial counsel sufficiently investigates the facts of the case, adequately researches the law, and presents the case in a competent and reasonably effective manner and then in counsel's reasoned judgment determines that the assertion of a particular defense could prove disadvantageous to the defense, such decision is a matter of trial tactics and strategy left to the discretion of trial counsel. The fact that appellate counsel now disagrees with trial counsel's decisions and would have handled the appellant's case differently does not require a finding that trial counsel's representation of him was so inadequate as to amount to ineffective assistance of counsel. *Berryhill v. Ricketts*, 242 Ga. 447, 249 S.E.2d 197 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2418, 60 L. Ed. 2d 1073 (1979).

The standard of effectiveness of counsel is not to be judged by hindsight with reference to trial tactics, even though another lawyer or other lawyers might have conducted the trial differently. *Gottschalk v. State*, 160 Ga. App. 769, 287 S.E.2d 107 (1982).

Complaint as to tactics must raise question of loyalty, integrity, or competence. — Where the defendant's appellate complaint relates to tactical judgments made by trial

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counsel and, in the absence of a showing that the trial counsel's loyalty, integrity, or best use of counsel's ability is questioned, a new trial will not be granted on the ground that the defendant was not afforded competent representation. *Bishop v. State*, 155 Ga. App. 611, 271 S.E.2d 743 (1980).

Tactical decision is question of fact; reasonableness of tactic a question of law. — The question of whether a decision by counsel was a tactical one is a question of fact. However, whether a tactic was reasonable is a question of law. *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992).

Failure to request certain instructions. — Although the defendant's counsel failed to secure a transcript of the defendant's daughter's juvenile court proceeding, wherein the daughter claimed sole responsibility for having shoplifted various items from a store, it was not shown that such a transcript or a jury charge on the daughter's prior consistent statements would have caused the jury to reject the testimony of the store's asset protection agent that he observed the defendant tear packaging off items of merchandise in her shoplifting trial; accordingly, there was no ineffective assistance of the defendant's counsel in violation of the sixth amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIV, and the failure of the trial court to have given the jury prior consistent statement jury instructions under O.C.G.A. § 5-5-24(b) was not harmful error. *Tucker v. State*, 282 Ga. App. 807, 640 S.E.2d 310 (2006).

Because the trial court thoroughly instructed the jury that it was the arbiter of each witness's credibility and that it should give consideration to each witness's interest or lack thereof in the outcome of the case, no other instructions were necessary, as this charge adequately covered the possible motive, interest, or bias of a state witness; thus, counsel was under no obligation to request an additional instruction regarding motive, interest, or bias. *Lee v. State*, 281 Ga. 776, 642 S.E.2d 835 (2007).

Failure to request lesser-included offense instruction. — In a murder prosecution, the

appeals court rejected the defendant's claims that trial counsel was ineffective in failing to pursue a battered woman syndrome defense and by failing to request a jury instruction on the lesser offense of voluntary manslaughter, as: (1) the evidence showed that the defendant, after consultation with counsel, instead chose to focus exclusively on the defense of justification; (2) the evidence did not support a voluntary manslaughter charge; and (3) the defendant did not want the trial court to charge on manslaughter. Moreover, because appellate counsel did not ask trial counsel about the decision not to seek the manslaughter instruction, that decision was presumed to be a strategic. *Ballard v. State*, 281 Ga. 232, 637 S.E.2d 401 (2006).

Ineffective assistance of counsel claims are usually not considered on direct appeal because a district court normally has not had the opportunity to conduct an evidentiary hearing or to render findings of fact. *United States v. Badolato*, 701 F.2d 915 (11th Cir. 1983).

Where the issue of ineffectiveness of counsel is raised for the first time on appeal, the case must be remanded to the trial court for an evidentiary hearing on the claim. *Holt v. State*, 205 Ga. App. 40, 421 S.E.2d 131 (1992); *Turner v. State*, 210 Ga. App. 328, 436 S.E.2d 66 (1993).

Ineffective assistance of counsel claim may be raised for the first time in the direct appeal if the direct appeal marks the first appearance of new counsel but, where new counsel amends a motion for new trial without raising the issue of ineffective assistance so that it may be heard in the trial court, the issue is waived. *Holt v. State*, 205 Ga. App. 40, 421 S.E.2d 131 (1992).

Applicability of "reasonably effective assistance" standard. — The "reasonably effective assistance" standard is applicable to the pretrial as well as the trial phase. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Standard inappropriate in civil suit seeking prospective relief. — The "ineffective assistance of counsel" standard as set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is inappropriate for a civil suit seeking prospec-

tive relief, where the plaintiff's burden is to show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), cert. denied, 495 U.S. 957, 110 S. Ct. 2562, 109 L. Ed. 2d 744 (1990).

Question of ineffectiveness of counsel divides itself into two parts: First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by U.S. Const., amend. 6. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Kornegay v. State*, 174 Ga. App. 279, 329 S.E.2d 601 (1985).

There are two components to the claim of ineffective assistance of counsel: Deficient performance and prejudice resulting from such deficient performance; neither exists in the instant case. *Manus v. State*, 180 Ga. App. 658, 350 S.E.2d 41 (1986).

To establish ineffective assistance of counsel the defendant must show both that counsel's performance was deficient and that this deficiency prejudiced the defense. *Brock v. State*, 183 Ga. App. 277, 358 S.E.2d 613 (1987); *Gross v. State*, 262 Ga. 232, 416 S.E.2d 284 (1992); *Taylor v. State*, 203 Ga. App. 210, 416 S.E.2d 554 (1992).

In order to prevail on an ineffective-assistance claim, a convicted defendant must show: (1) that counsel's performance was deficient, i.e., that counsel's performance was not reasonable under all the circumstances; and (2) that this deficient performance prejudiced the defense, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Johnson v. State*, 199 Ga. App. 67, 404 S.E.2d 139, cert. denied, 199 Ga. App. 906, 404 S.E.2d 139 (1991).

Joint representation not ineffective. — The burden is on the defendant claiming ineffectiveness of counsel to establish (1) the attorney's representation in specified instances fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofes-

sional errors, the result of the proceeding would have been different. *Day v. State*, 203 Ga. App. 186, 416 S.E.2d 548 (1992).

Trial counsel did not provide ineffective assistance of counsel under the sixth amendment where: (1) trial counsel jointly represented defendants, a husband and a wife; (2) the trial court questioned defendants about the joint representation and they testified that they understood the potential problems with joint representation; (3) any error was induced by defendants; (4) there was no evidence that defendant husband would have been offered a better deal if he had testified against defendant wife; and (5) defendant wife's argument that trial counsel was unable to argue that the methamphetamine in the safe belonged to defendant husband completely ignored defendant wife's testimony that she put the methamphetamine in the safe and that her husband was lying to protect her, and the notes about the various drug sales. *Christopher v. State*, 262 Ga. App. 257, 585 S.E.2d 107 (2003).

Standard for determining effectiveness of counsel applies equally to both appointed and retained counsel. *Spence v. State*, 163 Ga. App. 198, 292 S.E.2d 908 (1982).

Test for relief from conviction on grounds of inadequate counsel. — It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel under U.S. Const., amend. 6 will be granted only when the trial is a farce, or a mockery of justice, or is shocking to the conscience of the reviewing court, or the purported representation is only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for a conference and preparation. Lawyers are not required to be infallible. The ability and faithfulness of an attorney is not to be judged by whether the attorney won or lost the verdict. *Mitchell v. Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972); *Bonaparte v. Smith*, 362 F. Supp. 1315 (S.D. Ga.), aff'd, 484 F.2d 956 (5th Cir. 1973), cert. denied, 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974); *Sewell v. State*, 130 Ga. App. 740, 204 S.E.2d 524 (1974); *Beavers v. State*, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper func-

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tioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Jones v. State*, 177 Ga. App. 531, 339 S.E.2d 786 (1986).

Right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing, and when a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors — the kind of testing envisioned by the sixth amendment has occurred, but if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. *Heath v. State*, 268 Ga. App. 235, 601 S.E.2d 758 (2004).

Test with regard to guilty plea. — To show ineffective assistance of counsel, a defendant who pleads guilty must show that defendant's counsel erred and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Johnson v. State*, 260 Ga. App. 897, 581 S.E.2d 407 (2003).

In a case in which defendant sought to withdraw defendant's guilty plea after sentencing based on, *inter alia*, defense counsel's ineffectiveness in allegedly giving defendant confusing advice about the sentence and in allegedly failing to inform defendant that defendant had the opportunity to withdraw defendant's guilty plea prior to sentencing, the trial court did not clearly err in finding that the evidence of ineffective assistance of counsel was insufficient to justify allowing defendant to withdraw defendant's guilty plea, as the record clearly showed that defendant was well aware of the trial court's intention to sentence defendant to 20 years in prison and that defense counsel had informed defendant that defendant could withdraw defendant's guilty plea prior to sentencing if defendant did not want to accept the intended sentence. *Johnson v. State*, 260 Ga. App. 897, 581 S.E.2d 407 (2003).

Trial court did not abuse its discretion in finding that defendant's trial counsel was not ineffective at defendant's plea hearing

and in denying defendant's plea withdrawal motion. There was not a reasonable probability that, but for the attorney's failure to challenge a Ga. Unif. Super. Ct. R. 33.9 violation, the result of the guilty plea hearing would have been different, because a sufficient factual basis existed from the testimony at the plea hearing and a prior bond hearing to support the plea. *Bielen v. State*, 265 Ga. App. 865, 595 S.E.2d 543 (2004).

Defendant's motion to withdraw the guilty pleas because the defendant received ineffective assistance of counsel at a guilty plea hearing since defense counsel misinformed the defendant regarding the amount of time the defendant would serve in prison was properly rejected by the trial court because: (1) the counsel correctly informed the defendant that the defendant would not be eligible for parole consideration for at least 20 years and the counsel denied telling the defendant that the defendant would serve no more than 20 years; (2) the trial court clearly explained the defendant's sentence to the defendant at the plea hearing, including the fact that the defendant would not be eligible to be considered for parole for at least 20 years and that because of the violent nature of the defendant's crimes the defendant likely would spend the rest of the defendant's life in prison; and (3) the trial court emphasized to the defendant that neither the defendant's counsel nor the district attorney could make any certification to the defendant concerning the defendant's eligibility for parole; even assuming the counsel provided erroneous advice about the time the defendant would serve in prison, the defendant was informed of the correct sentence prior to the entry of the defendant's plea and the defendant could not show prejudice. *Rios v. State*, 281 Ga. 181, 637 S.E.2d 20 (2006).

Defendant failed to establish that the defendant received ineffective assistance in defense counsel's advice to plead guilty because the defendant's trial counsel testified that after the conviction in a first trial, it was counsel's best professional recommendation that the defendant plead guilty in the second case, as the second case was a lot worse than the first and that, if the defendant went to trial in the second case, the defendant was potentially facing a much longer sentence, but as a consequence of the plea, the defen-

dant's maximum aggregate sentence in both cases was 15 years, with 13 to serve; moreover, the defendant's testimony demonstrated that the defendant understood that by pleading guilty, the defendant would not have to serve a longer sentence. *Hollman v. State*, 280 Ga. App. 53, 633 S.E.2d 395 (2006).

Trial court did not err by denying a defendant's motion to withdraw the defendant's guilty plea due to ineffective assistance of the counsel representing the defendant at the plea hearing as: (1) the counsel met with the defendant several times prior to the plea hearing, reviewed the district attorney's file, and discussed with the defendant the evidence the state intended to present against the defendant; (2) the counsel moved to suppress the defendant's statements to the police and discussed the options available with the defendant after the motion was denied, including the state's offer of a plea recommendation; and (3) the defendant failed to show how additional communication with the counsel would have changed the defendant's decision to enter a guilty plea. *Rios v. State*, 281 Ga. 181, 637 S.E.2d 20 (2006).

For summary of standards by which lawyer competency is to be judged according to recent federal cases, see *Carter v. State*, 176 Ga. App. 632, 337 S.E.2d 413 (1985).

Standard in capital cases. — A defendant is entitled to an attorney likely to render and, in fact, rendering reasonably effective assistance, whether that attorney be retained or court-appointed. This standard is to be applied with particular care in capital cases. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), vacated on other grounds sub nom. *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

In context of challenge to guilty plea, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Tahamtani v. Lankford*, 846 F.2d 712 (11th Cir. 1988) (standard not met).

Trial court did not abuse its discretion in disregarding defendant's testimony that defendant's appointed attorney misled defen-

dant and in refusing to allow defendant to withdraw defendant's plea because: (1) defendant's counsel was not ineffective because: (a) counsel stated that defendant determined that the plea and the resulting sentence to be served concurrently with what defendant already had was better than going to trial; (b) counsel expressly stated that counsel made no threats or promises to induce the client's plea; and (c) counsel testified that before completing the plea, the attorney continuously advised defendant of the status of the witnesses against the counsel; (2) defendant's plea was voluntary and knowingly entered because defendant understood the charges, the sentence, and plea consequences; and (3) there was a factual basis for the plea. *Hill v. State*, 267 Ga. App. 357, 599 S.E.2d 307 (2004).

Defendant could not argue that defendant received ineffective assistance of counsel because of defense counsel's failure to object to a breach of the terms of the plea agreement by the state, as the record showed that the state did not breach the plea agreement; accordingly, defense counsel was not required to raise a meritless objection concerning the terms of the agreement. *Pitts v. State*, 265 Ga. App. 633, 595 S.E.2d 322 (2004).

Prejudice component of a claim of ineffective assistance of counsel in cases involving withdrawal of guilty pleas may be satisfied by showing that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Heath v. State*, 268 Ga. App. 235, 601 S.E.2d 758 (2004).

Plea deals. — Because the defendant failed to show that trial counsel was ineffective for failing to properly advise the defendant regarding a plea offer, and counsel was not required make meritless objections to the admission of testimony and evidence, the defendant's ineffective assistance of counsel claim failed. *Hunter v. State*, 281 Ga. 526, 640 S.E.2d 271 (2007).

Standard for judging counsel's effectiveness in petty offense cases. — Even while extending the right of counsel to indigents for petty offenses, the United States Supreme Court has obliquely acknowledged that the enormous volume of minor cases will continue to result in hurried and inad-

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

equate prosecution, defense, and determination. The Georgia Court of Appeals cannot presume to set standards of representation in these circumstances but must accept adequacy *prima facie* in the absence of a showing either that counsel's loyalty or integrity were in question, or that the trial was a farce or mockery of justice. *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973).

Test is not whether ablest or most skillful attorneys were appointed. — The question of whether the accused has been deprived of the aid and benefit of counsel depends not on whether the ablest or most skillful attorneys were appointed for the accused, but on whether the attorneys actually appointed were so ignorant, inexperienced, or grossly lacking in appreciation of their responsibility as to amount to virtually no representation upon the trial. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Test of representation is whether defendant was denied effective assistance of counsel, which means representation so lacking in competence that it becomes the duty of the court or the district attorney to observe it and correct it. *Mitchell v. Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972).

Mere subjective lack of confidence in the attorney by a defendant is not sufficient to render the assistance provided by counsel ineffective under U.S. Const., amend. 6. *United States v. Beaver*, 524 F.2d 963 (5th Cir. 1975), cert. denied, 425 U.S. 905, 96 S. Ct. 1498, 47 L. Ed. 2d 756 (1976).

Attorneys are officers of the court and are presumed to do as the law and their duty require them. — When an attorney is appointed by the court to defend a person accused of crime who is unable to employ counsel, it is to be presumed that the attorney will discharge the attorney's full duty in the premises. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Sufficient skill and learning presumed. — It is also to be presumed that the court, in appointing counsel for this purpose, will appoint attorneys who have sufficient skill

and learning to defend the accused properly. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Broad discretion must be granted trial courts on matters of continuances, and only unreasoning and arbitrary insistence upon expeditiousness in the face of justifiable request for delay would violate the right to assistance of counsel. *Bennett v. State*, 186 Ga. App. 832, 368 S.E.2d 789 (1988).

Testimony of defendants and their trial counsel. — When the issue of whether defendants were denied effective assistance of counsel has been raised in a motion for new trial, defendants' trial counsel, who was a different attorney than their appellate counsel, should be allowed to testify as to attorney's conduct of the trial, and defendants should also be allowed to testify and/or present evidence on this issue. *Martin v. State*, 185 Ga. App. 145, 363 S.E.2d 765 (1987).

When a trial counsel is unavailable for a hearing on a claim of ineffective counsel, the trial court shall decide the issue on the record of the case proceedings and other available evidence. *Bowman v. State*, 222 Ga. App. 893, 476 S.E.2d 608 (1996).

Failure of appellate counsel to challenge state's use of peremptory challenges. — Appellate counsel was ineffective in failing to ask the state supreme court to set aside the petitioner's conviction on the ground that petitioner was denied right to equal protection where the state used nine out of ten peremptory challenges to exclude blacks from the jury in the petitioner's trial for malice murder and it was clear that such a claim would have succeeded on appeal. *Eagle v. Linahan*, 268 F.3d 1306 (11th Cir. 2001).

Remand of claim. — A defendant's claim of ineffective assistance of counsel may be remanded for further consideration even though the claim is not raised in a motion for a new trial where the instant case is not pending in a trial court subsequent to the Georgia supreme court's decision in *Thompson v. State*, 255 Ga. 654, 341 S.E.2d 5 (1986) which prevents a remand of an ineffective assistance of counsel claim which is raised for the first time on appeal. *Foote v. State*, 184 Ga. App. 900, 363 S.E.2d 180 (1987).

Where a defendant is represented on ap-

peal by counsel other than trial counsel, and no motion for a new trial was filed, the case may be remanded for a hearing and appropriate findings concerning a claim of ineffective assistance of counsel. *Thompson v. State*, 186 Ga. App. 471, 367 S.E.2d 320, aff'd, 188 Ga. App. 508, 373 S.E.2d 292 (1988); *Brady v. State*, 207 Ga. App. 451, 428 S.E.2d 373 (1993).

Where the failure of trial counsel to object to the alleged improper closing argument of counsel for the state is urged in support of the appellant's enumeration of error, which raises the ineffective-assistance-of-counsel claim, but the appellant is represented on appeal by different counsel than at trial, the case will be remanded to the trial court for a hearing and appropriate findings concerning the issue of ineffective assistance of counsel. *Green v. State*, 187 Ga. App. 373, 370 S.E.2d 348 (1988), aff'd, 191 Ga. App. 807, 383 S.E.2d 134 (1989).

Defendant's claim of ineffective assistance was correctly denied, where on remand to the trial court for a hearing on the effectiveness of trial counsel, defendant merely reasserted deficiencies in trial counsel's performance, but did not attempt to establish that those claimed deficiencies prejudiced the defense. *Murray v. State*, 262 Ga. 435, 420 S.E.2d 752 (1992).

The lack of any hearing before the trial court concerning counsel's effectiveness required remand of case for an evidentiary hearing on the asserted claims of ineffective assistance of counsel. *Wright v. State*, 209 Ga. App. 128, 433 S.E.2d 99 (1993).

Trial court committed reversible error when it did not address a defendant's claim that defense counsel failed to support post-conviction remedies, deliberately foregoing a direct appeal for four years without the defendant's consent, because that ground was closely connected to the defendant's repeated effort to obtain appellate counsel and as such, a hearing was required; moreover, the defendant was entitled to rely on the fact that a hearing on the motion was scheduled, and as a result, no action was taken to waive or abandon a right to a hearing. *Jones v. State*, 280 Ga. App. 287, 633 S.E.2d 806 (2006).

Counsel's use of peremptory strike after juror removed for cause. — Defendant did not receive effective assistance of counsel

after defendant's attorney used a peremptory strike to strike a juror who had already been stricken for cause; defendant was prejudiced by the unnecessary waste of a peremptory strike, and the denial of defendant's motion for a new trial was improper. *Fortson v. State*, 277 Ga. 164, 587 S.E.2d 39 (2003).

Meritorious claim as prerequisite to challenge. — Where the defendant does not have a meritorious fourth amendment claim, the defendant cannot prevail on the defendant's claim that counsel was ineffective for not challenging the defendant's arrest. *Thomas v. Newsome*, 821 F.2d 1550 (11th Cir.), cert. denied, 484 U.S. 967, 108 S. Ct. 461, 98 L. Ed. 2d 401 (1987).

Attorney's failure to bring a jury challenge claim did not constitute ineffective representation, where petitioner failed to show that a jury challenge claim would have been meritorious. *Burden v. Zant*, 690 F. Supp. 1040 (M.D. Ga. 1988), aff'd, 903 F.2d 1352 (11th Cir. 1990), rev'd on other grounds, 498 U.S. 433, 111 S. Ct. 862, 112 L. Ed. 2d 962 (1991), aff'd after remand, 975 F.2d 771 (11th Cir. 1992), rev'd on other grounds, 510 U.S. 132, 114 S. Ct. 654, 126 L. Ed. 2d 611 (1994).

A defendant did not receive ineffective assistance of counsel as: (1) a hearsay objection to statements the defendant made during an argument and to testimony that the defendant stated that the defendant should have killed the other witnesses would have been futile as the statements were not offered for the truth of the matter asserted; (2) a hearsay objection to a witness's testimony as to the defendant's statements during a van ride would also have been futile as the statements were admissible under O.C.G.A. § 24-3-3; and (3) counsel's strategic decision to attack certain testimony through cross-examination was not ineffective assistance of counsel. *Johnson v. State*, 281 Ga. 229, 637 S.E.2d 393 (2006).

Inexperience does not constitute ineffectiveness per se: a defendant who relies on allegations of counsel's inexperience in support of an ineffective-assistance-of-counsel claim must still make the two-part showing of deficient performance and prejudice. *Burden v. Zant*, 903 F.2d 1352 (11th Cir. 1990), rev'd on other grounds, 498 U.S. 433, 111 S. Ct. 862, 112 L. Ed. 2d 962 (1991), aff'd after remand, 975 F.2d 771 (11th Cir. 1992).

Right to Counsel (Cont'd)
5. Duties and Effectiveness of Counsel (Cont'd)

Counsel's performance need only fall within a sphere of reasonable legal skill and practice. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), judgment vacated on other grounds sub nom. *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

Attorney's performance need not be ideal in every strategic or substantive particular. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), judgment vacated on other grounds sub nom. *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

Whenever a defendant selects the defendant's own counsel, that counsel truly represents the defendant and no mistake or error of counsel, made in good faith and with earnest and honest purpose to serve the client, can be made the basis of a claim of reversible error. *Donaldson v. State*, 180 Ga. App. 879, 350 S.E.2d 849 (1986).

Inadequate preparation of counsel is one ground for finding a violation of the right to effective counsel. *Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981), cert. denied, 456 U.S. 1011, 102 S. Ct. 2307, 73 L. Ed. 2d 1308 (1982).

The total failure of trial preparation required a disposition that there was evidence of ineffectiveness so pervasive that a particularized inquiry into prejudice would be unguided speculation. *Cochran v. State*, 262 Ga. 106, 414 S.E.2d 211 (1992).

Where counsel was appointed to the case approximately two weeks before the defendant's trial was scheduled to begin, the counsel had only a short period of time in which to prepare for the case, the counsel had duties in other courts, and a family illness occupied a great deal of the counsel's out-of-court time, the defendant was not given effective assistance of counsel. *Cochran v. State*, 262 Ga. 106, 414 S.E.2d 211 (1992).

Defendant did not show defense counsel provided ineffective assistance because counsel was not prepared for trial, as the defendant did not point to any instances

in the record that reflected counsel's lack of preparedness. Furthermore, defense counsel's decision to not move for a mistrial after the prosecutor asked the defendant why the defendant's sibling shot the defendant was not ineffective as counsel's decision was within the ambit of trial strategy and counsel's decision was not outside the wide range of reasonable professional conduct. *Berry v. State*, 262 Ga. App. 375, 585 S.E.2d 679 (2003).

Trial counsel's failure to promptly interview restaurant employees did not amount to ineffective assistance as the purported witnesses alleged that they knew nothing and defendant failed to make a proffer about what they might have said if interviewed earlier. *Robinson v. State*, 278 Ga. 31, 597 S.E.2d 386 (2004).

Defendant failed in the burden of showing that the trial counsel was ineffective due to the failure to adequately prepare for trial and failure to file a suppression motion regarding a one-on-one showup identification, as defendant's failure to be up front with counsel deprived the counsel of an opportunity to effectively cross-examine a witness, and counsel's decision not to file a suppression motion was part of the trial strategy, and thus was not second-guessed on appeal. *Johnson v. State*, 272 Ga. App. 881, 614 S.E.2d 128 (2005).

Defendant failed to establish a claim of ineffective assistance of counsel based on an alleged failure to consult adequately with the defendant because defense counsel testified to extensive telephone conversations with the defendant regarding the case, and several meetings; further, the defendant advanced nothing that suggested that further meetings would have produced a different result at trial. *Phillips v. State*, 280 Ga. 728, 632 S.E.2d 131 (2006).

Appeals court rejected defendant's claims that trial counsel was ineffective: (1) for failing to move to sever the trial from a co-defendant's; (2) for failing to call as a witness a certain individual who would have provided evidence that was crucial to the defense; and (3) because counsel was ill-prepared for trial, as the overwhelming evidence of guilt would not have changed the outcome of the trial; thus, defendant failed to prove that the defendant was prejudiced by these allegations. *Jenkins v. State*, 279 Ga. App. 897, 633 S.E.2d 61 (2006).

Defendant failed to establish a claim of ineffective assistance from defense counsel's alleged inadequate preparation based on counsel's failure to search, find, and interview numerous witnesses who could have impeached the testimony of the state's witnesses because the defendant did not identify these witnesses and made no proffer of the expected testimony; moreover, although the defendant complained that defense counsel failed to take sworn statements from the prosecution's witnesses, the defendant did not state what these statements may have revealed, other than the defendant's hope that these statements would have cleared up confusion about what occurred, which was insufficient to establish that a probability existed that the result of the trial might have been different if counsel had done so. *Johnson v. State*, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failure to request a continuance to locate potential exculpatory witnesses; the defendant failed to show prejudice, as the defendant did not show that the testimony of such witnesses would have been relevant and favorable. *Wells v. State*, 281 Ga. 253, 637 S.E.2d 8 (2006).

On remand, a Georgia trial court properly found that the defendant did not receive the ineffective assistance of trial counsel, as the record clearly showed that counsel: (1) met with the defendant to prepare for trial and go over discovery; (2) met with the prosecutor to discuss the case; (3) discussed legal issues and possible defenses with the defendant; and (4) properly decided to withhold copies of documents from the defendant, who was incarcerated, out of an abundance of caution that other inmates would steal them, learn the details of the case, and then offer to testify against the defendant in order to receive preferable treatment. *Williams v. State*, 281 Ga. 196, 637 S.E.2d 25 (2006).

Defendant's ineffective assistance of counsel claim based on first appellate counsel's failure to properly research the issues for the motion for new trial and to present evidence necessary for the trial court to make a reasonable determination of whether there was error in the trial sufficient to merit a new trial was rejected as appointed counsel's failure to act and all of the defendant's

counsel's failure to pursue pretrial motions did not constitute ineffective assistance and the defendant failed to cite any authority as to the other seven issues the defendant claimed were not properly presented; the only means by which the defendant could pursue a claim challenging the effectiveness of first appellate counsel was through a habeas corpus proceeding. *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, 2007 Ga. LEXIS 66 (2007).

Although a defendant asserted that certain statements by trial counsel about inadequate time to review discovery materials provided by the prosecution indicated that the trial counsel was insufficiently prepared for the defendant's malice murder trial, no ineffective assistance of counsel was shown; the trial court noted on the motion for a new trial that the record showed that trial counsel had reviewed the material provided by the prosecution, had investigated the case, had filed and argued pre-trial motions, and had adequate time to prepare for trial, and the defendant did not point out any occurrence at trial that demonstrated a lack of preparation. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Before a court should grant a new trial upon the ground that counsel failed to do their duty, there should be strong and convincing proof to overcome the presumption to the contrary. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

No guarantee of errorless counsel. — The constitutional right to the assistance of counsel does not guarantee errorless counsel, nor counsel judged ineffective by hindsight. *Bonaparte v. Smith*, 362 F. Supp. 1315 (S.D. Ga.), aff'd, 484 F.2d 956 (5th Cir. 1973), cert. denied, 415 U.S. 981, 94 S. Ct. 1572, 39 L. Ed. 2d 878 (1974); *Jones v. State*, 232 Ga. 771, 208 S.E.2d 825 (1974), cert. denied, 419 U.S. 1115, 95 S. Ct. 792, 42 L. Ed. 2d 814 (1975); *Pitts v. Hopper*, 402 F. Supp. 119 (N.D. Ga. 1974), aff'd, 520 F.2d 941 (5th Cir. 1975); *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). But see *Stewart v. State*, 232 Ga. App. 565, 502 S.E.2d 502 (1998); *Leggett v. State*, 241 Ga. 237, 244 S.E.2d 847 (1978); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978); *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978),

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

aff'd, 591 F.2d 1342 (5th Cir. 1979); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979); *Suits v. State*, 150 Ga. App. 285, 257 S.E.2d 306 (1979); *Fegan v. State*, 154 Ga. App. 791, 270 S.E.2d 211 (1980); *Warner v. State*, 155 Ga. App. 495, 271 S.E.2d 636 (1980); *Bishop v. State*, 155 Ga. App. 611, 271 S.E.2d 743 (1980); *Hudson v. State*, 156 Ga. App. 281, 274 S.E.2d 675 (1980); *Rosser v. State*, 156 Ga. App. 463, 274 S.E.2d 812 (1980); *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980); *Irby v. State*, 156 Ga. App. 761, 275 S.E.2d 391 (1980); *Young v. Zant*, 506 F. Supp. 274 (M.D. Ga. 1980), rev'd on other grounds, 677 F.2d 792 (11th Cir. 1982); *Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981); *Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. 1981); *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982); *Austin v. Carter*, 248 Ga. 775, 285 S.E.2d 542 (1982); *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), vacated, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984); *Spangler v. State*, 162 Ga. App. 624, 292 S.E.2d 461 (1982); *Tanner v. State*, 162 Ga. App. 623, 292 S.E.2d 476 (1982); *Storey v. State*, 162 Ga. App. 763, 292 S.E.2d 483 (1982); *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982); *Mitchell v. Hopper*, 538 F. Supp. 77 (S.D. Ga. 1982), supplemented by 564 F. Supp. 780 (S.D. Ga. 1983), aff'd in part, rev'd in part sub nom. *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985), aff'd in part sub nom. *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir.), rev'd in part sub nom. *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986), cert. denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987), 500 U.S. 960, 111 S. Ct. 2276, 114 L. Ed. 2d 727 (1991); *Galloway v. State*, 165 Ga. App. 536, 301 S.E.2d 894 (1983); *Johnson v. State*, 165 Ga. App. 773, 302 S.E.2d 626 (1983); *Birt v. Montgomery*, 709 F.2d 690 (11th Cir. 1983), cert. denied, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984); *Fleming v. Zant*, 560 F. Supp. 525 (M.D. Ga. 1983), aff'd sub nom. *Fleming v. Kemp*, 748 F.2d 1435 (11th Cir. 1984), cert. denied, 475 U.S. 1058, 106 S. Ct. 1286, 89 L. Ed. 2d 593 (1986); *Brown v. State*, 179 Ga. App. 538, 346 S.E.2d 908 (1986).

The constitutional right to effective assistance of counsel insures not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. *Veit v. State*, 182 Ga. App. 753, 357 S.E.2d 113 (1987).

Petitioner was not entitled to error-free representation, only representation that fell within the range of competence demanded of attorneys in criminal cases and conformed to professional standards of reasonable investigation of facts and understanding of the law. *Lancaster v. Newsome*, 880 F.2d 362 (11th Cir. 1989).

Constitutional right to assistance of counsel only guarantees counsel reasonably likely to render and rendering reasonably effective assistance. *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). But see *Stewart v. State*, 232 Ga. App. 565, 502 S.E.2d 502 (1998); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978); *Carbo v. United States*, 581 F.2d 91 (5th Cir. 1978); *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979); *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907 (1979); *Suits v. State*, 150 Ga. App. 285, 257 S.E.2d 306 (1979); *Warner v. State*, 155 Ga. App. 495, 271 S.E.2d 636 (1980); *Bishop v. State*, 155 Ga. App. 611, 271 S.E.2d 743 (1980); *Hudson v. State*, 156 Ga. App. 281, 274 S.E.2d 675 (1980); *Rosser v. State*, 156 Ga. App. 463, 274 S.E.2d 812 (1980); *Williams v. State*, 156 Ga. App. 481, 274 S.E.2d 826 (1980); *Irby v. State*, 156 Ga. App. 761, 275 S.E.2d 391 (1980); *Young v. Zant*, 506 F. Supp. 274 (M.D. Ga. 1980), rev'd on other grounds, *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982); *Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981); *Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. 1981); *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982); *Austin v. Carter*, 248 Ga. 775, 285 S.E.2d 542 (1982); *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), vacated, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984), cert. denied, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed. 2d 367 (1985); *Spangler v. State*, 162 Ga. App. 624, 292 S.E.2d 461 (1982); *Tanner v. State*, 162

Ga. App. 623, 292 S.E.2d 476 (1982); Storey v. State, 162 Ga. App. 763, 292 S.E.2d 483 (1982); Mitchell v. Hopper, 538 F. Supp. 77 (S.D. Ga. 1982), supplemented by 564 F. Supp. 780 (S.D. Ga. 1983), aff'd in part, rev'd in part sub nom. Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985), aff'd in part sub nom. Mitchell v. Kemp, 762 F.2d 886 (11th Cir.), rev'd in part sub nom. Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986), cert. denied, 487 U.S. 1026, 107 S. Ct. 3249, 97 L. Ed. 2d 774 (1987), 500 U.S. 960, 111 S. Ct. 2276, 114 L. Ed. 2d 727 (1991), cert. denied, 487 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987); Galloway v. State, 165 Ga. App. 536, 301 S.E.2d 894 (1983).

U.S. Const., amend. 6 guarantees criminal defendants the right to counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances. Birt v. Montgomery, 709 F.2d 690 (11th Cir. 1983), cert. denied, 469 U.S. 874, 105 S. Ct. 232, 83 L. Ed. 2d 161 (1984); United States v. Johnson, 709 F.2d 639 (11th Cir.), cert. denied, 464 U.S. 1010, 104 S. Ct. 531, 78 L. Ed. 2d 713 (1983).

The right to effective counsel does not mean errorless counsel, nor does it mean counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Jackson v. State, 167 Ga. App. 509, 306 S.E.2d 757 (1983).

Good faith errors of retained counsel not ordinarily reversible error. — Ordinarily, if the defendant selects the defendant's own counsel, that counsel truly represents the defendant and no mistake or error of counsel, made in good faith and with earnest and honest purpose to serve the client, can be made the basis of claim of a reversible error. Irby v. State, 156 Ga. App. 761, 275 S.E.2d 391 (1980).

Good faith errors of appointed counsel are normally insufficient to justify granting a motion to vacate sentence. Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973).

Honest mistake of retained counsel not basis of claim of error. — Whenever a defendant selects the defendant's own counsel, that counsel truly represents the defendant and no mistake or error of counsel, made in good faith and with earnest and honest purpose to serve the client, can be made the basis of a claim of reversible error.

Scott v. State, 178 Ga. App. 844, 344 S.E.2d 764 (1986).

Significant misleading statements of counsel can rise to a level of denial of due process of law and result in a vitiation of the judicial proceeding because of ineffective assistance of counsel. Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973).

Trial court did not err in denying defendant's motion for new trial, because: (1) trial counsel's failure to object to a mock Christmas gift that was entered into evidence was part of counsel's strategy to attack the victim's credibility and veracity, and thus was not ineffective assistance of counsel; (2) because it was necessary for trial counsel, as part of the trial strategy, to raise the issue of the victim's veracity, trial counsel could not subsequently object to the victim's prior consistent statement, which was entered to verify the victim's testimony; (3) trial counsel was not ineffective for failing to file a motion to sever the charges, as the decision was presumed to be strategic; and (4) trial counsel's failure to reserve objections to the jury charge, without a showing of deficient performance and prejudice to the defense, was not ineffective assistance. However, trial counsel's failure to object to opinion testimony about the victim's veracity or request that it be stricken constituted deficient performance, but the testimony was not so significant as to have contributed to the jury's verdict. Mealor v. State, 266 Ga. App. 274, 596 S.E.2d 632 (2004).

Counsel's decision not to seek suppression of evidence. — Defendant's ineffective assistance of counsel claims lacked merit, as: (1) trial counsel's decisions not to seek suppression of a bloody jacket seized from the defendant's home was strategic, and not to challenge, were strategic; and (2) the defendant failed to show a reasonable likelihood that the outcome of the trial would have been different had counsel objected to evidence of the victim's good character or evidence of the defendant's bad character. Parker v. State, 281 Ga. 490, 640 S.E.2d 44 (2007).

Tactical decision not to secure additional evaluations. — Defendant received effective assistance of counsel where defense counsel made a strategic decision not to obtain an additional psychiatric evaluation based on defense counsel's review of the psychiatric

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

records and counsel's conversations with defendant; there was no evidence that defendant's sanity at the time of the charged offense would be a significant factor at trial since: (1) defendant had repeatedly been diagnosed with depressive disorder, which did not support a mental incapacity defense; (2) the only evidence that defendant had a condition that could have supported a mental incapacity defense came from an expert witness that the trial court found not to be credible; and (3) defendant insisted that the victim's death was the result of self-defense. *Coker v. State*, 262 Ga. App. 320, 585 S.E.2d 221 (2003).

Attorneys do not become incompetent because of a single act even though it may have been a mistake in judgment. *Hudson v. State*, 156 Ga. App. 281, 274 S.E.2d 675 (1980).

In a prosecution for rape and murder, the court determined that even assuming that the defendant's trial counsel should have discovered and used certain impeachment evidence to attack the testimony of two witnesses, the state habeas court's conclusion that counsel's failure to do so did not prejudice the defendant's sentence was objectively reasonable. *Brown v. Head*, 272 F.3d 1308 (11th Cir. 2001), cert. denied, 537 U.S. 978, 123 S. Ct. 476, 154 L. Ed. 2d 338 (2002).

Effectiveness of counsel cannot be measured by the result reached at trial. *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976); *Hudson v. State*, 156 Ga. App. 281, 274 S.E.2d 675 (1980).

A defendant cannot retain the defendant's selected counsel and seemingly acquiesce in counsel's tactics, only to have judgment set aside on alleged incompetence of counsel if outcome of trial is unfavorable. *Harrell v. State*, 139 Ga. App. 556, 228 S.E.2d 723 (1976).

Standard of effectiveness of counsel is not to be judged by hindsight nor by result that appellant was convicted. *Spangler v. State*, 162 Ga. App. 624, 292 S.E.2d 461 (1982); *Waites v. State*, 178 Ga. App. 333, 343 S.E.2d 115 (1986).

Effectiveness of counsel cannot be fairly measured by results of trial, but upon rea-

sonable effectiveness of counsel's services at time they were rendered. *Spence v. State*, 163 Ga. App. 198, 292 S.E.2d 908 (1982).

That appointed counsel is a highly respected attorney does not establish counsel's effectiveness in a particular case. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

Shortness of time spent with a client alone does not suffice to show ineffective representation. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

Defendant did not show defendant was deprived of effective assistance of counsel because defense counsel allegedly did not adequately meet with defendant or prepare for trial because there was no specified amount of time counsel had to spend with defendant, counsel met with defendant at critical stages of the defense and before trial and presented discovery to defendant for review, defendant participated in jury selection and was allowed to meet with counsel before the start of trial, and, even if counsel's performance was deficient, defendant did not show the trial's outcome would have been different if counsel had spent more time with the defendant. *Martin v. State*, 266 Ga. App. 392, 597 S.E.2d 445 (2004).

Attempt to withdraw does not show ineffectiveness. — The mere fact that defendant's counsel attempted to withdraw from the case (after defendant voiced dissatisfaction with counsel when the case was called for trial) did not demonstrate deficient performance. *Middlebrooks v. State*, 208 Ga. App. 23, 430 S.E.2d 163 (1993).

Membership of the bar in good standing is prima facie proof of competency as an attorney. *Hill v. Balkcom*, 213 Ga. 58, 96 S.E.2d 589 (1957); *Suits v. State*, 150 Ga. App. 285, 257 S.E.2d 306 (1979); *Chapman v. State*, 154 Ga. App. 532, 268 S.E.2d 797 (1980); *Hudson v. State*, 156 Ga. App. 281, 274 S.E.2d 675 (1980).

Membership of the bar in good standing is prima facie proof that counsel's presentation meets due process requirements. *Hill v. Balkcom*, 213 Ga. 58, 96 S.E.2d 589 (1957).

Commissioned officer admitted to practice before courts-martial, is a competent attorney within the purview of U.S. Const., amend. 6. *Altmayer v. Sanford*, 148 F.2d 161 (5th Cir. 1945).

Defendants have duty to notify the courts of an inadequacy in the assistance of coun-

sel, and the judiciary is not required to monitor all cases to insure that counsel are using due diligence in prosecuting their client's appeals. *Chapman v. United States*, 469 F.2d 634 (5th Cir. 1972).

Defendant's required showing of deficient performance prejudicing defense. — To prove ineffective assistance of counsel, a defendant is required to show that counsel's performance was deficient and that this deficient performance prejudiced defendant's defense. A trial court's determination with respect to counsel's effectiveness will be upheld on appeal unless clearly erroneous. *Davis v. State*, 264 Ga. App. 128, 589 S.E.2d 700 (2003).

Defendant's refusal to cooperate. — A defendant may not refuse to cooperate with appointed counsel and then claim that the defendant was not effectively represented. *Jefferson v. State*, 209 Ga. App. 859, 434 S.E.2d 814 (1993).

Advisement of the right not to testify. — Defendant's claim that counsel provided ineffective assistance of counsel by failing to adequately advise the defendant of the defendant's right not to testify failed as the defendant did not rebut the presumption that counsel acted as an effective legal representative and properly advised the defendant of the defendant's rights since there was no testimony that counsel failed to inform the defendant of the defendant's constitutional rights or the risks of testifying. *Mayberry v. State*, 281 Ga. 144, 635 S.E.2d 736 (2006).

Factors considered where inadequate representation alleged. — When inadequate representation is alleged, the critical factual inquiry ordinarily relates to whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). But see *Stewart v. State*, 232 Ga. App. 565, 502 S.E.2d 502 (1998).

In determining reasonably effective assistance of counsel, critical factual inquiry relates to whether a defense was not presented, sufficiency of counsel's consultation with defendant and adequacy of investigation

into facts and law and whether errors alleged resulted from inadequate trial preparation rather than from unwise choices of strategy and trial tactics. *Hall v. State*, 162 Ga. App. 713, 293 S.E.2d 862 (1982).

Where inadequate representation of counsel is alleged, the reviewing court normally considers whether the defendant had a defense which was not presented; whether trial counsel consulted with the accused and adequately investigated the facts and the law; and whether the omissions charged to trial counsel resulted from inadequate preparation, rather than from unwise trial tactics. *Ealy v. State*, 251 Ga. 426, 306 S.E.2d 275 (1983).

Burden and standard of proof of denial of benefit of counsel. — The burden is on the applicant to sustain the contention that the applicant was denied the benefit of counsel. In order to sustain such contention, it is incumbent upon the applicant to show that the applicant was virtually unrepresented. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

For relief, a petitioner must show that the petitioner's counsel was in fact ineffective, that counsel's conduct was not within the range of competence demanded of attorneys in criminal cases. A petitioner then has the additional burden of proving that the petitioner's counsel's ineffectiveness caused actual and substantial prejudice in the petitioner's case. *Mitchell v. Hopper*, 564 F. Supp. 780 (S.D. Ga. 1983), aff'd, 762 F.2d 886 (11th Cir. 1985), cert. denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987).

In order to be entitled to habeas corpus relief on a claim of ineffective assistance of counsel, the petitioner must establish by a preponderance of the evidence: (1) that based upon the totality of circumstances in the entire record the petitioner's counsel was not "reasonably likely to render" and in fact did not render "reasonable effective assistance"; and (2) that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of the petitioner's defense. Even if the petitioner meets this burden, habeas corpus relief may still be denied if the state can prove that in the context of all the evidence it remains certain beyond a reasonable doubt that the outcome

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

of the proceedings would not have been altered but for the ineffectiveness of counsel. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

Because of the presumption that a lawyer is competent, the burden falls upon a defendant to demonstrate a constitutional deprivation of right to counsel. *Kervin v. State*, 178 Ga. App. 601, 344 S.E.2d 441 (1986).

In determining whether there has been actual ineffective assistance of counsel, thereby requiring the reversal of the defendant's conviction, the defendant must show both that trial counsel's performance was deficient and that this deficiency prejudiced the defense. *Tutton v. State*, 179 Ga. App. 462, 346 S.E.2d 898 (1986).

Defendant bears the burden to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Webb v. State*, 178 Ga. App. 725, 344 S.E.2d 660 (1986); *Askin v. State*, 178 Ga. App. 810, 344 S.E.2d 699 (1986); *Parisie v. State*, 178 Ga. App. 857, 344 S.E.2d 727 (1986); *Scott v. State*, 178 Ga. App. 844, 344 S.E.2d 764 (1986); *Bradley v. State*, 178 Ga. App. 894, 344 S.E.2d 772 (1986).

In order to prevail on an ineffectiveness claim, a convicted defendant must show: (1) that counsel's performance was deficient, i.e., that counsel's performance was not reasonable under all the circumstances; and (2) that this deficient performance prejudiced the defense, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Jones v. State*, 180 Ga. App. 706, 350 S.E.2d 309 (1986); *Rhinehart v. State*, 181 Ga. App. 507, 352 S.E.2d 823 (1987).

The burden is on the defendant to show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *Brown v. State*, 257 Ga. 277, 357 S.E.2d 590 (1987).

Because trial counsel's actions involved

strategic decisions or failed to harm defendant and defendant could only pursue a claim against appellate counsel through a habeas corpus proceeding, defendant did not carry the burden of proving ineffective assistance. *Miller v. State*, 273 Ga. App. 171, 614 S.E.2d 796 (2005), cert. denied, 2007 Ga. LEXIS 90 (Ga. 2007).

Burden of demonstrating a constitutional violation rests upon the defendant, and in the absence of a showing to the contrary it will be assumed that trial counsel put aside any personal animosity toward defendant arising from the collapse of the economic arrangements between defendant and trial counsel and rendered reasonably effective assistance. *Brown v. State*, 180 Ga. App. 361, 349 S.E.2d 250 (1986).

Prejudice must be shown. — A defendant claiming ineffective assistance of counsel must establish that the attorney's alleged failure resulted in some degree of prejudice to the defendant. *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982).

Prejudice is required for habeas corpus relief based on ineffective assistance of counsel. *United States v. Lagrone*, 727 F.2d 1037 (11th Cir. 1984).

Because the defendant did not assert a possessory interest in a car in which the defendant was a passenger or in items seized from the car, the defendant failed to show standing to contest the admissibility of those items, and since it was also unclear what was known to the officer at time of the defendant's arrest, the defendant failed to establish ineffective assistance based on counsel's failure to file a motion to suppress those items. *Callahan v. State*, 280 Ga. App. 323, 634 S.E.2d 102 (2006).

Defendant did not receive ineffective assistance of counsel due to counsel's failure to object to hearsay testimony of a note-passing inmate as the hearsay statements fell within the exception permitting hearsay statements made by co-conspirators during the pendency of the conspiracy; the failure to object did not constitute deficient performance. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Trial counsel was not ineffective in requesting an inapplicable impeachment charge as the improper language was a mere passing reference in a lengthy instruction and the defendant could not show a reason-

able probability that trial counsel's performance changed the outcome of the trial. *Miller v. State*, 281 Ga. App. 354, 636 S.E.2d 60 (2006), cert. denied, 2007 Ga. LEXIS 106 (Ga. 2007).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 in failing to argue at trial and on appeal that the inmate's statutory rape and incest convictions should have merged into the inmate's rape conviction as a matter of fact since all of the crimes arose out of the same incident, as the crimes of statutory rape and incest were not established by proof of the same or less than all the facts required to establish the crime of rape; the inmate's convictions of statutory rape under O.C.G.A. § 16-6-3 and incest under O.C.G.A. § 16-6-22 were not included pursuant to O.C.G.A. § 16-1-6(1) in the rape conviction under O.C.G.A. § 16-6-1, as statutory rape, which required evidence as to the victim's age and that the victim was not the inmate's spouse, and incest, which required proof of the victim's relation to the inmate, had elements not required for rape. *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

Defendant did not meet the defendant's burden of showing prejudice to support the defendant's ineffective assistance of counsel claim as the defendant did not proffer an alleged alibi witness's testimony at the hearing on the defendant's new trial motion. *Boatwright v. State*, 281 Ga. App. 560, 636 S.E.2d 719 (2006).

In a malice murder prosecution, trial counsel was not required to object when a witness testified about an encounter a few days before the victim was killed in which the defendant held a gun to the head of a friend of the victim, as the testimony amounted to evidence of prior difficulties between defendant and the victim, and was admissible without notice and a hearing pursuant to Ga. Unif. Super. Ct. R. 31.3; hence, counsel could not be deemed ineffective for a failure to voice an objection to that evidence. *Sims v. State*, 281 Ga. 541, 640 S.E.2d 260 (2007).

Assuming that defense counsel was deficient for not having knowledge of the contents of the defendant's cell phone records, the defendant could not show the required prejudice in light of the overwhelming evidence establishing the defendant's guilt.

Swanson v. State, Ga. , S.E.2d , 2007 Ga. LEXIS 351 (May 14, 2007).

Absent any prejudice from counsel's alleged ineffectiveness for failing to object to the state's introduction of hearsay and evidence of prior abuse committed by the defendant against the victim and the victim's mother, and for counsel's failure to move for a mistrial, the defendant's ineffective assistance of counsel claim lacked merit. *Johnson v. State*, 281 Ga. 770, 642 S.E.2d 827 (2007).

An inmate seeking habeas corpus had not shown prejudice by the alleged deficiencies of trial counsel, and even if trial counsel had failed to provide certain records to a psychologist, the psychologist, upon seeing the records, had reaffirmed the psychologist's original opinion that the inmate was not mentally retarded; the additional mitigation evidence cited by the inmate would not have made a significant contribution in light of the evidence trial counsel actually presented. *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

When prejudice presumed. — In some cases, prejudice from the ineffective assistance of counsel may be presumed, including those instances in which there has been an actual or constructive denial of the assistance of counsel altogether. *Heath v. State*, 268 Ga. App. 235, 601 S.E.2d 758 (2004).

Necessity of showing of prejudice and disadvantage from counsel's ineffectiveness. — Under the law of the Eleventh Circuit, if the court finds that counsel's representation was not merely deficient or inadequate in many or most respects, but was functionally equivalent in every respect to having no representation at all, then it is not necessary for a habeas applicant to show that the applicant was prejudiced by counsel's failings. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

In a case where counsel's representation is below proper standards in certain respects, but where the representation was not the functional equivalent of no representation, the relevant standard requires the habeas applicant to demonstrate that counsel's failings worked to the applicant's "actual and substantial disadvantage"; if the applicant is successful in making this showing, the writ

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must be granted unless the state proves that counsel's ineffectiveness was harmless beyond a reasonable doubt. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

A habeas petitioner has the burden of persuasion to demonstrate that the ineffective assistance of counsel created not only a possibility of prejudice, but that it worked to the petitioner's actual and substantial disadvantage. *Fleming v. Zant*, 560 F. Supp. 525 (M.D. Ga. 1983), aff'd, 748 F.2d 1435 (11th Cir. 1984), cert. denied, 475 U.S. 1058, 106 S. Ct. 1286, 89 L. Ed. 2d 593 (1986); *Spradlin v. State*, 262 Ga. App. 897, 587 S.E.2d 155 (2003).

Even assuming that trial counsel's performance was deficient, appellant failed to show that a reasonable probability existed that such performance would have prejudiced the appellant's defense. *Robinson v. State*, 231 Ga. App. 368, 498 S.E.2d 579 (1998).

Defendant's claims of ineffective assistance of counsel lacked merit as some of the alleged errors were strategic decisions which could not be the basis for such a claim and there was no evidence that absent the alleged errors by counsel that the outcome of the trial would have been different. *Pinson v. State*, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

Defendant failed to show that anything that defense counsel would have done differently or how an earlier disclosure of Brady information would have affected the outcome of the trial, and thus failed to show that the failure to object on Brady grounds constituted deficient performance or that the defendant was prejudiced thereby. *Callahan v. State*, 280 Ga. App. 323, 634 S.E.2d 102 (2006).

Defendant's ineffective assistance of counsel claim was properly rejected by the trial court, given evidence that: (1) counsel did not stipulate as to the weight of the marijuana seized; (2) counsel's failure to file a suppression motion did not constitute per se ineffective assistance of counsel, and defen-

dant failed to show that the challenged evidence would have been suppressed had the motion been filed; (3) defendant's decision not to testify was defendant's own; and (4) a continuing witness objection would not have changed the outcome of the trial. *Parnell v. State*, 280 Ga. App. 665, 634 S.E.2d 763 (2006).

Suppression of identification. — Trial counsel was not ineffective by failing to seek suppression of the identification evidence or attack the reliability of the same on grounds that such was impermissibly suggestive, as: (1) the showup was preceded by a photo array against which no attack was made; and (2) counsel's strategy in handling the state's failure to elicit in-court identification testimony from a particular witness was reasonable. *Brooks v. State*, 281 Ga. 514, 640 S.E.2d 280 (2007).

Defendant will be relieved of defendant's burden to establish prejudice stemming from counsel's errors in three instances: (1) an actual or constructive denial of counsel; (2) government interference with defense counsel; and (3) counsel that labors under an actual conflict of interest that adversely affects counsel's performance. *Heath v. State*, 268 Ga. App. 235, 601 S.E.2d 758 (2004).

Truth of allegation that counsel violated ethical considerations, directory rules, and disciplinary standards would not automatically relieve appellant of the burden to show harm resulting from the alleged misconduct. *Robinson v. State*, 210 Ga. App. 278, 435 S.E.2d 718 (1993).

Attorney's acts of professional misconduct in unrelated matters and cases did not establish inadequacy or prejudice. *White v. State*, 267 Ga. 523, 481 S.E.2d 804 (1997).

Suspension from practice of law. — An attorney suspended from the practice of law for failure to comply with state bar administrative regulations does not render ineffective assistance of counsel under either the United States or Georgia Constitution when representing a criminal defendant. *Cornwell v. Dodd*, 270 Ga. 411, 509 S.E.2d 919 (1999).

Administrative suspension. — Defendant did not show that defendant received ineffective assistance of counsel, despite the fact that defendant's counsel was under the state bar's administrative suspension at the time defendant was being tried, as the suspension

was for failing to timely respond to an inquiry and did not show that counsel provided ineffective assistance in representing defendant; since defendant did not show any other evidence that defense counsel provided ineffective assistance, defendant's ineffective assistance of counsel claim had to fail. *Zinnamon v. State*, 261 Ga. App. 170, 582 S.E.2d 146 (2003).

Attorney is effective if the assumptions upon which the attorney bases the defense strategy are reasonable and the attorney's choices on the basis of those assumptions are reasonable. *Mitchell v. Hopper*, 564 F. Supp. 780 (S.D. Ga. 1983), *aff'd*, 762 F.2d 886 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987).

Standard for holding a conviction unconstitutional for failure of counsel to obtain evidence should be at least as rigorous as that for getting a new trial on the ground of newly discovered evidence. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), *rev'd* on other grounds, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Advice as to interrogation prior to adversary proceedings. — Sixth amendment claim as to advice given by counsel to defendant with respect to the police interrogation occurring prior to the initiation of adversary judicial proceedings was without merit, because the right does not attach to pre-adversarial interrogations. *Ford v. State*, 256 Ga. 375, 349 S.E.2d 361 (1986).

Failure to obtain information concerning police interrogation of defendant. — Counsel did not provide reasonably effective assistance to defendant where they failed to interview or otherwise obtain information concerning defendant's interrogation by police officers. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), *rev'd* on other grounds, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Allowing second confession. — Because the defendant had already confessed to the district attorney, the defendant's subsequent confession to the police after brief consultation with the defendant's public defender did not show ineffective assistance of counsel; counsel might have felt it would present the obvious remorse of the defendant. *Stewart v. State*, 262 Ga. 894, 426 S.E.2d 367 (1993).

Defendant's right to effective assistance of counsel not violated by preindictment delay. *United States v. Jorge-Salon*, 734 F.2d 789 (11th Cir.), *cert. denied*, 469 U.S. 869, 105 S. Ct. 215, 83 L. Ed. 2d 145 (1984).

Inquiry into counsel's failure to challenge jury arrays required. — Where a defendant claimed ineffective assistance of counsel based on counsel's failure to pursue defendant's requests to challenge the arrays of the grand and traverse juries and to secure the presence of certain defense witnesses, trial court's summary overruling of defendant's motions for change of counsel without a hearing or any further inquiry was error. *Heard v. State*, 173 Ga. App. 543, 327 S.E.2d 767 (1985).

Failure to challenge jury array. — Defense counsel's failure to challenge the grand jury array did not amount to ineffective assistance of counsel, even though a co-defendant's attorney successfully challenged the array because of an insufficient representation of women. *Fleming v. Zant*, 560 F. Supp. 525 (M.D. Ga. 1983), *aff'd sub nom. Fleming v. Kemp*, 748 F.2d 1435 (11th Cir. 1984), *cert. denied*, 475 U.S. 1058, 106 S. Ct. 1286, 89 L. Ed. 2d 593 (1986).

Neither defense counsel's failure to timely challenge the composition of the grand jury nor counsel's tactical decision not to challenge the traverse jury array results in the denial of the defendant's sixth and fourteenth amendment rights to effective assistance of counsel. *Godfrey v. Francis*, 251 Ga. 652, 308 S.E.2d 806 (1983), *cert. denied*, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), *cert. dismissed*, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Counsel's representation of county in another case's jury composition challenge. — Defendant would be entitled to have conviction overturned on ground of ineffective assistance of counsel upon proof that defense counsel, who had not raised a question as to the grand jury's composition, was actively involved in county's defense to constitutional challenge of grand jury composition in another case. *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983), *overruled* on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Effective assistance requires pretrial investigation. — It is beyond dispute that effective

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assistance of counsel requires some degree of pretrial investigation. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

Defense counsel was not ineffective for alleged failure to conduct pretrial investigation which was the result of reasoned tactical decisions because counsel did visit the scene of the crime, spoke with defendant and the defendant's family, gained limited access to defendant's file, viewed the autopsy report, and received scientific reports. *Solomon v. Kemp*, 735 F.2d 395 (11th Cir. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 940, 83 L. Ed. 2d 952 (1985).

The failure of defense counsel to prepare and investigate an insanity defense was, at best, a failure to perform investigatory duties rather than a fundamental breakdown of the adversarial process such that prejudice would be presumed, as the only evidence produced was that the defendant informed the trial attorneys that a psychiatrist who had cared for the defendant had told the defendant that the defendant was on the verge of insanity and that the defendant became temporarily insane when the defendant consumed alcohol. *Chadwick v. Green*, 740 F.2d 897 (11th Cir. 1984).

Defendant's counsel did not render ineffective assistance for a failure to interview two witnesses in defendant's criminal trial, as defendant submitted no evidence to show how any information possessed by those witnesses would have helped in the defense. *Andrews v. State*, 275 Ga. App. 426, 620 S.E.2d 629 (2005).

Scope of counsel's duty to investigate should be narrowly circumscribed by the specific facts revealed to counsel by the client. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Counsel must investigate plausible defenses. — The failure to conduct a reason-

ably substantial investigation into a defendant's one plausible line of defense is not a permissible trial strategy. *United States v. Badolato*, 701 F.2d 915 (11th Cir. 1983).

Failure to research or investigate. — As evidence showed that a doctor asked defense counsel about the effect of a nolo plea to sexual battery on the doctor's future participation in federal health care programs, and that counsel responded with affirmative misrepresentations, which were caused by counsel's failure to perform basic research, the habeas court properly allowed the doctor to withdraw the doctor's plea. *State v. Patel*, 280 Ga. 181, 626 S.E.2d 121 (2006).

Failure to adequately research law. — Where prior cases supported a defense that defendant's consent to a blood test allowed the state to use the sample only to prosecute the offense of driving with a controlled substance in the defendant's urine, not for a possession charge, counsel was ineffective in not raising that issue. *Turpin v. Helmeci*, 271 Ga. 224, 518 S.E.2d 887 (1999).

Failure to request preliminary hearing. — The defendant was not entitled to the reversal of the defendant's conviction based on the defendant's trial counsel's failure to request a preliminary hearing since it could not be determined, without trial counsel's testimony, whether the decision was a trial tactic. *McClarity v. State*, 234 Ga. 348, 506 S.E.2d 392 (1998).

Criminal Procedure Discovery Act constitutional. — Reciprocal discovery provisions of the Criminal Procedure Discovery Act (O.C.G.A. § 17-16-1 et seq.) do not violate the right to effective representation of counsel by denying defendant the benefit of counsel's judgment of whether and when to reveal aspects of defendant's case to the state. *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999).

It is reasonable to expect a defendant's attorney to conduct an investigation to determine the facts upon which all future decisions will be made, and this is especially true where the defendant, because of trauma, has no memory of the event; under such a circumstance, a lawyer is duty-bound to investigate so that the lawyer can properly advise a client. *Heath v. State*, 268 Ga. App. 235, 601 S.E.2d 758 (2004).

Failure regarding discovery. — The defendant was not entitled to the reversal of the

defendant's conviction based on the defendant's trial counsel's failure to make any discovery motions since, absent trial counsel testimony to the contrary, such choice was presumed to be strategic. *McClarity v. State*, 234 Ga. 348, 506 S.E.2d 392 (1998).

The defendant was not entitled to the reversal of the defendant's conviction based on the defendant's trial counsel's failure to request informal discovery where the record showed that counsel asked the state's attorney several questions about the file and since, absent trial counsel's testimony, the court could not further evaluate the issue. *McClarity v. State*, 234 Ga. 348, 506 S.E.2d 392 (1998).

In a defendant's malice murder trial, a failure by the defendant's trial counsel to comply with reciprocal discovery procedures which resulted in a trial court ruling precluding the defendant from impeaching a witness by introducing certified copies of the felony convictions of the witness did not constitute ineffective assistance of counsel; although the failure had to be considered deficient performance, it produced no prejudice because evidence of the criminal history of the witness was introduced by other means and the jury was instructed on the law of impeachment. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Failure to investigate lines of defense can support an ineffective assistance of counsel claim. *Collins v. Francis*, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984).

Counsel has rendered effective assistance even though counsel decided not to pursue a particular line of defense without substantial investigation, so long as the decision was reasonable under the circumstances. *Baines v. State*, 201 Ga. App. 354, 411 S.E.2d 95 (1991).

Defendant's argument that defense counsel was ineffective on general grounds was not supported by citations to the record, and it was not the appellate court's duty to cull the record in search of error; defendant's argument that trial counsel was ineffective for failing to investigate the fingerprint evidence and failing to obtain an independent fingerprint expert was rejected for failure to show harm. *Gary v. State*, 259 Ga. App. 136, 575 S.E.2d 903 (2003).

Failure to move for change of venue. — Trial counsel was not ineffective in failing to

move for a change of venue where the record showed that the decision was based on sound trial strategy and, even if the parties had agreed to change venue to a particular county, the trial court would have determined venue. *Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745 (1995), cert. denied, 516 U.S. 829, 116 S. Ct. 100, 133 L. Ed. 2d 54 (1995).

An alleged failure of a defendant's trial counsel to present evidence in support of a motion for a change of venue in defendant's prosecution for malice murder did not demonstrate that the defendant received ineffective assistance of counsel; the defendant presented no evidence post-trial to suggest that the trial's setting was inherently prejudicial or that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible, and since a complete failure to make a motion for change of venue would not have constituted ineffective assistance of counsel under those circumstances, the failure to support the motion adequately likewise did not show ineffectiveness under those circumstances. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Counsel's failure to object to appointed judge. — Defendant's claim that an order appointing a senior judge to preside over defendant's trial was insufficient under O.C.G.A. § 15-1-9.2(b) was not timely filed given it was filed after the motion for a new trial. Furthermore, counsel's failure to object to the appointment of the judge did not deny defendant effective assistance of counsel. *Strozier v. State*, 277 Ga. 78, 586 S.E.2d 309 (2003).

Failure to object to pretrial showup. — Although it may have been better practice to move to exclude evidence regarding the pretrial showup and to object to the in-court identification, since neither strategy would have changed the result, neither omission may be deemed conclusive evidence of ineffectiveness on the part of counsel. *Holbrook v. State*, 209 Ga. App. 301, 433 S.E.2d 616 (1993).

Failure to contest validity of indictment. — Defendant was not prejudiced by the failure of the defendant's trial counsel to contest the validity of an indictment, where the indictment was not void as a matter of law. *Hammock v. State*, 201 Ga. App. 614,

Right to Counsel (Cont'd)**5. Duties and Effectiveness of****Counsel (Cont'd)**

411 S.E.2d 743, cert. denied, 201 Ga. App. 903, 411 S.E.2d 743 (1991).

Defendant's counsel provided ineffective assistance under U.S. Const., amend. 6 because the counsel failed to file a timely demurrer to the burglary count of an indictment, pursuant to O.C.G.A. § 16-7-1, which was fatally defective because it did not specify an underlying felony, and the requirement could not be imputed because there was no specific incorporation by reference and this failure contributed to defendant's conviction on a void count. *Polk v. State*, 275 Ga. App. 467, 620 S.E.2d 857 (2005).

Defendant's counsel was not ineffective for failing to object to the indictment as a whole because it was allegedly not received in open court, as there was no evidence that the indictment had not been returned in open court, it bore the signature of the grand jury foreperson, and the minutes of the criminal court docket showed that the indictment was filed. *Polk v. State*, 275 Ga. App. 467, 620 S.E.2d 857 (2005).

Because the record showed that the victim could not recall the exact dates when the events alleged in the indictment occurred, the state was not able to identify a specific date for the offenses, and the defendant offered no other evidence that the indictment was imperfect in form or substance or that the defendant's ability to present a defense was impaired, the defendant failed to establish that a special demurrer would have been successful or that defense counsel's failure to file such pleading before trial affected the outcome of the proceedings; therefore, the defendant's ineffective assistance claim lacked merit. *Berman v. State*, 279 Ga. App. 867, 632 S.E.2d 757 (2006).

Defense counsel's performance was deficient in failing to challenge the defendant's charge of possession of a firearm by a convicted felon on the basis that the indictment erroneously alleged that the crime was committed on a date after the indictment was issued; since this was the second time the defendant had been indicted for that offense, if trial counsel had timely challenged that count, any future prosecution for that crime would have been barred, and thus

prejudice to the defendant was shown. *Langlands v. State*, 280 Ga. 799, 633 S.E.2d 537 (2006).

Failure to argue double jeopardy claim. — Counsel did not err in failing to argue a frivolous double jeopardy claim. *Jackson v. United States*, 976 F.2d 679 (11th Cir. 1992).

Failure to raise claim concerning effective date of amendment. — Failure to argue that amendments requiring five years of additional prison time were not in effect when defendant committed the crime did not constitute ineffective assistance of counsel since the amendments took effect on the enactment date for the entire act, over three years earlier. *Jackson v. United States*, 976 F.2d 679 (11th Cir. 1992).

Failure of counsel to request a continuance. — It obviously is not ineffective for counsel to fail to request a continuance for delay only. *Chandler v. State*, 204 Ga. App. 512, 419 S.E.2d 751 (1992).

The defendant was not entitled to the reversal of a conviction based on trial counsel's failure to request a continuance after learning on the morning of trial that a videotape of the incident at issue would be introduced since such choice was presumed to be strategic. *McClarity v. State*, 234 Ga. 348, 506 S.E.2d 392 (1998).

Defendant failed to show that the counsel rendered ineffective assistance, in violation of U.S. Const., amend. 6, after the counsel failed to request a continuance upon learning the identity of a confidential informant who had conducted controlled drug buys on the first day of defendant's criminal trial, as defendant failed to show prejudice by the mere speculation as to what might have been uncovered by further investigation of the informant. *Brown v. State*, 274 Ga. App. 302, 617 S.E.2d 227 (2005).

Failure to request bifurcated trial. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failure to request a bifurcated trial on felony murder in violation of O.C.G.A. § 16-5-1 and on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131; because the possession count was a predicate offense for the felony murder count, the prior conviction that was admitted into evidence was relevant to the felony murder count, and it was not necessary to sever the possession count.

Wells v. State, 281 Ga. 253, 637 S.E.2d 8 (2006).

Failure to pursue insanity defense. — Trial counsel was not ineffective in failing to pursue an insanity defense as: (1) nothing in the hospital's evaluation of defendant supported an insanity defense; (2) defendant never claimed that defendant was insane, only that defendant could not remember; (3) the sentencing court stated that defendant was evaluated twice, and that the reports contained no indication that defendant did not have the capacity to distinguish between right and wrong at the time of the crimes; (4) defendant failed to present evidence at defendant's new trial hearing regarding defendant's mental capacity that would support the feasibility of an insanity defense; and (5) defendant did not show that counsel unreasonably failed to inquire into defendant's mental state or that there was a likelihood that such an evaluation would have affected the outcome of the trial. *Osterhout v. State*, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

Defendant failed to show that the counsel was ineffective in violation of U.S. Const., amend. 6 for a failure to pursue a request for a psychological examination, an insanity defense under O.C.G.A. § 16-3-2, and failure to assert that defendant was not competent to stand trial under O.C.G.A. § 17-7-130 in a criminal trial arising from multiple offenses, including murder, as there was nothing in the defendant's psychological history or in counsels' interactions with the defendant which suggested that there was a problem with the defendant's sanity or competency. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

Defendant was not erroneously denied a new trial on grounds that trial counsel was ineffective, as the evidence, via trial counsel's testimony, showed that: (1) counsel, after gathering the defendant's medical history and interviewing the defendant's medical provider, did not believe the defendant was insane; and (2) counsel, after consulting with the defendant and gaining an approval, made a strategic decision not to pursue a mental health defense, opting instead to pursue a claim of self-defense. *Radford v. State*, 281 Ga. 303, 637 S.E.2d 712 (2006).

Trial counsel's strategic decisions in representing the defendant did not amount to

ineffectiveness, as: (1) the defendant's own self-serving general statements regarding a purported psychological condition at the time of the offense were insufficient to substantiate any claim of a mental condition which would have provided a possible defense; (2) counsel's determination to rely exclusively on the prior difficulties between the defendant and the victim proved no deficiency; and (3) no ineffectiveness resulted by counsel's failure to object to the prosecutor's alleged improper remarks during closing argument. *Nichols v. State*, 281 Ga. 483, 640 S.E.2d 40 (2007).

Failure to contact alibi witnesses. — Defense counsel's failure to contact alibi witnesses and to object to illegally obtained evidence was prejudicial, because the evidence against the defendant was not overwhelming and a reasonable probability existed that the presence of the alibi witnesses would have affected the result. *Richardson v. State*, 189 Ga. App. 113, 375 S.E.2d 59 (1988).

Defendant's representation was not ineffective for failure to interview possible alibi witnesses or to call them to testify at trial where the record indicated that counsel did investigate the possibility of an alibi defense and that, under the circumstances, counsel made a tactical decision that an alibi defense would not be feasible. *McCoy v. Newsome*, 953 F.2d 1252 (11th Cir.), cert. denied, 504 U.S. 944, 112 S. Ct. 2283, 119 L. Ed. 2d 208 (1992).

Court's finding that defendant received effective assistance of counsel was not clearly erroneous where defendant did not overcome the presumption that counsel's failure to call alibi witness was made in the exercise of reasonable professional judgment. *Jackson v. State*, 209 Ga. App. 217, 433 S.E.2d 655 (1993).

Failure to present alibi witnesses. — Although defendant discussed potential alibi witnesses with the attorney and attempted to contact and interview those witnesses, none of the witnesses were able to provide defendant with an alibi at the time of a robbery, and accordingly, counsel made a tactical decision not to call any witnesses on defendant's behalf; such was not ineffective assistance. *Todd v. State*, 275 Ga. App. 459, 620 S.E.2d 666 (2005).

Defendant failed to establish a claim of

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

ineffective assistance of counsel based on counsel's failure to present an alibi witness because counsel testified that counsel thought the jury would believe that the alibi witness, the defendant's sibling, was lying for the defendant, and because counsel did not call the sibling in order to preserve the right to final closing argument. *Walker v. State*, 280 Ga. App. 457, 634 S.E.2d 93 (2006).

Failure to present alibi evidence. — Defendant failed to establish a claim of ineffective assistance of counsel based on defense counsel's strategy in not presenting evidence that the defendant was at the defendant's mother's home on the night of the crime as an alibi defense because counsel testified that although the defendant offered multiple alibi defenses, defendant did not tell counsel that the defendant was at the mother's home on the night of the murder, that counsel did not consider the defendant's mother a good source of defense evidence because the mother's extensive history of substance abuse presented a major obstacle to the mother's credibility, and that counsel believed that the defendant's fiancé was not credible because the fiancé had previously posed as a reporter conducting interviews about the murder and counsel believed there was a high probability of that fact damaging the defendant's defense; counsel also testified that counsel did not want to introduce any evidence in order to preserve the right to opening and closing argument, which was a valid trial strategy. *Phillips v. State*, 280 Ga. 728, 632 S.E.2d 131 (2006).

Defendant was not denied effective assistance of counsel, and claims that the counsel was ineffective by failing to: (1) offer testimony of certain alibi witnesses; (2) adequately consult with the defendant prior to trial; and (3) move to sever the trial from that of the co-defendants were rejected, given that the defendant never provided counsel with any alibi witnesses, a claim that counsel failed to consult with the defendant was unfounded, and counsel's strategy to have the co-defendants tried together was sound. *Adkins v. State*, 280 Ga. 761, 632 S.E.2d 650 (2006).

Strategy not to call eyewitness. — Because the defendant's trial counsel testified that

counsel did not call an eyewitness to the incident that led to the charges that the defendant committed aggravated assault of a peace officer and four counts of felony obstruction of an officer because interviews with the eyewitness revealed evidence that would have been detrimental to the defendant's claim that the defendant acted in self-defense, the omission of this testimony did not constitute ineffective trial strategy. *Carver v. State*, 203 Ga. App. 197, 416 S.E.2d 810, cert. denied, 203 Ga. App. 905, 416 S.E.2d 810 (1992).

Failure to present cumulative evidence. — Although trial counsel could have further impeached co-defendants with certified copies of their felony convictions, any such deficiency in counsel's performance could not have prejudiced defendant because the jury was already aware of the disreputable character of these witnesses by virtue of their own testimony on the stand. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

Failure to introduce medical evidence. — Defendant did not receive effective assistance of counsel when defendant provided counsel medical records showing that defendant suffered from "confusional migraines," which could render defendant unable to form the requisite criminal intent, but counsel did not investigate the condition, nor was evidence of it, which was defendant's only defense, offered, and defendant was prejudiced because other evidence showed defendant was suffering from this condition at the time of defendant's alleged crime. *Guzman v. State*, 260 Ga. App. 689, 580 S.E.2d 654 (2003).

Failure to obtain service of diabetes expert. — See *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999).

Counsel were not ineffective in failing to take photographs to memorialize the bruises defendant contends he received at the hands of the police, where the evidence shows that if photographs had been taken, they would not have materially assisted the judge and the jury in determining the voluntariness of his confession, since police photographs showed only insignificant marks. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Failure to hire polygrapher. — Defendant failed to establish a claim that defense coun-

sel was ineffective based on the fact that defense counsel did not hire a defense polygraph examiner to rebut the state's examiner because, at the motion for new trial hearing, the defendant's trial defense counsel testified that this was a matter of trial strategy to preserve the right to closing argument; defense counsel was prepared to and did cross-examine the state's expert to bring out the points defense counsel wanted to raise and felt the value of putting on a defense expert was outweighed by retaining the right to close. *Johnson v. State*, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

Failure to obtain admission of polygraph evidence. — Defendant did not receive ineffective assistance of counsel due to an attorney's failure to obtain a stipulation from the state permitting the admission of the results of a polygraph test, in a case in which the attorney had not entered the attorney's appearance in the case, because the defendant did not show that the state was willing to enter into a stipulation to authorize the admission of the polygraph results and the defendant did not show that the attorney's performance was deficient or that the defendant suffered any prejudice from the inaction. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Failure to file motion to suppress evidence. — Defense counsel's failure to make a motion to suppress on the grounds that warrants were issued without probable cause was neither deficient nor prejudicial and did not render counsel's assistance ineffective. *Davis v. State*, 209 Ga. App. 755, 434 S.E.2d 752 (1993).

Defendant's counsel committed prejudicial error in failing to pursue a motion to suppress or otherwise object to the admission of evidence illegally seized on the day of defendant's arrest. *Jefferson v. State*, 217 Ga. App. 747, 459 S.E.2d 173 (1995).

Defendant did not show defendant was deprived of the effective assistance of counsel because defense counsel did not move to suppress evidence of prior difficulties between defendant and the victim, as such a motion would have been denied. *Martin v. State*, 266 Ga. App. 392, 597 S.E.2d 445 (2004).

Defendant's claim that trial counsel was ineffective in failing to move to suppress defendant's post-arrest statement was with-

out merit as trial counsel viewed the statement as exculpatory and failed to make the motion as part of counsel's trial strategy. *Ogden v. State*, 266 Ga. App. 399, 597 S.E.2d 491 (2004).

Malice murder and accompanying life sentence were upheld on appeal because counsel was not ineffective for failing to make a motion to suppress defendant's two statements; attempting to suppress the first statement would have been futile because defendant was not under arrest and not subject to a custodial interrogation, and the second statement was made after a waiver of Miranda rights. *Wiggins v. State*, 280 Ga. 627, 632 S.E.2d 80 (2006).

Trial counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to object to a witness's hearsay testimony that the codefendant told the witness that the three defendants acted together in carrying out the robbery and murder; this testimony was properly admitted as a statement by a coconspirator under O.C.G.A. § 24-3-5. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 2007 U.S. LEXIS 2212 (U.S. 2007).

Failure to submit written motions to suppress excused where court entertains oral motions. — The failure to submit any written motions to suppress certain lineup identification evidence does not support the defendant's allegation of ineffective legal representation at trial where the trial court entertained such motions made orally and conducted a hearing thereon outside the presence of the jury. *Aparicio v. State*, 166 Ga. App. 793, 305 S.E.2d 649 (1983).

Delay in filing of motion. — Tactical decision to delay the filing of a potentially meritorious suppression motion in order later to obtain more favorable habeas review was objectively unreasonable. *Huynh v. King*, 95 F.3d 1052 (11th Cir. 1996).

Failure to exclude cross-examination as to previous injuries of child victim constitutional. — In a prosecution for killing a child, the failure of trial court to rule on a motion to exclude cross-examination by the state of the defendant concerning previous injuries to the child in question does not deny the defendant effective assistance of counsel. *Bethea v. State*, 251 Ga. 328, 304 S.E.2d 713 (1983).

Right to Counsel (Cont'd)**5. Duties and Effectiveness of Counsel (Cont'd)**

Failure to object. — Because the defendant's counsel did not object to a nurse's testimony summarizing what the victim had told the nurse about the victim's rape by defendant, this was not ineffective assistance of counsel because the victim's veracity was at issue, the victim was present at trial, under oath, and subject to cross-examination, and the nurse's testimony amounted to a prior consistent out-of-court statement, which was admissible. *Johnson v. State*, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Because the state's questions to a witness were not leading, had answers that were obvious, or were answered by the witness or other witnesses, trial counsel was not ineffective for failing to object. *Capers v. State*, 273 Ga. App. 427, 615 S.E.2d 126 (2005).

Failure to object to expert testimony. — Defendant failed to establish a claim of ineffective assistance of counsel based on counsel's failure to object to an agent's testimony regarding what the agent believed to be a marijuana stalk in a burn pile because expert testimony based on scientific tests was not necessarily required to establish that a substance was marijuana if the identifying witness had the requisite training in the narcotics field; additionally, defense counsel testified that counsel did not think it was all that helpful to focus on the stalk because it may have emphasized that the substance was marijuana before it got burned. *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

Failure to object to use of "victim." — Trial court's ruling that it was highly unlikely that a reasonable probability existed that the outcome of the defendant's case would have been different but for defense counsel's failure to object to the use of the word "victim", when referring to the victim, was not clearly erroneous; moreover, defense counsel testified that the defense theory was to show that the prosecution was on a witch hunt against the defendant and not objecting to the state's use of the word "victim" reinforced that strategy of showing that the state was "paranoid." This was a matter of tactics and strategy, and whether wise or unwise did not constitute ineffective assis-

tance of counsel. *Johnson v. State*, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

Introduction of the defendant's criminal history was proper as a tactical measure where it was done as an explanation of the defendant's sole defense that the defendant obtained contraband to aid the state. *Fountain v. State*, 231 Ga. App. 700, 500 S.E.2d 614 (1998).

Introduction of prior conviction. — Counsel was not ineffective by failing to object to introduction of defendant's prior conviction to because that conviction had been properly obtained and was not subject to attack. *Watkins v. State*, 206 Ga. App. 575, 426 S.E.2d 26 (1992).

Failure to make meritless objection. — Trial counsel was not ineffective in failing to raise a constitutional challenge to O.C.G.A. § 16-13-31(e) based on the statute's allowance of a conviction for trafficking in methamphetamine if a defendant possessed 28 grams or more, regardless of the purity of the methamphetamine mixture, while O.C.G.A. § 16-13-31(a) only allowed a conviction for trafficking in cocaine if the mixture of cocaine had a purity of at least 10 percent; the proposed challenge was not supported by the evidence as the state's expert testified that 56.2 grams of the 79.0 grams of the substance tested was positive for methamphetamine, and there was no proffer or evidence as to the purity of the mixture or any allegation by defendants that the substance was not methamphetamine. *Christopher v. State*, 262 Ga. App. 257, 585 S.E.2d 107 (2003).

Defendant was not denied effective assistance of counsel where counsel did not request a misidentification charge, despite misidentification being defendant's sole defense, because the jury charge as a whole correctly and thoroughly instructed the jury on such issues as the presumption of innocence, reasonable doubt, burden of proof, credibility of witnesses, and impeachment of witnesses, and where there was overwhelming evidence of defendant's guilt. *Brown v. State*, 260 Ga. App. 627, 580 S.E.2d 348 (2003).

Defendant's claim that defendant was denied effective assistance of counsel failed where counsel's failure to ask for a curative instruction because of the admission of testimony by a co-conspirator was not an error

as the testimony was admissible under the co-conspirator exception to the hearsay rule, and counsel's failure to object and request a mistrial following certain comments by the assistant district attorney during closing arguments did not amount to ineffective assistance since the gravamen of the argument was to urge the jury to find from the inconsistencies that a witness had lied. *Robinson v. State*, 278 Ga. 31, 597 S.E.2d 386 (2004).

Trial counsel was not ineffective in failing to make a meritless objection based on the state's expert's testimony as to the source of the DNA on a sock, as the possible mechanisms by which epithelial cells ended up on a sock were beyond the ken of the average layman; since the evidence at issue was admissible, defendant's trial counsel was not required to object. *Eley v. State*, 266 Ga. App. 45, 596 S.E.2d 660 (2004).

Defendant's conviction for child molestation was affirmed because defendant did not carry defendant's burden of showing that defendant's counsel rendered ineffective assistance as the record showed that counsel adequately prepared for trial, defendant was advised of the possible sentence during plea bargaining, and counsel allowed character evidence in as part of a reasonable trial strategy. *Kimmons v. State*, 267 Ga. App. 790, 600 S.E.2d 783 (2004).

Defendant's counsel did not render ineffective assistance under the Strickland standard, as evidence of defendant's prior acts towards the victim were admissible in defendant's trial, arising from other acts against the same victim, such that counsel's failure to object to the admission of such evidence was not a deficiency. *Andrews v. State*, 275 Ga. App. 426, 620 S.E.2d 629 (2005).

Trial counsel did not provide ineffective assistance under Ga. Const. 1983, Art. I, Sec. I, Para. XIV by failing to object when the trial court allowed a partition to be placed between the defendant and the child victim, allegedly in violation of U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XIV, when they testified in the molestation case; the defendant waived the confrontation claim since the defendant arranged for the partition in order to head off the state's request for testimony via closed-circuit television pursuant to O.C.G.A. § 17-8-55, and defense counsel's failure to object, therefore, could not be challenged because this

fell into the realm of strategy. *Zepp v. State*, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, *Schofield v. Holsey*, 2007 Ga. LEXIS 182 (Ga. 2007).

Defendant failed to establish a claim of ineffective assistance of trial counsel in the defendant's trial for the murder of the defendant's spouse based on counsel's failure to object to evidence that the defendant held an accidental death policy in the amount of \$243,750, payable to the defendant in the event of the spouse's accidental death and to evidence showing that the defendant inquired into the spouse's compensation and death benefits available through the spouse's employer; there was independent evidence directly relating the existence of the insurance policies and death benefits to the defendant's financial motive for the murder; financial gain from the defendant's marriage to the spouse, clearly including the spouse's insurance and employment benefits, and the prevention, at all costs, of the loss of such financial gain by virtue of a divorce, provided a compelling motive for the murder, and thus, such evidence was admissible and any attempt to exclude the evidence would have been unsuccessful. *Slakman v. State*, 280 Ga. 837, 632 S.E.2d 378 (2006), cert. denied, 2007 U.S. LEXIS 2249 (U.S. 2007).

Two defendants' attorneys were not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to object to the trial court's decision to replace a juror who was late to court with one of the alternate jurors who was fully qualified to sit on the jury under O.C.G.A. § 15-12-169; the juror's tardiness was a sound basis for dismissal under O.C.G.A. § 15-12-172. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 2007 U.S. LEXIS 2212 (U.S. 2007).

No ineffectiveness of counsel was shown in a defendant's malice murder trial by the failure of the defendant's trial counsel to object to the introduction of a prior consistent statement of a witness whose motivation for testifying against the defendant had been vigorously examined in cross-examination; such an objection would have been futile because the veracity of the witness was placed in issue by the cross-examination, rendering the prior consistent statement admissible, and therefore no ineffectiveness of

Right to Counsel (Cont'd)
5. Duties and Effectiveness of Counsel (Cont'd)

counsel was shown. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Trial court's denial of a defendant's motion for an out-of-time appeal was proper with respect to the defendant's claim that counsel was ineffective in violation of U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to testimony by a probation officer, as the officer's statement that under former O.C.G.A. § 42-1-2(a)(3), the defendant did not have to register as a sex offender if the defendant was afforded treatment as a first offender was a correct statement of law at the time; accordingly, counsel's failure to object thereto was not ineffectiveness, as any such objection would have lacked merit. *Ethridge v. State*, 283 Ga. App. 289, 641 S.E.2d 282 (2007).

In a case wherein the defendant was convicted of murder and other related crimes, because the defendant was unable to establish that the trial court's admission of a notebook containing song lyrics would have constituted an abuse of discretion had trial counsel voiced an objection, there existed no merit in the defendant's allegation that the defendant was provided ineffective assistance of counsel for the failure of defense counsel to object. *Castillo v. State*, 281 Ga. 579, 642 S.E.2d 8 (2007).

Motions to sever trial of defendants. — In a case wherein the defendant was convicted of murder and other related crimes, even assuming that defense counsel's failure to object to the rescission of a severance order constituted deficient performance, it was not an abuse of the trial court's discretion to deny the motion to sever since the number of defendants tried together was not so great as to create confusion of the evidence, the law applicable to each defendant was substantially the same, and there was no showing the jury was confused. *Castillo v. State*, 281 Ga. 579, 642 S.E.2d 8 (2007).

Because the charge that was given was adjusted to the evidence and was not erroneously incomplete, defense counsel was not ineffective in failing either to object or to request a more expansive instruction. *Roper v. State*, 281 Ga. 878, 644 S.E.2d 120 (2007).

Because the defendant's counsel was not ineffective in failing to make a meritless objection and could not be held to a duty to anticipate changes in the law regarding the use of a nolo plea to impeach a witness, allegations of ineffective assistance of counsel lacked merit. *Martin v. State*, 281 Ga. 778, 642 S.E.2d 837 (2007).

Failure to object to admissible evidence does not constitute ineffective assistance to counsel. *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982).

Trial counsel was not ineffective for failing to object to introduction of evidence that the murder victim had life insurance naming the defendant as beneficiary, where the required nexus was shown between the crime charged and the existence of the insurance. *Bagwell v. State*, 270 Ga. 175, 508 S.E.2d 385 (1998).

Defense counsel was not ineffective in failing to file a motion to suppress the gun and knitted caps found in the car, as defendant, a passenger, lacked standing to contest the search of the car; further, the caps were found in a search of the car incident to a lawful arrest. *Patterson v. State*, 259 Ga. App. 630, 577 S.E.2d 850 (2003).

Inmate's trial counsel was not ineffective for failing to object to the introduction of evidence of other "similar crimes" since there was no reasonable probability that, had defense counsel objected and the "similar crime" issue been addressed on appeal, the trial court's ruling would have been reversed and a new trial ordered; thus, the inmate was not prejudiced by said failure. *Walker v. Houston*, 277 Ga. 470, 588 S.E.2d 715 (2003).

Defendant failed to show that counsel provided ineffective assistance in violation of U.S. Const. amend. VI and Ga. Const. 1983, Art. I, Sec. 1, Para. XIV, based on counsel's failure to have objected to evidence regarding the chain of custody of drugs that were seized from the crime scene, as the evidence showed that the police placed the drugs in a tamper-proof identifiable container and that the crime lab technician who tested it received it in the same container, and there was no indication that there had been any tampering or substitution. *Reason v. State*, 283 Ga. App. 608, 642 S.E.2d 236 (2007).

Trial counsel was not ineffective for failing to object to pre-autopsy photographs of mur-

der victims; each of the photographs was relevant to some point of a forensic pathologist's testimony, and thus the photographs were admissible. *Conway v. State*, 281 Ga. 685, 642 S.E.2d 673 (2007).

Trial strategy and tactics regarding defense witnesses. — The determination as to which defense witnesses will be called is a matter of trial strategy and tactics. *Scapin v. State*, 204 Ga. App. 725, 420 S.E.2d 385 (1992).

Where the defendant's trial counsel's decision to not call a witness at trial was clearly strategic, because the witness was a crack addict and the trial counsel did not believe that the witness would withstand cross-examination, the appellate court was not required to find that trial counsel was deficient just because the defendant and defendant's appellate attorney presently disagreed with the trial counsel's decision. *Shields v. State*, 264 Ga. App. 232, 590 S.E.2d 217 (2003).

Decisions on witnesses and motions province of lawyer, after consulting client. — The decisions as to what witnesses to call and what motions to file are the exclusive province of the lawyer after consultation with the client. *Jackson v. State*, 167 Ga. App. 509, 306 S.E.2d 757 (1983).

Failure to make a motion unwarranted in law is not ineffective assistance of counsel. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

Failure to introduce evidence. — Defense counsel made an informed decision not to focus on the issue of defendant's proper residence, and as such did not constitute grounds for a new trial based upon a charge of ineffective assistance of counsel. *Watts v. State*, 477 S.E.2d 852 (1996).

Claim of ineffective assistance based on counsel's failure to introduce and use medical records to show inconsistent statements of the victim was not supported where the records had neither exculpatory nor impeachment value. *Brown v. State*, 226 Ga. App. 238, 486 S.E.2d 385 (1997).

Defendant did not demonstrate prejudice from trial counsel's failure to call an expert witness to testify on DNA analysis; the defen-

dant failed to introduce any evidence that the defendant could have called an expert witness who would have testified that the crime lab's testing results were unreliable and counsel did employ an expert whose report said the expert had nothing to add to the lab's report. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

Counsel was not ineffective for failing to present evidence of the defendant's prior consistent statements, as this was a matter of considered trial strategy and tactics, and was not due to counsel's failure to adequately prepare. Furthermore, in a rape prosecution, counsel was not ineffective for not objecting to the state's cross-examining defendant on the defendant's failure to state to police, as the defendant did at trial, that the defendant had consensual sex with the victim, as such an objection would have been meritless. *Munn v. State*, 263 Ga. App. 821, 589 S.E.2d 596 (2003).

In circumstances in which a trial court found that defense counsel was ineffective for failing to present evidence which supported the defendant's justification defense, it was illogical to grant a new trial for charges of murder and aggravated assault, but not for possession of a firearm in the commission of a crime; the jury could have acquitted the defendant of the possession charge on the basis of justification. *Langlands v. State*, 280 Ga. 799, 633 S.E.2d 537 (2006).

Defendant received ineffective assistance of counsel relating to charges arising from a fatal accident which occurred at an intersection controlled by a traffic light, based on the defense counsel's failure to introduce county department of transportation reports which showed, inter alia, that four days before the collision there had been a report that the traffic signals at this intersection were showing "green all 4 ways;" while witnesses testified that the victims had a green light when they entered the intersection, the defendant claimed the defendant, also, had a green light; the fact that there had been equipment malfunctions at this intersection, and reports of the signals holding green all four ways less than a week before this accident, was certainly relevant to the defense. *Gibson v. State*, 280 Ga. App. 435, 634 S.E.2d 204 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and

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U.S. Const., amend. 6 because defense counsel relied on the testimony of a licensed professional counselor to testify regarding the insanity defense relied upon by the defendant; while the defendant claimed that the defendant would have been able to convince the jury that the defendant was insane if defense counsel had sought the expertise of a licensed psychologist or psychiatrist, this argument failed, as an insanity defense did not require the expert testimony of a psychologist or psychiatrist, and the witness had conducted forensic evaluations, sometimes at the request of a court, more than 25 times, and the witness had been qualified as an expert in forensic counseling between eight and 10 times. *Perez v. State*, 281 Ga. 175, 637 S.E.2d 30 (2006).

Inadequate preparation of expert witness. — Trial counsel were not ineffective for failing to sufficiently prepare a medical expert, even though the expert was unable while testifying to recall a portion of the statement defendant made to police, where the statement was over 90 pages in length, and counsel testified that they had gone over everything with the expert ‘from A to Z.’ *Henry v. State*, 269 Ga. 851, 507 S.E.2d 419 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Failure to call expert witness. — Defense counsel was not ineffective, notwithstanding the contention that counsel failed to call a psychiatrist retained by the defense and failed to request a continuance when it became apparent that the psychiatrist would not be available to testify since: (1) the psychiatrist never submitted a report to defense counsel expressing an unequivocal opinion that the defendant met the standard of legal insanity and acknowledged that jurors might have some difficulty accepting as a viable defense the psychiatrist’s diagnosis that the defendant experienced a “dissociative reaction;” and (2) by the time defense counsel discovered that the expert was unavailable, numerous other witnesses had already made arrangements to travel significant distances in order to testify for the defense; and (3) defense counsel decided to proceed and to attempt to develop the issue

of the client’s mental condition through the testimony of the court-appointed psychologist and lay witnesses. *Ucak v. State*, 273 Ga. 536, 544 S.E.2d 133 (2001).

Trial counsel was not ineffective for not having retained an independent expert witness to review the physical evidence; the expert that counsel retained for the motion for new trial testified that there was nothing in the evidence that “precluded” the victim’s torso from being 12 to 18 inches off the sofa when the first bullet struck him, but that in any event, the victim was seated, leaning against the back of the sofa, when the third shot was fired into the victim’s mouth from a distance of an inch or two; the evidence showed that the shooting was done with malice, not in self-defense, nor as the result of some provocation. *Cooper v. State*, 279 Ga. 189, 612 S.E.2d 256 (2005).

Defendant’s trial counsel was not ineffective on the basis that counsel did not attempt to have a defense reconstruction specialist testify, as counsel explained that counsel considered whether another expert was needed, but believed that an officer provided the information which counsel needed to support the sole defense of misfortune or accident, i.e., that the victim was standing in the middle of the road and it was very dark. Defense counsel further stated that the decision not to seek funds for and hire a reconstruction expert was one of trial tactics because the state’s expert provided the needed facts. *Corbett v. State*, 277 Ga. App. 715, 627 S.E.2d 365 (2006).

Defendant did not receive ineffective assistance of counsel because trial counsel failed to call an expert witness regarding child sexual abuse syndrome as counsel explained that counsel did not employ an expert witness regarding child sexual abuse syndrome because, in counsel’s opinion, it was inapplicable. *Tadic v. State*, 281 Ga. App. 58, 635 S.E.2d 356 (2006).

Reasonable tactical decision not to call expert witness. — Attorney’s decision not to call a defense expert to challenge the blood stain on defendant’s boot was a deliberate tactical decision. The fact that the blood on the boots matched that of the victim was consistent with the defense’s theory of the case, and the decision not to call expert witnesses concerning the blood stain was reasonable. *Williams v. Kemp*, 846 F.2d 1276

(11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931 (1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 108 L. Ed. 2d 965 (1990).

Trial counsel's failure to call expert witness did not constitute ineffective assistance where this testimony was not considered necessary and where decision was a reasonable trial tactic. *Smith v. State*, 207 Ga. App. 290, 428 S.E.2d 95 (1993).

Because the jury was fully aware of the fact that hair and fiber samples did not yield any match to defendant, counsel's failure to call an expert witness on that subject was not ineffective assistance. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

It was not professionally unreasonable for counsel not to investigate the possibility of rebuttal testimony from an expert pathologist on the evidence of rape. *Parker v. Turpin*, 60 F. Supp. 2d 1332 (N.D. Ga. 1999), aff'd sub nom. *Parker v. Head*, 244 F.3d 831 (11th Cir. 2001).

No duty to present cumulative expert testimony. — Where transcript indicated that jury was fully aware that latent prints lifted from crime scenes did not match defendant by virtue of investigator's testimony, defendant was not denied effective assistance of counsel because counsel did not call an expert to show such evidence. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

Failure to investigate, interview, or subpoena not prejudicial. — While defense trial counsel may have been ineffective, there was no prejudice from trial counsel's failure to investigate leads, interview alibi witnesses, or subpoena witnesses where the testimony at a hearing on a motion for a new trial showed that there was little if any material value to the defense that would have been produced by investigation, interview, or subpoena. *Davenport v. State*, 172 Ga. App. 848, 325 S.E.2d 173 (1984).

Defense counsel's failure to interview all of the known witnesses and failure to obtain the complete state witness list did not fall below the standard of effective assistance of counsel, in light of the alibi asserted so vehemently by the defendant, which was supported by several family witnesses interviewed by counsel. *Mulligan v. Kemp*, 771 F.2d 1436 (11th Cir. 1985), cert. denied, 480 U.S. 911, 107 S. Ct. 1358, 94 L. Ed. 2d 529 (1987).

The evidence of record was not sufficient to compel a finding that trial counsel's performance was deficient or that any deficiency of trial counsel prejudiced the defense because the trial counsel did not call the defendant's physician to testify regarding a heart condition, which the defendant felt could help explain the defendant's behavior at the time the defendant was arrested for failure to maintain the defendant's lane and driving under the influence. *Scapin v. State*, 204 Ga. App. 725, 420 S.E.2d 385 (1992).

No ineffective assistance for failure to call witness where it was never asserted that this witness would provide defendant with an alibi or any other defense. *Smith v. State*, 209 Ga. App. 540, 433 S.E.2d 694 (1993).

Because defendant failed to show that but for the counsel's failure to interview certain witnesses, including the victim, the outcome would have been different, the defendant failed to meet the burden of showing that the counsel provided ineffective assistance; counsel observed the witnesses in preliminary hearing matters, reviewed the videotape of the victim, and felt prepared to commence the trial, and there was a lot of hostility between the witnesses and defendant. *Osmer v. State*, 275 Ga. App. 506, 621 S.E.2d 519 (2005).

Eventual testimony and cross-examination vitiates charge of harmfulness. — Defense counsel's failure to object to testimony of accomplice at time of introduction was not harmful because accomplice eventually testified at hearing and was subject to cross-examination; and as such the testimony objected to on appeal was cumulative of accomplice's in-court testimony. *In re J.B.*, 223 Ga. App. 429, 477 S.E.2d 874 (1996).

Failure to interview mitigation witnesses. — Counsel's failure to interview mitigation witnesses and to present evidence in mitigation is not ineffective assistance where the decision not to call such witnesses is made by the defendant and counsel's advice is reasonable under the circumstances. *Mitchell v. Hopper*, 564 F. Supp. 780 (S.D. Ga. 1983), aff'd, 762 F.2d 886 (11th Cir. 1985), cert. denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987).

Offer to obtain witnesses declined by defendant. — Where the record established sufficient time, opportunity, and offer of

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assistance by the court and counsel to obtain witnesses, which offer was declined by defendant in court, the record did not support appellate counsel's claim of ineffectiveness of the trial defense counsel. *Alexander v. State*, 186 Ga. App. 787, 368 S.E.2d 550 (1988).

Obligation not to produce false or misleading evidence. — Defendant's claim that the defendant's attorney should have hired a hand-writing expert to show that the defendant did not write a threatening note the victim received was rejected while the record reflected that the defendant told the attorney that the defendant wrote the note. In light of this admission, the attorney's decision not to produce contrary testimony merely fulfilled the ethical obligation to refrain from producing false or misleading evidence. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931, cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 103 L. Ed. 2d 931 (1989).

Hiring of black investigator to talk to black witnesses. — Denial of defendant's motion for funds to hire a black investigator who "might" be able to interview black witnesses who had been unwilling to talk to counsel did not prevent counsel from rendering reasonable effective assistance, where counsel was later able to interview many of these witnesses prior to trial. *Williams v. State*, 257 Ga. 311, 357 S.E.2d 578 (1987).

Guilty plea does not relieve counsel of the responsibility to investigate potential defenses so that the defendant has an informed choice; counsel must assist actually and substantially in the defendant's decision whether to plead guilty, so that the decision is made knowingly and voluntarily, though counsel's advice need not be errorless and need not involve every conceivable defense. *Dodd v. Williams*, 560 F. Supp. 372 (N.D. Ga. 1983).

Counsel does not have to present all available mitigating circumstance evidence in general, or all mental illness mitigating evidence in particular, in order to render effective assistance of counsel. *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995).

Mitigation strategy adopted by counsel at sentencing was not unreasonable under the circumstances. *Turpin v. Mobley*, 269 Ga. 635, 502 S.E.2d 458 (1998).

Failure to present psychiatric evidence at culpability stage. — Because there was no evidence that through reasonable diligence counsel could have obtained an expert to testify favorably on the mental illness defense, defendant was not prejudiced by any alleged error of counsel in failing to present psychiatric evidence during the culpability stage. *Parker v. Turpin*, 60 F. Supp. 2d 1332 (N.D. Ga. 1999), aff'd sub nom. *Parker v. Head*, 244 F.3d 831 (11th Cir. 2001).

Failure to present psychiatric evaluation at sentencing hearing. — Where, although trial counsel was aware well in advance of trial that the defendant had spent at least a brief period of time in a mental hospital shortly before the shooting, and that for some reason a psychiatric evaluation had already been ordered, counsel completely ignored the possible ramifications of those facts as regards the sentencing proceeding. This omission denied the defendant reasonably competent representation at the penalty phase, and the resulting prejudice was clear, as the only testimony the jury heard at sentencing concerning the defendant's mental history and condition, including the bizarre behavior the defendant occasionally exhibited, was that which was presented by the defendant's parent. *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

Failure to present psychiatric testimony at sentencing. — Absent a showing that testimony concerning the defendant's psychiatric condition was available and that, had it been requested, it could have materially affected the defendant's sentence, the trial court did not err by denying the defendant's motion for new trial on the basis that the defendant's trial counsel was ineffective because counsel failed to offer testimony during the sentencing phase concerning the defendant's psychiatric condition. *Gilbert v. State*, 209 Ga. App. 483, 433 S.E.2d 664 (1993).

Failure of the state to provide an indigent defendant with a psychiatric examination so materially interfered with the defendant's ability "to require the prosecution's case to

survive the crucible of meaningful adversarial testing” as to raise a presumption that the defendant’s counsel could not have been able to provide effective assistance. *Blake v. Kemp*, 758 F.2d 523 (11th Cir.), cert. denied, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed. 2d 367 (1985).

Psychological evaluation is not required in every death penalty case, and because counsel had ample opportunity to assess the defendant’s state of mind, counsel’s conclusion that further investigation into the defendant’s mental state would be fruitless was entirely reasonable under the circumstances. *Mitchell v. Hopper*, 564 F. Supp. 780 (S.D. Ga. 1983), aff’d, 762 F.2d 886 (11th Cir. 1985), cert. denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987).

Defendant was not denied effective assistance of counsel where counsel failed to demand a psychiatric examination of the defendant without showing of actual and substantial detriment. *Tucker v. Zant*, 724 F.2d 882 (11th Cir. 1984), aff’d, 762 F.2d 1480 (11th Cir. 1985), judgment vacated, 474 U.S. 1001, 106 S. Ct. 517, 88 L. Ed. 2d 452 (1985), for further consideration in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), aff’d, 802 F.2d 1293 (11th Cir. 1986), cert. denied, 480 U.S. 911, 107 S. Ct. 1359, 94 L. Ed. 2d 529 (1987).

Trial counsel was not ineffective in failing to raise the issue of mental illness prior to trial, and in failing to present evidence of it at trial where the defendant was examined by both a state psychologist and an independent psychologist, neither of whom found the defendant incompetent to stand trial. *Hosick v. State*, 262 Ga. 432, 421 S.E.2d 65 (1992).

Selecting the only cooperative although not entirely favorable psychiatrist, as opposed to none, was not deficient. *Hance v. Zant*, 981 F.2d 1180 (11th Cir.), cert. denied, 510 U.S. 920, 114 S. Ct. 317, 126 L. Ed. 2d 263 (1993).

Because the evidence showed that the defendant’s counsel discussed with the defendant the right to testify and advised against it, and defendant never affirmatively asked to testify, defendant failed to demonstrate that counsel erroneously deprived the defendant of the choice to testify and that counsel’s deficiency in this regard deprived the defendant of a fair trial. *Mobley v. State*,

264 Ga. 854, 452 S.E.2d 500 (1995); *Barron v. State*, 264 Ga. 865, 452 S.E.2d 504 (1995).

Defendant was not denied effective assistance of counsel at a trial for rape and aggravated sodomy because there was no basis to request a continuance or disallowance of a colposcope printout, which showed the victim’s anal bruising, based on the state’s failure to produce the printout before trial because: (1) defendant already had the assistant’s examination report, which mentioned the picture; (2) defendant’s counsel was permitted to interview the assistant before the assistant’s testimony; (3) the day of the trial was the first time that the prosecutor saw the picture; (4) there was no bad faith by the state; and (5) the printout was cumulative of other testimony. Furthermore, defendant’s counsel was not ineffective for failing to notify defendant of the added sodomy charge because defendant, who had a prior rape conviction, was already facing a mandatory life without parole sentence upon conviction of rape, regardless of the sodomy charge. *McMorris v. State*, 263 Ga. App. 630, 588 S.E.2d 817 (2003).

Defendant did not show that defendant received ineffective assistance of counsel when defendant’s trial counsel did not request a broader jury instruction on justification that would have stated that a victim’s threats and menaces could justify a defendant’s use of deadly force, as the justification charge the trial court gave the jury was adequate; moreover, since defendant’s trial counsel did not testify at defendant’s motion for a new trial, defendant did not show why defendant’s counsel did not request a broader charge, and, thus, defendant did not overcome the presumption that the attorney’s conduct was within the wide range of reasonable professional assistance because the attorney might have had several legitimate reasons for not requesting a broader charge, which also meant defendant could not show one required component of ineffectiveness, that the attorney’s representation was deficient. *Garrett v. State*, 276 Ga. 556, 580 S.E.2d 236 (2003).

Although defendant claimed that defense counsel: (1) allegedly met with defendant only three times prior to defendant’s felony murder trial; (2) did not seek the help of an investigator; (3) failed to subpoena witnesses who would have testified on defendant’s

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behalf; (4) neglected to inform the trial court that defendant had conflicts with two prospective jurors; and (5) failed to have defendant testify at a Jackson-Denno hearing, defendant failed in defendant's burden of establishing defendant's claim of ineffective assistance, as the trial court's credibility determinations on the issue were binding if not clearly erroneous, and the trial court found that defense counsel was not deficient after hearing testimony from defense counsel that defense counsel met with defendant numerous times, investigated the case personally, contacted the witnesses suggested by defendant and did not find them helpful, sought other witnesses, did not recall being told of conflicts with potential jurors, and did not call defendant at the Jackson v. Denno hearing because of a strategic decision to avoid giving the prosecution further "ammunition." *Salyers v. State*, 276 Ga. 568, 580 S.E.2d 240 (2003).

Defendant's counsel was not ineffective in defendant's shoplifting case for: (1) not viewing a videotape of defendant's consent to a search of defendant's vehicle; and (2) failing to subpoena witnesses or documents from the store to challenge the pricing and identification of the shoplifted items. Given that: (1) the decision not to view the videotape was a matter of trial strategy based upon counsel's knowledge that the videotape was defective and that the tape would not have been useful because the store manager saw defendant place the items in the trunk of defendant's car such that the police had probable cause to search the car even without defendant's valid consent, which, also meant that, even if counsel erred, the error did not prejudice defendant because a suppression motion would not have been successful; and (2) counsel investigated and interviewed witnesses and determined that the value of the merchandise was irrelevant due to defendant's criminal history and also made the strategic decision not to introduce evidence regarding pricing and valuation, as that would have eliminated counsel's right to present the opening and concluding remarks during closing argument. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Defendant was not denied effective assistance of counsel where the attorney did not request a charge on impeachment of a witness by a prior conviction of a crime of moral turpitude in light of the overwhelming evidence of defendant's guilt, even if the convicted witness's testimony had been discounted. *Holt v. State*, 260 Ga. App. 826, 581 S.E.2d 257 (2003).

Trial court's determination that the defendant received effective assistance of counsel was not clearly erroneous because: (1) defense counsel failed to object to hearsay evidence that was cumulative, and therefore harmless, as the defendant failed to show that but for the alleged deficiency, the outcome of the proceedings would have been different; and (2) defense counsel failed to object to the defendant's spouse's testimony at the presentencing hearing, as there was no showing that the improper evidence prejudiced the defendant. *Ingram v. State*, 262 Ga. App. 304, 585 S.E.2d 211 (2003).

In a case where defendant was convicted of selling cocaine and obstruction of an officer, defendant failed to establish that counsel was ineffective, because trial counsel insisted that counsel communicated a plea to defendant and that defendant was "adamant" on not accepting the plea, and the record revealed that trial counsel had several meetings with the defendant, conducted discovery, filed pretrial motions, and spoke with most of the state's witnesses. *Trammell v. State*, 262 Ga. App. 786, 586 S.E.2d 693 (2003).

Trial counsel was not ineffective in counsel's cross-examination of a rape victim, after the victim changed the victim's testimony as: (1) the trial counsel thoroughly cross-examined the victim regarding the changed testimony; (2) the trial counsel pointed out that the victim had testified just minutes before that the victim had talked to the victim's spouse about the victim's testimony; and (3) the trial counsel argued to the jury that the victim's changed testimony was suspect. Furthermore, trial counsel was not ineffective in opening the door to the admission of character evidence by cross-examining a detective who executed a search warrant as to whether defendant lived in the room searched as the examination was a matter of sound trial strategy. *Johnson v. State*, 263 Ga. App. 443, 587 S.E.2d 775 (2003).

Defendant's counsel was not ineffective for failing to object to the prosecutor's reference to the September 11, 2001, terrorist attacks; there was no evidence in the record as to trial counsel's perspective because trial counsel did not testify at the hearing on the motion for new trial, and while the appellate court did not condone the analogy's use so soon after the 9-11 tragedy, it could not conclude that but for trial counsel's failure to object to its use, the jury would have acquitted defendant. *Chalvatzis v. State*, 265 Ga. App. 699, 595 S.E.2d 558 (2004).

When defendant's counsel did not object to references to defendant's alleged drug use, this was not ineffective assistance of counsel because the references were relevant to defendant's argument with the victim when the crimes with which defendant was charged occurred and to whether the victim was afraid of defendant, so they were relevant to the credibility of both defendant and the victim, on which the case ultimately turned. *Johnson v. State*, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Evidence supported the trial court's conclusion that defendant's trial counsel rendered effective assistance because: (1) counsel did not err in not moving for a directed verdict because the evidence sufficed to sustain defendant's conviction for possession-of-a-firearm-by-a-convicted-felon charge; (2) counsel's failure to object to the trial court's failure to recharge the jury in the second phase of the bifurcated trial was harmless error; (3) counsel's failure to object to detective's testimony regarding citizens' complaints about a drug dealer was appropriate trial strategy because counsel did not want to call more attention to the statement; and (4) counsel's failure to object to the prosecutor's closing argument statements was not deficient performance as each of the prosecutor's statements was a reasonable inference drawn from the evidence. *Ballard v. State*, 268 Ga. App. 55, 601 S.E.2d 434 (2004).

Trial court did not err in denying defendant's motion for new trial, because, although trial counsel's failure to object to opinion testimony about the victim's veracity or request that it be stricken constituted deficient performance, the testimony was not so significant as to have contributed to the jury's verdict. Accordingly, defendant failed to demonstrate that but for counsel's

failure to object or move to strike, a reasonable probability exists that the result of the trial would have been different. *Mealor v. State*, 266 Ga. App. 274, 596 S.E.2d 632 (2004).

Defendant's ineffective assistance of counsel claim was rejected where defense counsel objected to a specific question on the basis of foundation, and then informed the trial court what the proper foundation would be for the introduction of the sought-after testimony; it was not error to interpose a foundational objection in a manner consistent with the ability to secure appellate review of the trial court's ruling. *McCullough v. State*, 268 Ga. App. 445, 602 S.E.2d 181 (2004).

Counsel for convicted child molester: (1) adequately investigated; (2) employed a recognized trial tactic of not calling expert and other witnesses to testify that child's testimony was based on dreams or family background and not reality in order to preserve the final word in closing argument; and (3) was not shown to have engaged in performance that affected the outcome of the trial by not objecting to testimony under O.C.G.A. § 24-3-36 regarding to the defendant's failure to respond to the state's investigator, and under O.C.G.A. § 24-9-85(b), by not requesting a special instruction regarding the child's alleged false swearing. *Bruce v. State*, 268 Ga. App. 677, 603 S.E.2d 33 (2004).

Defendant failed to show that the counsel rendered ineffective assistance, in violation of U.S. Const., amend. 6, on the basis that the counsel did not object when one of the victims testified that defendant stabbed the victim on purpose and not by accident, as there was no support for the proposition that such a statement was inadmissible opinion testimony under O.C.G.A. § 24-9-65; even if it were deemed inadmissible, no prejudice was shown to defendant. *Brown v. State*, 275 Ga. App. 99, 619 S.E.2d 789 (2005).

Defendant failed to show that the counsel rendered ineffective assistance under the Strickland standard in defendant's criminal trial, as counsel's performance during trial was not shown to be deficient; moreover, defendant's claims that the counsel sought money in order to make a deal with the district attorney, that the counsel failed to

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file certain motions requested by defendant, and that counsel failed to provide a list of witnesses in a timely manner, were specifically denied by the counsel in open court and further, defendant failed to show any prejudice resulted from the alleged failures of the counsel. *Isaac v. State*, 275 Ga. App. 254, 620 S.E.2d 483 (2005).

In a prosecution of defendant for the murder of the defendant's mother's boyfriend, defense counsel failure to investigate the victim's violent nature was not ineffective; the jury was given considerable information concerning the victim's violent nature, that the victim had beaten defendant's mother, and had consumed cocaine; even with further investigation, the outcome of the trial would not have changed; the jury rejected both the justification defense and the lesser charge because there was overwhelming evidence that defendant committed malice murder. *Cooper v. State*, 279 Ga. 189, 612 S.E.2d 256 (2005).

Because, *inter alia*, defendant's counsel requested a full and complete recordation of the trial, there was no evidence that a change of venue was warranted, counsel thoroughly investigated the case, and there was no evidence of prosecutorial misconduct, defendant failed to demonstrate any deficiency by trial counsel or that defendant was prejudiced thereby. *Hampton v. State*, 279 Ga. 625, 619 S.E.2d 616 (2005).

Because the U.S. Supreme Court case of *Crawford* had not yet been decided when defendant's criminal trial was held, defendant's counsel could not have been deemed ineffective under U.S. Const., amend. 6 for failing to anticipate a change in the law and make such an argument with respect to the admissibility of a deceased witness's statement; rather, the statement was properly admitted under the necessity exception to the hearsay rule, pursuant to O.C.G.A. § 24-3-1(b), as there was no indication that the statement was not accompanied by indicia of reliability, and in any event, admission thereof was harmless because it was cumulative of other evidence admitted in the trial. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

Statements by defendant's co-conspirator to a third person regarding defendant's actions during the criminal project bore sufficient indicia of reliability to be admissible in defendant's criminal trial, pursuant to O.C.G.A. § 24-3-5, and any objection on the grounds of the confrontation clause under U.S. Const., amend. 6 or on hearsay grounds would have lacked merit; accordingly, defendant's counsel was not ineffective for failing to object to the admission thereof. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

Despite the defendant's claims that trial counsel failed to: (1) discuss the possibility of a plea or engage in plea negotiations with the state; (2) advise defendant of the consequences of being sentenced as a recidivist; and (3) advise defendant of the consequences of a speedy trial demand, the defendant's ineffective assistance of counsel claims failed because the record showed that the state never made a plea offer and the defendant failed to show that the outcome of the trial would have been different but for trial counsel's alleged remaining errors. *Carter v. State*, 280 Ga. App. 891, 635 S.E.2d 246 (2006).

Because trial counsel was not ineffective in: (1) failing to seek suppression of criminal acts which took place in other jurisdictions and to which the defendant was connected because they were part of the crime spree that began with the murder of the victim, as such was admissible; (2) failing to seek a mistrial when an objection to the state's opening statement, although overruled, had some merit; (3) failing to object to jury instructions on mere presence and parties to a crime, as the charges were correct statements of the law and supported by the evidence; (4) making statements in closing argument that were actually in furtherance of the defense's theory of the case; (5) entering into a stipulation with the prosecutor; and (6) failing to move for a directed verdict of acquittal, as the evidence supported the defendant's convictions, the defendant's ineffective assistance of counsel claims lacked merit. *Pruitt v. State*, Ga. S.E.2d , 2007 Ga. LEXIS 347 (May 14, 2007).

When each alleged deficiency of trial counsel either was completely without any factual basis or involved counsel's failure to object to clearly admissible evidence or

proper trial procedure, and when the alleged deficiencies in some instances were also attributable to reasonable trial strategy, there were no errors that could be considered in a cumulative prejudice analysis. *Waits v. State*, Ga. , S.E.2d , 2007 Ga. LEXIS 305 (Apr. 24, 2007).

Counsel at the defendant's resentencing trial was not ineffective in allegedly failing properly to investigate, prepare and present evidence of the defendant's mental condition and family background. The defendant did not demonstrate a reasonable probability that, if adduced at trial, the psychiatric and background evidence presented in the habeas proceeding would have caused the sentencer to conclude that the balance of aggravating and mitigating circumstances did not warrant death. *Hance v. Kemp*, 258 Ga. 649, 373 S.E.2d 184 (1988), cert. denied, 490 U.S. 1012, 109 S. Ct. 1658, 104 L. Ed. 2d 172 (1989).

Psychiatric testimony that defendant legally sane. — Alleged lack of a "meaningful" psychiatric examination did not render the defendant's counsel ineffective insofar as the presentation of a defense of mental illness was concerned, because the defendant called as a witness the examining psychiatrist, who expounded upon the psychiatrist's written report and testified that the psychiatrist had concluded that the defendant was legally sane, although suffering from schizophrenia. *Heflin v. State*, 183 Ga. App. 149, 358 S.E.2d 298 (1987).

Denial of motion for psychiatric assistance. — Where the record disclosed no evidence that the defendant's sanity at the time of the offenses charged would be a significant factor at trial nor even that the defendant's mental condition was seriously in question, there was no abuse of discretion in the trial court's denial of the defendant's "motion for psychiatric assistance," and the defendant also suffered no deprivation of effective assistance of counsel resulting from the trial court's denial of the defendant's motion. *Davidson v. State*, 183 Ga. App. 557, 359 S.E.2d 372, cert. denied, 183 Ga. App. 905, 359 S.E.2d 372 (1987).

"Spare him for science" argument. — The contention that use of the "spare him for science" argument constitutes ineffective assistance of counsel finds no support. *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995).

Defendant's failure to testify on the defendant's own behalf could not be attributed to the defendant's trial counsel who was not ineffective therefore. *Rachell v. State*, 210 Ga. App. 106, 435 S.E.2d 480 (1993).

Failure to allow defendant to testify. — Defendant's claim that trial counsel's failure to call the defendant as a witness despite the defendant's insistence that the defendant testify, constituted ineffective assistance of counsel, and, as it was raised for the first time on appeal, warranted remand. *Robbins v. State*, 207 Ga. App. 556, 428 S.E.2d 450 (1993).

Trial counsel's decision not to call the defendant and the defendant's alibi witness did not fall below standard of reasonableness. *Phillips v. State*, 233 Ga. App. 557, 504 S.E.2d 762 (1998).

Where counsel had sound strategic reasons for advising a defendant not to testify at defendant's murder trial, and defendant was aware that defendant could testify despite counsel's advice but never requested to do so, counsel was not ineffective for refusing to allow defendant to testify. Furthermore, defendant's contention that counsel improperly failed to investigate the murder case and call essential witnesses was rejected since no prejudice to defendant was shown from the alleged ineffective assistance of counsel and since defendant made no proffer as to what a thorough investigation would have uncovered or what the allegedly essential witnesses would have said. *Domingues v. State*, 277 Ga. 373, 589 S.E.2d 102 (2003).

Defendant's claim that counsel was ineffective for advising defendant not to testify on defendant's own behalf was without merit because defendant made this decision on defendant's own after being advised by counsel. *Simpson v. State*, 277 Ga. 356, 589 S.E.2d 90 (2003).

Defendant's trial counsel was not ineffective in the criminal trial in refusing to allow defendant to testify, as counsel ultimately left the decision to defendant and defendant decided against testifying, and it was not in defendant's best interest to testify because the defendant's version of events would have put the defendant in the vicinity of the crime; defendant failed to establish that the counsel prevented the defendant from testifying, and the defendant could not complain of the election to follow the reasonable

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tactical advice of the lawyer. *Todd v. State*, 275 Ga. App. 459, 620 S.E.2d 666 (2005).

Failure to call accused's relative as witness.

— Trial counsel was not ineffective in failing to call any witnesses in defendant's defense, especially because counsel believed those potential witnesses would not have helped the defense, counsel wished to preserve the right to opening and closing argument, and the witness's testimony could be suspect due to their relationship to defendant. *Sims v. State*, 278 Ga. 587, 604 S.E.2d 799 (2004).

Failure to interview or otherwise obtain information from any of the state's witnesses listed on the indictment falls below the standard required of reasonably effective counsel. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Calling of character witnesses. — Defense counsel's decision during the sentencing phase to present some character witnesses and to exclude others notwithstanding their willingness to testify was a tactical decision, reasonable under the circumstances. *Solomon v. Kemp*, 735 F.2d 395 (11th Cir. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 940, 83 L. Ed. 2d 952 (1985).

Failure to call character witness. — Failure to call character witness was a legitimate trial tactic designed to rely upon defendant's own testimony to raise the good character defense and did not result in ineffective assistance. *Avans v. State*, 207 Ga. App. 329, 427 S.E.2d 826 (1993).

Defendant did not receive ineffective assistance of counsel by defendant's attorney's failure to call witnesses to testify to the nature of defendant's acquaintance with the victim and to impeach the victim's testimony that the victim had never "partied" or smoked marijuana with defendant as: (1) the proffered testimony went merely to the details of the admitted acquaintance between defendant and the victim before the incident, not to the facts surrounding the incident itself or the charges against defendant; (2) the only purpose of the evidence was to impeach the victim's testimony re-

garding how well the victim knew defendant, an issue on which trial counsel cross-examined the victim; and (3) defendant was not prejudiced by the absence of the evidence. *Joyner v. State*, 267 Ga. App. 309, 599 S.E.2d 286 (2004).

Failure to present self-serving testimony of client. — Failure to present self-serving testimony of the defendant, a grandparent, and a neighbor did not constitute ineffective assistance of counsel at the defendant's trial for child molestation, because graphic testimony of the young victims and the strongly corroborative testimony of the parent of one of them made it unlikely that the outcome of the trial would have been affected. *Ray v. State*, 183 Ga. App. 57, 357 S.E.2d 877 (1987).

Failure to present character evidence. — Counsel's failure to present character evidence at the mitigation phase of a capital case did not deprive the defendant of the defendant's right to reasonable representation. *Stanley v. Zant*, 697 F.2d 955 (11th Cir. 1983), cert. denied, 467 U.S. 1219, 104 S. Ct. 2667, 81 L. Ed. 2d 372 (1984).

It was reasonable for the attorney of a defendant convicted of murder to assume that the presentation of any character evidence at the sentencing hearing might motivate the state to introduce the defendant's prior conviction when it might not introduce it otherwise, even though it had the right to present the conviction in the absence of mitigating character witnesses, and to assume that the conviction would substantially outweigh any testimony as to good character. *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985), cert. denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987).

Counsel's decision not to place defendant's character in issue was a matter of trial tactics. *Owens v. State*, 207 Ga. App. 153, 427 S.E.2d 529 (1993).

Presentment of character evidence. — Trial counsel was not ineffective in offering evidence of good character, considering the overwhelming evidence of defendant's guilt. *Hayes v. State*, 263 Ga. 15, 426 S.E.2d 557 (1993).

Failure to counter witness' testimony. — Defendant demonstrated no deficiency in counsel's representation for failure to counter minister's testimony regarding defendant's church attendance. *Etheridge v.*

State, 210 Ga. App. 96, 435 S.E.2d 292 (1993).

Failure to meet notice requirements for admission of acts of violence by victim. — In a prosecution for malice murder, failure of defendant's counsel to meet the notice requirements for the admission of specific acts of violence by the victim was sufficient to support defendant's motion for a new trial on the basis of ineffective assistance of counsel. *Johnson v. State*, 266 Ga. 380, 467 S.E.2d 542 (1996).

Failure of counsel to file timely or sufficient notice of specific acts of violence by the victim did not fall below an objective standard of reasonableness where neither defendant nor an investigator were able to produce viable evidence. *Ball v. State*, 232 Ga. App. 107, 501 S.E.2d 281 (1998).

Decision of defense counsel not to seek an autopsy of the murder victim to identify the murder weapon was a reasonable, tactical one. *Willis v. Newsome*, 771 F.2d 1445 (11th Cir. 1985), cert. denied, 475 U.S. 1050, 106 S. Ct. 1273, 89 L. Ed. 2d 581 (1986).

Failure to make motion for directed verdict of acquittal not ineffective. — Defendant's contention that the defendant did not receive effective assistance of counsel because counsel made no motion for a directed verdict of acquittal based on insufficiency of the evidence was without merit. *Galloway v. State*, 165 Ga. App. 536, 301 S.E.2d 894 (1983).

Failure to except to jury charges. — No ineffective assistance of counsel where defendant failed to establish with reasonable probability that allegedly erroneous jury instructions would have affected the result of the trial. *Peavy v. State*, 262 Ga. 782, 425 S.E.2d 654 (1993); *Davis v. State*, 209 Ga. App. 187, 433 S.E.2d 366 (1993).

The defendant was not entitled to the reversal of the defendant's conviction based on the defendant's trial counsel's failure to submit jury charges regarding the limited scope of admission of similar transactions because the court covered the issue in its charge and the defendant failed to show prejudice. *McClarity v. State*, 234 Ga. 348, 506 S.E.2d 392 (1998).

Defense counsel's failure to object to instructions on kidnapping with bodily injury and unanimity did not deprive defendant of a fair sentencing hearing nor did the instruc-

tion jeopardize the reliability of the sentencing recommendation. *Parker v. Turpin*, 60 F. Supp. 2d 1332 (N.D. Ga. 1999), aff'd sub nom. *Parker v. Head*, 244 F.3d 831 (11th Cir. 2001).

Defendant did not show defendant was deprived of the effective assistance of counsel because defense counsel did not make certain objections or request certain jury charges, as defendant did not show that this prejudiced defendant's defense, and counsel's decisions in this area were a matter of trial strategy. *Martin v. State*, 266 Ga. App. 392, 597 S.E.2d 445 (2004).

Defendant failed to meet the burden to show that the counsel rendered ineffective assistance at trial, pursuant to the Strickland standard under U.S. Const., amend. 6, as the failure to request instructions was shown to be a trial strategy, for which no prejudice was shown, and there was no need to object to an instruction which was a correct statement of the law and was supported by the evidence; further, appellate counsel was not shown to be ineffective because no prejudice was shown and because certain issues which were not raised in defendant's new trial motion, pursuant to O.C.G.A. § 5-5-23, were procedurally barred from review on appeal. *Godfrey v. State*, 274 Ga. App. 237, 617 S.E.2d 213 (2005).

Failure to object to jury charge. — Trial counsel was not ineffective for failing to object to the trial court's inclusion of a simple assault charge after the charge conference at which the trial court stated that the charge would not be given, in violation of O.C.G.A. § 5-5-24(b), as the jury found defendant guilty of simple assault on one of the aggravated assault charges, so defendant failed to show how the failure to object prejudiced defendant's defense. *Osterhout v. State*, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

Defense counsel's decision not to object to testimony about defendant's failure to tell a police officer that defendant was on the scene to pick up defendant's friends, including both what defendant said and what defendant did not say, was a matter of trial strategy and was not ineffective assistance of counsel; defense counsel thought that the testimony was helpful to defendant because it tended to show defendant's ignorance of the co-defendants' intent to commit a crime.

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Botelho v. State, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

Failure of defense counsel to object to unconstitutional burden-shifting jury charge on intent, standing alone, did not constitute error so serious that counsel was not functioning as the “counsel” guaranteed by U.S. Const., amend. 6. *Carter v. Montgomery*, 769 F.2d 1537 (11th Cir. 1985).

Failure to request limiting instruction. — Trial counsel’s action in failing to request limiting instructions as to “bad character” evidence could have been strategic, so as not to highlight the evidence, and was thus presumed strategic, rather than deficient, in the absence of testimony to the contrary; since defense counsel did not testify at the motion for new trial, the defendant failed to show that any purported deficiencies in the defendant’s representation amounted to ineffective assistance. *Tarver v. State*, 280 Ga. App. 89, 633 S.E.2d 415 (2006).

Trial counsel did not provide ineffective assistance of counsel in failing to request a jury instruction on specific forcible felonies since even assuming that trial counsel was deficient, the defendant could not show prejudice as the trial court charged the jury on the presumption of innocence, reasonable doubt, the burden of proof, and the defense of justification, including the definition of a forcible felony; the jury was fairly informed as to when a homicide was justified and there was not a reasonable probability that the jury would have reached a different result if an instruction on specific forcible felonies had also been given. *Lott v. State*, 281 Ga. App. 373, 636 S.E.2d 102 (2006).

Failure to request charge on lesser-included offense. — Since no instruction on lesser included offenses was required, trial counsel was not ineffective for failing to request such an instruction; also, in light of the attack on a detective’s techniques in interviewing an alleged child victim of molestation made by trial counsel in cross-examination and closing argument, the defendant failed to show that there would have been a different outcome had counsel requested funds and called an expert witness similarly to attack those tech-

niques, and failed to establish a claim of ineffective assistance in this regard; finally, trial counsel’s decision to not call two witnesses was based on sound strategy and the defendant failed to show prejudice from the failure. *Tyler v. State*, 279 Ga. App. 809, 632 S.E.2d 716 (2006), cert. denied, 2006 Ga. LEXIS 810 (Ga. 2006); overruled on other grounds, *Schofield v. Holsey*, 2007 Ga. LEXIS 182 (Ga. 2007).

Failure to file motion to suppress evidence. — The mere failure to file a motion to suppress evidence does not constitute per se ineffective assistance of counsel. *Ponder v. State*, 201 Ga. App. 388, 411 S.E.2d 119 (1991).

Failure to pursue lesser-included offense. — Trial counsel’s failure to request a charge on lesser-included offenses could be considered as a trial tactic legitimately providing effective assistance of counsel. *Sydenstricker v. State*, 209 Ga. App. 418, 433 S.E.2d 644 (1993).

Counsel’s failure to request charge of mistake of fact. — Defense counsel did not provide ineffective assistance of counsel by failing to request a charge of mistake of fact under O.C.G.A. § 16-3-5 since the charge was not supported by the evidence as defendant testified that defendant was totally unaware of any of the co-defendants’ plans for breaking or entering the house; thus, the defense was a lack of knowledge of the crime, not that the defendant knew they had broken into the victim’s house, but believed that they were authorized to do so, and the trial court charged the jury on mere presence, mere association, and the requirement that the state prove beyond a reasonable doubt that defendant knew that a crime was being committed. *Botelho v. State*, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

Failure to question jurors deliberating too soon. — Where, during a recess at the guilt phase of the trial, the court received a note from one of the jurors that some deliberation had begun and the court instructed the jury not to begin its deliberations until it had heard all of the evidence and had been instructed by the court on the law, but defense counsel did not ask the court to question the jurors to determine if any of them had formed fixed and unyielding opinions at this point, counsel’s inaction here simply did not fall outside the wide range of

reasonable professional assistance. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Failure of counsel to poll the jury did not constitute ineffective assistance where there was nothing in the record to indicate that any juror was uncertain of the verdict. *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982).

Adequate response to polling of jury. — Trial court did not err in ruling that defendant's trial counsel did not provide ineffective assistance of counsel when the juror indicated during the polling of the jury that the verdict had not been that juror's verdict, as the juror indicated in response to the next question that the verdict against defendant on multiple child molestation charges was the juror's verdict now. The juror's response, as the last juror to respond, showed that the verdict was unanimous and, thus, defense counsel's objection to the verdict would have been fruitless. *Benefield v. State*, 264 Ga. App. 511, 591 S.E.2d 404 (2003).

Failure to request mistrial not ineffective assistance. — Where the prosecutor asked an isolated, prejudicial question expressing an opinion as to a witness' credibility, a prompt and properly worded instruction by the judge to the jury cured and rendered harmless any prejudice arising from the question. Therefore, defense counsel's informed decision to forego requesting a mistrial fell within the wide range of reasonable professional assistance defense attorneys are supposed to provide. *Truitt v. Jones*, 614 F. Supp. 1342 (S.D. Ga. 1985), aff'd, 791 F.2d 940 (11th Cir. 1986).

Where the defendant's counsel objected to an improper argument by the prosecutor based on O.C.G.A. § 17-8-76 and the trial court sustained the objection and instructed the jury accordingly, counsel's failure to move for a mistrial did not constitute ineffective assistance since the defendant was not deprived of a fair sentencing trial. *Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745 (1995), cert. denied, 516 U.S. 829, 116 S. Ct. 100, 133 L. Ed. 2d 54 (1995).

Trial counsel was not ineffective in failing to object or move for a mistrial with respect to the trial court's direction that a witness be allowed to finish the witness's answer as any objection or motion for mistrial would have

been without merit; the failure to raise a meritless objection cannot constitute ineffective assistance of counsel. *Patterson v. State*, 259 Ga. App. 630, 577 S.E.2d 850 (2003).

Objecting to a mistrial. — No ineffective assistance proven by defense counsel's objection to a mistrial where counsel explained that counsel thought the detective's inconsistency, exposed upon cross-examination, could be helpful in establishing reasonable doubt as to the defendant's guilt. *Coney v. State*, 209 Ga. App. 9, 432 S.E.2d 812 (1993).

No prejudice from error on limits for closing argument. — While the defendant met the burden of showing trial counsel's deficient performance based on a misimpression that counsel was entitled to only one hour to make a closing argument, instead of two as permitted by O.C.G.A. § 17-8-73, the defendant failed to show that but for said error, trial counsel could have convinced the jury that defendant was innocent of the crimes charged. *Hardeman v. State*, 281 Ga. 220, 635 S.E.2d 698 (2006).

Failure to pursue appeal. — Habeas court's order denying an inmate's verified petition, which asserted that trial counsel rendered ineffective assistance, was reversed, as the allegations contained in said petition served as sufficient evidence to support the inmate's claim that counsel failed to file a notice of appeal after being instructed by the inmate to do so. *Rolland v. Martin*, 281 Ga. 190, 637 S.E.2d 23 (2006).

Failure to produce independent medical testimony. — The mere possibility that another medical expert might draw conclusions different from those drawn by the State's witnesses did not sufficiently support the suggestion that defense counsel was ineffective in failing to produce independent medical testimony. *Pugh v. State*, 250 Ga. 668, 300 S.E.2d 504 (1983).

Failure to advise regarding nature of rights waived. — Where the record does not affirmatively reflect that the defendant's counsel adequately advised the defendant concerning the nature of the rights the defendant waived and the effect thereof, and since the record is silent on this matter and the defendant has challenged the effectiveness of counsel, the court could not presume, that the defendant received adequate advice and counsel from the defendant's

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attorney. *Watt v. State*, 204 Ga. App. 839, 420 S.E.2d 769, cert. denied, 204 Ga. App. 922, 420 S.E.2d 769 (1992).

Raising issue of parole. — Counsel was not ineffective by raising the issue of defendant's possible eligibility for parole if given a life sentence rather than the death penalty because, by addressing the issue directly, counsel was able to answer questions which, in all probability, inevitably arise during the jury's deliberations of a death case. *Parker v. Turpin*, 60 F. Supp. 2d 1332 (N.D. Ga. 1999), aff'd sub nom. *Parker v. Head*, 244 F.3d 831 (11th Cir. 2001).

Failure to advise defendant regarding ineligibility for parole. — The failure of trial counsel to advise the defendant that no portion of the defendant's 15-year sentence could be served on parole did not constitute ineffective assistance of counsel. *Williams v. Duffy*, 270 Ga. 580, 513 S.E.2d 212 (1999).

Incorrect advice regarding eligibility for parole leading to guilty plea. — Defense counsel was ineffective since counsel incorrectly advised the defendant that eligibility for parole would be after serving ten years in prison. Defendant would not have accepted a negotiated plea if counsel had correctly advised defendant of the requirement to serve the entire 20 years in prison on a kidnapping charge. *Crabbe v. State*, 248 Ga. App. 314, 546 S.E.2d 65 (2001).

Failure to provide service within expected range of competency. — If defense counsel is so ill-prepared that counsel fails to understand the client's factual claims or the legal significance of those claims or that counsel fails to understand the basic procedural requirements applicable in court, the Court of Appeals has held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar. *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

Public defender assisting. — Defendant was not denied effective assistance of counsel based on fact that public defender was appointed for arraignment only and thereafter when defendant had failed to employ his own counsel he was instructed to repre-

sent himself with assistance of public defender. *Durden v. State*, 165 Ga. App. 48, 299 S.E.2d 107 (1983).

If defense counsel does not adequately investigate the matter of an insanity defense, does not adequately inform and advise the client as to the advisability of utilizing such a defense, and did not raise and press the issue of disqualification of the judge, due process and adequate representation by counsel are lacking. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Defendant unrepresented until 15 minutes before trial. — Indigent defendant, who was charged with misdemeanor theft by receiving, was denied effective assistance of counsel, because the defendant was only able to retain an attorney 15 or 20 minutes before trial, after the defendant's parent agreed to "come up" with the money for the attorney's fee. *Lowrance v. State*, 183 Ga. App. 421, 359 S.E.2d 196 (1987).

Counsel appointed seven days before trial. — Where counsel, appointed seven days before trial, moved unsuccessfully for a continuance, interviewed the defendant, examined the scene of the crime, contacted witnesses and observed the trial of the co-defendant, and to some extent chose to forego filing certain motions and pursuing certain areas of inquiry, but these choices were reasonable strategic decisions given the time constraints of the situation, counsel's assistance in this area was effective. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

Time allowed for preparation. — When counsel was appointed to represent a defendant charged with rape, assault, possession of a knife during the commission of a crime, and cruelty to children on the Friday before the week trial was scheduled to begin, and was given a one-week continuance, counsel should have had more time to prepare, given the gravity of the charges, but defendant showed no prejudice from counsel's short preparation time, as it was not shown that any of the things counsel would have done, given more time, would have resulted in evidence favorable to defendant or a different result of the trial in which he was found guilty. *Johnson v. State*, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Representation at different stages by counsel from same public defender's office.

— Even though the defendant was represented by counsel employed by the same public defender's office, both when the defendant negotiated a guilty plea and at the hearing on the defendant's motion to withdraw the plea, there was no conflict of interest requiring appointment of a private attorney to assert a claim of ineffective assistance of counsel as the basis for withdrawal of the plea. *Boyette v. State*, 217 Ga. App. 593, 458 S.E.2d 397 (1995).

Determination of whether the assistance rendered by counsel is reasonably effective is not to be based solely upon counsel's performance at trial; there must be consideration of the "totality of circumstances," which encompasses the quality of counsel's assistance from time of appointment or retention through appeal. *Fleming v. Zant*, 560 F. Supp. 525 (M.D. Ga. 1983), *aff'd*, 748 F.2d 1435 (11th Cir. 1984), *cert. denied*, 475 U.S. 1058, 106 S. Ct. 1286, 89 L. Ed. 2d 593 (1986).

Absence of counsel during state's argument. — Under no theory can it be maintained that it is error to permit appointed counsel to leave the courtroom during the state's argument and thereby depriving the defendant of the right of counsel under U.S. Const., amend. 6 and U.S. Const., amend. 14. *Bryant v. State*, 229 Ga. 60, 189 S.E.2d 435 (1972).

Counsel has broad discretion in conduct of trial. — In the conduct of a trial, broad latitude of advice, direction, and policy in the interest of the client is essentially vested in counsel. Counsel often waive apparently important points in the bona fide belief that, on the whole, greater advantage will be gained indirectly than might have been gained directly by insisting on them, and such a waiver either express or implied would ordinarily not tend to show incompetency. No lawyer is infallible, and the constitutional guarantees of the benefit of counsel, and of due process, do not contemplate such infallibility. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, *cert. denied*, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Counsel's handling of case in retrospect. — While other lawyers, had they represented the defendant, might have conducted the defense in a different manner, and might

have exercised different judgments, the fact that the attorney chose to try the defendant's case in the manner in which it was tried and made certain decisions as to the conduct of the defense with which the defendant and the defendant's presently employed attorneys now disagree, does not require a finding that counsel's representation of the defendant was so inadequate as to amount to a denial to the defendant of the effective assistance of counsel. *Johnson v. Caldwell*, 228 Ga. 776, 187 S.E.2d 844 (1972); *Chapman v. State*, 154 Ga. App. 532, 268 S.E.2d 797 (1980); *Lewis v. State*, 246 Ga. 101, 268 S.E.2d 915 (1980).

That the case could have been tried differently on behalf of the defendant does not mean that the defendant failed to receive a vigorous and competent defense. *Fegan v. State*, 154 Ga. App. 791, 270 S.E.2d 211 (1980); *Jordan v. State*, 177 Ga. App. 637, 340 S.E.2d 269 (1986).

The fact that another attorney may have handled defendant's defense differently is not indicative of trial counsel's ineffective assistance. *Hammond v. State*, 157 Ga. App. 647, 278 S.E.2d 188 (1981).

Although another lawyer may have conducted the defense in a different way, asked different questions, and made different objections, etc., the fact that the defendant's counsel made decisions during the trial with which the defendant and the defendant's current counsel now disagree does not require a finding that the original representation of the defendant was so inadequate as to amount to a denial of effective assistance of counsel. *Cherry v. State*, 178 Ga. App. 483, 343 S.E.2d 510 (1986).

The fact that the case could have been tried differently on behalf of the defendant does not mean that the defendant failed to receive a vigorous and competent defense. *Sleeth v. State*, 201 Ga. App. 324, 411 S.E.2d 79 (1991).

Attorney's "silent trial" tactic in representing a defendant was not so defective as to entitle the defendant to constitutional relief without a showing that the attorney's conduct prejudiced the defendant. *Warner v. Ford*, 752 F.2d 622 (11th Cir. 1985).

Communication with client as to plea options. — Objective professional standards dictated that the defendant's counsel, under the circumstances, should have communi-

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cated the opportunity to plead guilty to voluntary manslaughter for a long-term sentence rather than go to trial on a murder indictment and risk a life sentence. However, because there was no inference from the evidence that the defendant would have accepted the offer as made or something similar, (the unmistakable conclusion was that she would not have accepted or even considered the offer to plead guilty to voluntary manslaughter), the evidence supported a finding that counsel was reasonably effective. *Lloyd v. State*, 258 Ga. 645, 373 S.E.2d 1 (1988).

Defendant would be entitled to relief for ineffective assistance of counsel if the defendant demonstrated that the defendant would have accepted a plea bargain absent counsel's errors. *Muff v. State*, 210 Ga. App. 309, 436 S.E.2d 47 (1993).

Ineffective assistance was not shown by failure of counsel to properly inform the defendant of the statutory ramifications of a guilty plea because there was evidence that, before the defendant entered a guilty plea, the defendant was informed of the specific consequences by the defendant's parole officer and repetition of that information by counsel would not have altered the defendant's decision to enter the plea of guilty. *Pendley v. State*, 217 Ga. App. 394, 457 S.E.2d 681 (1995).

Counsel not ineffective if actions come within ambit of trial tactics and strategy. — Counsel's decision to have the defendant display the defendant's teeth to the jury and then agreeing to the state's cross-examination of the defendant on the issue of the defendant's teeth; counsel's handling of a motion to suppress identification testimony; and counsel's failure to object to certain hearsay testimony came within the ambit of trial tactics and strategy and fell within the range of reasonably effective assistance. *Heard v. State*, 177 Ga. App. 802, 341 S.E.2d 459 (1986).

Counsel's stipulation of nonuse of a tape recording obtained in a surveillance was not constitutionally infirm assistance of counsel, where there was no showing that the tape was relevant to the determination of guilt or

innocence, much less that it was favorable to defendant. *McCarthy v. State*, 196 Ga. App. 839, 397 S.E.2d 178 (1990).

When defendant's counsel did not object to an officer's testimony which bolstered the victim, this was not ineffective assistance of counsel because the officer's statements were elicited by counsel's line of questioning, which was not an unreasonable trial strategy, because it was consistent with counsel's announced trial strategy of trying to brand the victim as a liar. *Johnson v. State*, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Because defendant's claim that statements were made in the hope of receiving benefits was found to lack merit, based on the defendant's contradictory testimony by the lead counsel's regarding a plea agreement, there was no showing that the counsel was ineffective in allowing those statements to have been admitted in defendant's criminal trial; further, allowing the statements was a reasonable strategic decision after a plea agreement requiring defendant to testify truthfully had been previously made. *Redwine v. State*, 280 Ga. 58, 623 S.E.2d 485 (2005).

Allegation that counsel was ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object on sixth amendment confrontation grounds to the admission of the codefendant's statement to police implicating defendant in a burglary failed; defense counsel's failure to raise the sixth amendment issue was a strategic decision, based on defendant's desire to be tried with the codefendants and to present a unified front. *Vincent v. State*, 276 Ga. App. 415, 623 S.E.2d 255 (2005).

Failure to use battered woman syndrome defense. — Counsel's decision not to pursue a defense based on the battered woman syndrome was a reasonable choice of trial strategy. *Lewis v. State*, 265 Ga. 451, 457 S.E.2d 173 (1995).

Where trial counsel investigated battered woman syndrome and determined that assertion of the syndrome defense was unrealistic, such decision did not equate to ineffective assistance of counsel. *Smith v. State*, 231 Ga. App. 677, 499 S.E.2d 663 (1998).

Failure to research mitigating evidence constitutes ineffective assistance. — Defense counsel's performance during the sentencing phase of the defendant's capital trial, by failing to conduct a reasonable search for

mitigation evidence, which would have uncovered numerous mitigation witnesses, and by failing to offer the client's clean criminal record, resulted in no evidence being offered and amounted to ineffective assistance of counsel. *Johnson v. Kemp*, 615 F. Supp. 355 (S.D. Ga. 1985), *aff'd*, 781 F.2d 1482 (11th Cir. 1986).

Counsel's failure to investigate and present mitigating evidence fell below an objective standard of reasonableness under prevailing professional norms. *Thomas v. Kemp*, 796 F.2d 1322 (11th Cir.), *cert. denied*, 479 U.S. 996, 107 S. Ct. 602, 93 L. Ed. 2d 601 (1986).

Trial attorneys' performance during the sentencing phase of the defendant's murder trial was unreasonable in light of prevailing professional norms, because they failed to investigate and present mitigating evidence, and one of the attorneys attacked the client's character and separated said attorney from the client. *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), *cert. denied*, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992).

Failure to search for mitigating circumstances in client's background. — Counsel's decision not to mount an all-out investigation into a murder defendant's background in search of mitigating circumstances was supported by reasonable professional judgment, because there was a reasonable basis for counsel's strategic decision that an explanation of defendant's history would not have minimized the risk of the death penalty. *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987).

Because defendant's trial and appellate counsel did not investigate after being notified of defendant's history of mental problems, the habeas court properly concluded that they were ineffective and that defendant was prejudiced thereby. *Martin v. Barrett*, 279 Ga. 593, 619 S.E.2d 656 (2005).

Failure to put on mitigating evidence at a sentencing hearing is not per se ineffective. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), *cert. denied*, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

Failure to present character during sentencing phase. — In a prosecution for armed robbery and felony murder, defense counsels were ineffective in the sentencing phase of the trial where (1) despite their acknowledgment that the sentencing phase was the

most important part of the trial, defense counsels' examination of the witnesses was minimal and they sought to elicit very little relevant evidence about the defendant's character; (2) with respect to a number of witnesses, defense counsel sought only their opinion of the defendant's reputation for truth and veracity, which was a matter wholly irrelevant to the issue before the jury; and (3) even when defense counsel departed from the truth-and-veracity line of questioning, the testimony elicited was of a nature that could not reasonably have aided the jury in its sentence determination. *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999).

Failure to obtain psychiatric assistance. — Trial counsel was ineffective in counsel's failure to obtain an independent psychiatric or psychological examination of a murder defendant, where defendant's competence and sanity were not only significant factors at the trial, but the only issues. *Curry v. Zant*, 258 Ga. 527, 371 S.E.2d 647 (1988).

Where it is clear from the record already before the court that trial counsel's failure to seek additional psychiatric assistance or otherwise further investigate the petitioner's mental condition before trial for the purpose of presenting an insanity or other diminished responsibility defense at trial did not deny the petitioner the effective assistance of counsel in the guilt phase of the trial, evidence of the petitioner's reduced mental capacity could in no way effect the conclusion in this regard and was not entitled to an evidentiary hearing in the district court to support the defendant's claim of ineffective assistance of counsel in the guilt phase of the defendant's trial. *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), *cert. denied*, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

Defendant who was convicted of voluntary manslaughter did not show that defense counsel provided ineffective assistance because counsel did not challenge the judgment of medical personnel that the defendant was competent to stand trial. *Morton v. State*, 265 Ga. App. 421, 594 S.E.2d 664 (2004).

Failure to obtain mitigating testimony. — Because none of the prospective witnesses who the defendant claimed should have been called in mitigation testified at the hearing on the motion for new trial, and the

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record did not show what they might have testified, the defendant failed to show that their testimony probably would have resulted in a different verdict. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Defendant's claim that attorney inadequately investigated and presented mitigating evidence in sentencing hearing was rejected where, although defendant later produced nine affidavits of persons who stated that they would have gladly testified on defendant's behalf had they been asked, a review of the affidavits indicates that they contained statements by friends and relatives which were substantially similar to the evidence attorney presented at the hearing. Consequently, these affidavits alone were insufficient to rebut the strong presumption that attorney's conduct fell within the wide range of reasonable professional assistance. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931 (1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 108 L. Ed. 2d 965 (1990).

Timing of testimony. — Even if none of the medical experts giving testimony knew that the trial counsel intended that he or she testify as to mitigating circumstances during the guilt phase, and not the penalty phase of the trial, that fact would not constitute ineffective assistance of counsel. *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995).

Mere waiver of an opening statement can be characterized as a trial tactic which cannot be equated to the ineffective assistance of counsel. *Warner v. State*, 155 Ga. App. 495, 271 S.E.2d 636 (1980).

The failure of a defendant's counsel to make an opening statement did not constitute ineffective assistance of counsel. *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982).

Shortness of trial counsel's opening statement does not show ineffective assistance. *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Failure to object to order of arguments. — Since defendant did not have a "constitu-

tional privilege" to both present evidence in his defense and open and conclude the closing arguments of the guilt/innocence phase of trial, trial counsel was not ineffective for failing to object the order of closing arguments set forth in O.C.G.A. § 17-8-71. *Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745 (1995), cert. denied, 516 U.S. 829, 116 S. Ct. 100, 133 L. Ed. 2d 54 (1995).

Because the jury was informed of a stipulation and were read the contents of the victim's post-mortem toxicology reports, the trial court properly limited defense counsel's closing arguments; defense counsel was not ineffective for failing to ask that closing argument be reported or for failing to request a jury charge on manslaughter, since defendant claimed that the shooting was accidental. *Williams v. State*, 279 Ga. 600, 619 S.E.2d 649 (2005).

Duty of counsel where defendant indicates desire to plead guilty. — When a person indicates a desire to enter a guilty plea, the duty of counsel is limited to ascertaining whether the decision so to plead is voluntarily and knowingly made. *Brown v. Jernigan*, 622 F.2d 914 (5th Cir.), cert. denied, 449 U.S. 958, 101 S. Ct. 368, 66 L. Ed. 2d 224 (1980).

Same duty is not owed by appointed counsel to an accused who pleads guilty as to one who decides to go to trial. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

Advice regarding plea must be competent. — The advice of counsel to a defendant entering a guilty plea must be within the range of competence demanded of attorneys in criminal cases. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Reasonably effective assistance is an easier standard to meet in the context of a guilty plea than in a trial, but counsel still must render competent service. It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly. He must actually and substantially assist his client in deciding whether to plead guilty. It is his job to provide the accused an understanding of the law in relation to the facts. The advice he gives need not be perfect, but it must be reasonably competent. His advice should permit the accused to make an informed and conscious choice. In other words, if the quality of counsel's service falls below a

certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Defendant's due process rights were violated where throughout the state and federal habeas proceedings the defendant was induced to plead guilty by defendant's counsel's erroneous advice that the plea bargain would enable defendant to serve the federal and state sentences concurrently. Thus, the attorney provided ineffective assistance to defendant as the guilty plea was not knowing, intelligent and voluntary. *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995).

Advice to plead guilty. — Defendant's guilty plea was the result of ineffective assistance of counsel in that counsel's advice was based upon an incorrect understanding of the law, as the defendant could not have been convicted, as counsel alleged, of aggravated assault; further, the result of the defendant's guilty plea was that the defendant received a harsher sentence than the defendant would have been received had the defendant gone to trial and been convicted. *Petty v. Smith*, 279 Ga. 273, 612 S.E.2d 276 (2005).

Where counsel has induced defendant to plead guilty on patently erroneous advice, the defendant has been denied the effective assistance of counsel, as well as due process. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

After an inmate's counsel affirmatively misinformed the inmate that if the inmate entered a plea of guilty to a first offender offense of violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., that such would not impair the inmate's ability to become a lawyer, nor would it impact the inmate's immigration status, the trial court erred in denying the inmate's petition for a writ of habeas corpus pursuant to O.C.G.A. § 9-14-5 because under the Strickland analysis, the inmate's counsel was ineffective, as the inmate had graduated law school and passed the Bar, but the inmate's admission was held up due to the conviction, and deportation proceedings had been commenced against the inmate. Thus, since the inmate relied upon a lawyer's misinformation about collateral consequences stemming from a guilty plea, the inmate had

grounds to argue that counsel provided ineffective representation pursuant to U.S. Const., amend. 6, and such claims are to be analyzed under the two-part Strickland test. *Rollins v. State*, 277 Ga. 488, 591 S.E.2d 796 (2004).

Duty to determine voluntariness of guilty plea. — Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts, which is the function of the accused's appointed counsel. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. *Lambert v. United States*, 392 F. Supp. 113 (N.D. Ga. 1975).

It is the defendant's lawyer's duty to ascertain whether a plea of guilty is entered voluntarily and knowingly. *Carbo v. United States*, 581 F.2d 91 (5th Cir. 1978); *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Counsel must actually and substantially assist the defendant in deciding whether to plead guilty by providing an understanding of the law in relation to the facts. Counsel's advice need not be perfect but it must be reasonably competent so as to permit the accused to make an informed and conscious choice. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Because defendant was advised by the court and trial counsel of the rights and the consequences of pleading guilty, the plea proceedings complied with Ga. Unif. Super. Ct. R. 33 and established that the guilty plea was knowing and voluntary; because counsel's actions fell well within the wide range of reasonable professional conduct, the trial court properly denied defendant's motion to withdraw the guilty plea. *Jones v. State*, 268 Ga. App. 723, 603 S.E.2d 73 (2004).

Examination of plea where imprisonment or death at stake. — What is at stake for an accused facing death or imprisonment demands utmost solicitude of which courts are capable in canvassing the matter with the

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accused to make sure the accused has a full understanding of what the plea connotes and of its consequence, and forestalls the spin-off of collateral proceedings that seek to probe murky memories. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

Basis for attack on plea. — A defendant's plea of guilty, based on reasonably competent advice, is not open to attack on the ground that counsel may have misjudged the admissibility of a confession. In such a case, a defendant's only recourse is to attack the voluntary and intelligent character of the plea, which may in some instances include an attack on the competence of counsel. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979).

Dispute of attorney's authority to enter guilty plea must be timely. — It would be trifling with the trial court to allow the client, after keeping silent in the presence of the court while the attorney entered a plea of guilty in the client's behalf and the court acting thereon imposed the sentence, to deny thereafter the authority of the attorney to enter the plea or to deny approval of such action by attorney. Had the defendant had any objection, he should have made it known at the time and before the court acted thereon. *Cobb v. Dutton*, 222 Ga. 11, 148 S.E.2d 399 (1966).

Trial court did not abuse its discretion in denying defendant's motion to withdraw the plea, because defendant's appointed counsel had conducted a sufficient investigation of the case to determine that defendant had a viable defense and to advise defendant to adhere to the *nolo contendere* plea defendant had entered. *Hopkins v. State*, 274 Ga. App. 872, 619 S.E.2d 368 (2005).

Counsel's failure to acquaint themselves with Georgia's presentence hearing law falls below the standard required of reasonably effective counsel and requires that the death sentence be set aside. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), *rev'd* on other grounds, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Counsel's failure to research the clear statutory law regarding the admissibility of

prior convictions in capital sentencing trials in Georgia is not ineffective assistance where counsel's position is that since the state had not given counsel "proper" notice prior to trial of statutory aggravating circumstances, no evidence of such circumstances could be offered, and where any misconception that counsel had concerning the law on the admissibility of prior convictions did not affect the defendant's decision not to take the stand. *Mitchell v. Hopper*, 564 F. Supp. 780 (S.D. Ga. 1983), *aff'd*, 762 F.2d 886 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987).

Counsel's failure to research the clear statutory law regarding the requirement of actual — but not written — notice of aggravating circumstances, and his reliance on a strict construction of the statutory notice requirement, does not amount to ineffective assistance, where the law of Georgia was not clear on this point at the time of the trial. *Mitchell v. Hopper*, 564 F. Supp. 780 (S.D. Ga. 1983), *aff'd*, 762 F.2d 886 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987).

Presentation of evidence in capital murder sentencing hearing. — No lawyer can foretell what will or will not convince 12 jurors to have mercy and give a sentence of life instead of death in a murder case; all a constitutionally effective lawyer can be required or expected to do is to make the informed decision of what mitigating evidence, if any, should be presented and how or through what witnesses it can most effectively be presented. *Fleming v. Zant*, 560 F. Supp. 525 (M.D. Ga. 1983), *aff'd*, 748 F.2d 1435 (11th Cir. 1984), *cert. denied*, 475 U.S. 1058, 106 S. Ct. 1286, 89 L. Ed. 2d 593 (1986).

Failure to dispute the amount of restitution ordered as a condition of probation may have been an error, but that of itself would not constitute ineffective assistance. *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983).

Counsel were less than reasonably effective in failing to file a motion for a new trial based on newly discovered evidence that murder victim was seen alive after being seen in the defendant's vicinity. *House v. Balkcom*, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Improper conflict of interest not found.

— The fact that, more than three years before the defendant's trial, the defendant's attorney had represented a prosecution witness in an unrelated criminal matter did not create an improper conflict of interest. *Hill v. State*, 269 Ga. 23, 494 S.E.2d 661 (1998).

Preparation of defendant as a witness.

— Trial counsel was not ineffective in counsel's preparation of the defendant as a witness where trial counsel met with the defendant and discussed the questions counsel would ask the defendant in a general way, and the defendant did not show that but for counsel's failure to prepare the defendant there was a reasonable probability that the outcome of the trial would have been different. *Mallon v. State*, 266 Ga. App. 394, 597 S.E.2d 497 (2004).

Mental incompetency.

— Trial court erred by refusing to conduct a hearing or to rule on defendant's motion for a new trial based upon its finding that defendant was, at that time, mentally incompetent and unable to assist counsel in challenging the conviction, as defendant's current mental incompetence provided no logical basis to delay a post-conviction proceeding to address whether defendant was incompetent at trial, whether the trial court should have been on notice of defendant's incompetency and conducted a hearing during trial, or whether trial counsel was ineffective for failing to timely raise the competency issue. *Florescu v. State*, 276 Ga. App. 264, 623 S.E.2d 147 (2005).

Waiver of jury trial.

— Trial counsel was not ineffective in advising defendant to waive defendant's right to a jury trial based on the unpleasant photographs of the victim as defendant seemed to grasp the reason for the advice, which was also given in the presence of defendant's father, and was given both before and after defendant began treatment for defendant's bipolar disorder. *Mallon v. State*, 266 Ga. App. 394, 597 S.E.2d 497 (2004).

Failure to object to rulings belied by record.

— Defendant failed to prove ineffective assistance during a criminal trial, as a police officer's testimony that the defendant said that the defendant slept with the defendant's child was met with a vigorous defense, including a successful directed verdict motion on one count, by the defendant's trial

counsel; the defendant's claim that the trial counsel failed to object when the trial court ruled that the defendant's silence when asked whether the defendant slept in the same bed as the child, constituted an admission that was contradicted by the clear evidence of the trial proceedings contained in the record. *Allen v. State*, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

Counsel present at all critical stages.

— Defendant was not denied effective assistance of counsel where counsel was appointed approximately three months prior to trial and was present at all "critical stages" of the case. *Ramsey v. State*, 183 Ga. App. 48, 357 S.E.2d 869, cert. denied, 183 Ga. App. 906, 357 S.E.2d 869 (1987).

Futile objections not required.

— Defendant was not denied effective assistance of counsel at a trial for aggravated child molestation because it would have been futile to object to the 10-year old victim's videotaped statement, which was admissible under the exception in O.C.G.A. § 24-3-16 for a child's statement of sexual abuse, since there was sufficient indicia of reliability and the child was available to testify at trial. *Campos v. State*, 263 Ga. App. 119, 587 S.E.2d 264 (2003).

— Because variances in the pronunciation and spelling of proper names were immaterial, an objection based on such variances would have been futile and trial counsel was not ineffective for failing to object. *Walker v. State*, 280 Ga. App. 457, 634 S.E.2d 93 (2006).

Failure to object to aggravating evidence.

— Because, at the sentencing phase of the trial, the state offered in aggravation an indictment and the defendants' plea of guilty to the indictment, and the sentence imposed under the Georgia First Offender Act, O.C.G.A. § 42-8-60 et seq., for the offenses of entering an automobile and theft by taking, and the defendant's lawyer did not object to this evidence, since evidence in aggravation is not limited to convictions, and reliable information tending to show a defendant's general bad character is admissible in aggravation, failure to object was not ineffective assistance. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

— That defendant's lawyer objected to damaging testimony of state's witnesses was not

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deficient, even if the objections lacked merit. The defendant's case could not have been prejudiced by this attempt. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Failure to impeach witness. — Defendant failed to demonstrate a claim of ineffective assistance of counsel based on counsel's failure to impeach an eyewitness with prior inconsistent statements since counsel testified that the witness was very argumentative and that the counsel questioned the witness as well as possible, and since counsel did impeach the witness with the prior statement in several respects; that counsel may not have impeached the witness in every respect did not show that counsel's performance fell outside the broad range of reasonable professional conduct. In any event, the exploration of additional inconsistencies in the witness's testimony would not have changed the outcome of the trial. *Sims v. State*, 280 Ga. 606, 631 S.E.2d 656 (2006).

Closing argument implying, but not expressly conceding, guilt. — If guilt was to some degree implied in what defense counsel said in the closing argument, it was a weak implication at best, and arguably unavoidable in light of the overwhelming evidence. There was no express concession of guilt. Consequently, the defendant was unable to show that counsel's "errors" were so serious that the defendant was deprived of a fair trial. *Messer v. Kemp*, 760 F.2d 1080 (11th Cir. 1985), cert. denied, 474 U.S. 1088, 106 S. Ct. 864, 88 L. Ed. 2d 902 (1986).

Initial doubt cast on counsel's effectiveness. — Defendant's allegations that trial counsel did not interview the prosecution witnesses, call defense witnesses the defendant requested, conduct basic investigation, or make discovery demands; and that the defendant, not the defendant's counsel, subpoenaed the government witnesses' criminal records, were sufficient to cast initial doubt on the effectiveness of counsel, especially since the federal Court of Appeals had also noted that the defendant's trial counsel could have discovered that the co-defendant had made statements favorable to the defen-

dant's defense if it had conducted appropriate discovery. *United States v. Yizar*, 956 F.2d 230 (11th Cir. 1992).

Counsel ineffective in capital murder case, but no prejudice present. — Trial counsel, in a capital murder case, who did not file a notice of appeal, filed a brief only after the Georgia Supreme Court threatened to impose sanctions, which brief included only five pages of argument, failed to attend oral arguments, and failed to heed a court request that counsel file a supplemental brief was woefully inadequate and likely ineffective, but no prejudice accrued as the federal court later remedied the only constitutional deficiency of the trial. *Morgan v. Zant*, 743 F.2d 775 (11th Cir. 1984), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986), cert. denied, 486 U.S. 1009, 108 S. Ct. 1739, 100 L. Ed. 2d 202 (1988).

Failure to honor requests. — Where defendant had no right to have voir dire and closing arguments fully recorded, trial counsel's failure to request such did not result in ineffective assistance. *Anderson v. State*, 206 Ga. App. 354, 426 S.E.2d 6 (1992).

Failure to redact defendant's name from records of prior convictions used to impeach witnesses. — Because the defense counsel introduced certified copies of convictions of state's witnesses to impeach them, but failed to redact the portion that implicated defendant as a participant in those crimes, which were identical or incidental to the crimes for which defendant was on trial, counsel's performance was deficient; as the main evidence against defendant was the testimony from those witnesses and there was no physical evidence that linked defendant to the crimes, the fact that defendant was involved with those same defendants in prior similar crimes could have led the jury to conclude that the same pattern was being repeated, and there was a reasonable probability that, but for counsel's ineffective assistance, the outcome of the trial would have been different, and defendant was entitled to a new trial pursuant to O.C.G.A. § 5-5-25. *Whitaker v. State*, 276 Ga. App. 226, 622 S.E.2d 916 (2005).

Failure to request instructions on lesser offense. — Defendant was not denied ineffective assistance of counsel by counsel's failure in aggravated assault trial to request

jury instructions on the lesser offenses of pointing a pistol at another or reckless conduct. *Fambro v. State*, 164 Ga. App. 359, 297 S.E.2d 111 (1982).

Defendant's counsel was entitled to rely on defendant's claim that defendant was not present when a victim was killed, counsel acted reasonably when counsel decided to defend charges of malice murder and felony murder by attacking the credibility of defendant's co-conspirators and when counsel decided not to ask that the jury be instructed on voluntary manslaughter as a lesser included offense of murder; furthermore, the trial court did not err because it did not give the jury an instruction on voluntary manslaughter, *sua sponte*. *Sparks v. State*, 277 Ga. 72, 586 S.E.2d 645 (2003).

Court's failure to charge language of O.C.G.A. § 17-7-131(b)(3)(A) (proceedings upon plea of insanity), by failing to include the phrase "if ever" when explaining when a court is allowed to release a defendant from a mental health facility, was not reversible error, nor did it deprive the defendant of a fair trial or effective assistance of counsel. The charge given specified that the court would retain control over the defendant's release and did not imply that the court would be required at some point to order his release. *Levin v. State*, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

Dispensing with lesser-included offense charge. — A defendant was not denied the effective assistance of counsel where the defendant's attorney made a reasonable tactical decision to dispense with a lesser-included offense charge and there was no evidence that a lack of consultation with the defendant, if any, either reflected a lack of investigation or caused an unknowing waiver of a constitutional right by the defendant. *Maynor v. Green*, 547 F. Supp. 264 (S.D. Ga. 1982).

Erroneous sentence estimate by defense counsel. — The United States Constitution does not guarantee every criminal defendant the assistance of perfect, errorless counsel, or counsel judged by hindsight, nor will the court grant habeas relief upon a mere showing that the defense counsel's strategy foundered. Even an erroneous sentence estimate by defense counsel does not vitiate the voluntariness of the defendant's plea. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Defendant must live with a plea if advised by competent counsel. — When the system of competent counsel advising a defendant about a plea of guilty functions satisfactorily, it is both fair and reasonable to expect that defendant who has made the choice and received whatever benefits flow therefrom be required to live by that choice. In any particular case in which the system fails, however, it is the court's duty to supply relief. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Plea based on ineffective assistance. — Where petitioner does not receive the effective assistance of counsel the plea of guilty is consequently not intelligent and voluntary. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Habeas court was clearly erroneous in denying defendant's petition for a writ of habeas corpus and in finding that defendant received effective assistance of counsel where: (1) trial counsel testified that counsel did not know of a potentially exculpatory witness disclosed by the state at the plea hearing; (2) as counsel was not aware of the witness, counsel's failure to explore the possible defense could not have been a matter of trial strategy; (3) the plea transcript showed counsel's apparent anger at defendant for initially denying defendant's guilt and thwarting the plea proceedings, which raised questions about the voluntariness of the pleas; and (4) there was a reasonable probability that, had defendant been advised of the serious problems with the state's case against defendant, including the existence of the potentially exculpatory witness, defendant would have insisted on going to trial. *Heyward v. Humphrey*, 277 Ga. 565, 592 S.E.2d 660 (2004).

Because defense counsel went over the voluntary manslaughter statute with defendant and explained intent to defendant, defendant failed to show that counsel was ineffective; because defendant's plea was freely and voluntarily made, the trial court did not err in denying defendant's motion for new trial. *Howard v. State*, 274 Ga. App. 861, 619 S.E.2d 363 (2005).

Failure to pursue appeal constitutes ineffective assistance. — Defendant was denied effective assistance of counsel where trial counsel wrote the defendant that counsel would "prepare a brief and submit it to the

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Court of Appeals" if new trial was not granted but failed to pursue the appeal and failed to inform the defendant of status of appeal despite the defendant's repeated written inquiries. *Webb v. State*, 254 Ga. 130, 327 S.E.2d 224 (1985), *aff'd*, 178 Ga. App. 725, 344 S.E.2d 660 (1986).

Because the defendant did not consent to foregoing an appeal of defendant's conviction, the failure of counsel to protect the defendant's right to appeal by filing a timely notice of appeal or by obtaining an extension of time constituted ineffectiveness. *Glass v. State*, 248 Ga. App. 91, 545 S.E.2d 360 (2001).

Ineffective assistance will justify reversing judgment only if deficiencies were reasonably likely to have altered the verdict. *Uren v. State*, 174 Ga. App. 804, 331 S.E.2d 642 (1985).

Drug use by counsel. — Defendant failed to show that the defendant's attorney's representation fell below an objective standard of reasonableness, where there was no specific evidence that the attorney's drug use or dependency impaired the attorney's actual conduct at trial. *Kelly v. United States*, 820 F.2d 1173 (11th Cir.), *cert. denied*, 484 U.S. 966, 108 S. Ct. 458, 98 L. Ed. 2d 398 (1987).

Tiredness of counsel. — Continuing court until 11:00 p.m. on one day of trial did not sufficiently fatigue defendant's trial counsels to result in the provision of ineffective assistance. *Hill v. State*, 263 Ga. 37, 427 S.E.2d 770, *reh'g denied*, 510 U.S. 1066, 114 S. Ct. 745, 126 L. Ed. 2d 708 (1994); *habeas corpus proceeding, remanded*, *Turpin v. Hill*, 269 Ga. 302, 498 S.E.2d 52 (1998), *cert. denied*, 510 U.S. 950, 114 S. Ct. 396, 126 L. Ed. 2d 344 (1993).

Community pressure claim invalid. — Petitioner's claim asserting that trial counsel's representation was "chilled" by community pressure and news coverage, did not state a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Givens v. Green*, 12 F.3d 1041 (11th Cir. 1994).

Conflict of interest. — Even though circumstances surrounding defense attorney's

representation of defendant in the pre-trial stage were sufficient to create a substantial risk of a conflict of interest because the attorney's professional colleagues in the public defender's office were representing defendant's co-defendants, and those co-defendants were the persons whom defendant blamed for the crime, defendant failed to show that the attorney performed in a manner that in any way reflected the divided loyalties of the defense attorney's office. *Reynolds v. Chapman*, 253 F.3d 1337 (11th Cir. 2001).

Defendant was entitled to habeas relief on the basis that defendant's attorney labored under a conflict of interest in the immediate post-trial stage of defendant's case because the attorney represented defendant and the co-defendant, both of whom had spent the entire trial attempting to foist blame on the other, and the conflict had an effect upon the representation that defendant received. *Reynolds v. Chapman*, 253 F.3d 1337 (11th Cir. 2001).

Violation of attorney-client privilege not found. — Defendant was not entitled to relief because trial counsel allegedly violated the attorney-client privilege by giving the state a copy of a list of witnesses and a summary of their testimony that defendant had prepared; counsel provided the list as part of the reciprocal discovery process, and defendant failed to show how the outcome of this case would have been different if defense counsel had not provided this list. *Weathersby v. State*, 263 Ga. App. 341, 587 S.E.2d 836 (2003).

Failure to strike jurors allegedly related to victim. — Petitioner was entitled to an evidentiary hearing on the petitioner's claim that counsel's failure to strike jurors allegedly related to the victim constituted ineffective assistance of counsel. Assuming that counsel knew or had reason to know that the jury was composed in part of persons disqualifiable under Georgia law, and had no reasonable basis for failing to strike these jurors, counsel's performance at the voir dire would fall outside the range of professionally competent assistance. *Smith v. Gearing*, 888 F.2d 1334 (11th Cir. 1989).

Ineffectiveness in voir dire not shown. — Defendant contended that counsel improperly failed to require voir dire to be recorded; however, no prejudice to defendant

was shown from the alleged ineffective assistance of counsel since defendant did not assert that anything harmful or prejudicial transpired during voir dire. *Domingues v. State*, 277 Ga. 373, 589 S.E.2d 102 (2003).

Effectiveness of pretrial investigation. — Although counsel has the duty to conduct pre-trial investigation, the standard for evaluating the effectiveness of counsel's pretrial investigation is reasonableness under the circumstances. *Greene v. United States*, 880 F.2d 1299 (11th Cir. 1989), cert. denied, 494 U.S. 1018, 110 S. Ct. 1322, 108 L. Ed. 2d 498 (1990).

Death sentence vitiated by counsel's failure to present mitigating evidence. — Petitioner's death sentence could not stand, in view of trial counsel's failure to present mitigating evidence at the penalty phase of petitioner's trial for murder, combined with a closing argument that did not even constitute an adequate plea for mercy. *Mathis v. Zant*, 704 F. Supp. 1062 (N.D. Ga. 1989), appeal dismissed, 903 F.2d 1368 (11th Cir. 1990).

Vacation of a death sentence was warranted where defendant's trial counsel was deficient in the conduct of the sentencing phase due to inadequate investigation and presentation of the mitigation case. *Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216 (1998), cert. denied, 525 U.S. 869, 119 S. Ct. 163, 142 L. Ed 2d 133 (1998).

Failure to object to improper arguments by prosecution. — Where appellant urges that the trial court erred in finding that trial counsel had afforded the defendant effective assistance despite counsel's failure to object in several instances to allegedly improper argument by counsel for the State, when the totality of the representation was adequate even assuming that one or more of appellant's cited instances would constitute improper argument, the failure of appellant's trial counsel to object would not warrant the grant of a new trial when the totality of the representation was adequate. *Green v. State*, 191 Ga. App. 807, 383 S.E.2d 134 (1989).

There was no reasonable probability that the result of the proceeding would have been different but for counsel's failure to call expert witnesses on the issues of fingerprints, fibers and hair. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

Failure to object to opening or closing argument. — Because the trial result would not have been different if counsel had objected to the prosecutor's argument, defendant failed to show that counsel was ineffective. *Hunter v. State*, 273 Ga. App. 52, 614 S.E.2d 179 (2005).

Defendant failed to establish a claim of ineffective assistance of counsel based on counsel's failure to object to the state's closing argument, in which the prosecutor incorrectly stated that the burden of proof was on the defendant because defense counsel testified that counsel did not object because counsel knew that the trial court would instruct the jury that the attorney's argument was not evidence, and then would tell the jury that the state had the burden of proof; additionally, the trial judge instructed the jury that the state had the burden of proof and that the burden never shifted to the defendant. *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

Failure to introduce star witness' prior inconsistent testimony. — Attorney's failure to impeach the star witness by introducing the witness' prior inconsistent testimony constituted ineffective assistance of counsel, because such failure sacrificed an opportunity to greatly weaken the witness' inculpatory testimony. *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989).

Failure to seek financial assistance for an investigator. — Unless the defendant can demonstrate that the defendant has been injured by the defense attorney's failure to seek financial assistance from the court for an investigator, such failure cannot constitute ineffective assistance of counsel. *Herndon v. State*, 235 Ga. App. 258, 509 S.E.2d 142 (1998).

Defendant must show retained counsel's acts deprived trial of fundamental fairness. — Whenever the actions of retained counsel operate to deprive the trial of fundamental fairness, then the due process clause of U.S. Const., amend. 14 has been violated, notwithstanding any kind of specific involvement by a particular state official. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979); *United States v. Cowart*, 590 F.2d 603 (5th Cir. 1979).

State involvement through knowledge of responsible state official. — If retained

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counsel's actions in representing the defendant do not violate fundamental fairness, but are challenged as less than reasonably effective in violation of U.S. Const., amend. 6, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979); *United States v. Cowart*, 590 F.2d 603 (5th Cir. 1979).

For a discussion of trial tactics which did not constitute ineffective assistance of counsel, see *Adams v. Balkcom*, 688 F.2d 734 (11th Cir. 1982).

What action by counsel constitutes effective assistance. — Where counsel makes three motions for a mistrial, participates in the question of a possible juror disqualification, moves for a directed verdict on one count of the indictment, tries to get the court to accept appellant's guilty plea and presents argument during the sentencing hearing, at which hearing the judge informs counsel that the judge is persuaded somewhat by counsel's argument and sentences appellant to a lesser sentence than the judge originally planned, counsel's representation of appellant is not so inadequate as to amount to a denial of effective assistance of counsel. *Warner v. State*, 155 Ga. App. 495, 271 S.E.2d 636 (1980).

Where the attorney submits an affidavit stating that the attorney has investigated the case prior to trial by interviewing several witnesses, has performed all legal research felt necessary to represent the appellant, has entered into plea negotiations with the district attorney's office, and has conferred privately with the appellant at great length before the case is called, and where at the close of the state's case, the trial court appoints an additional attorney to assist with the defense, grants a one-week recess to allow time to secure witnesses, and indicates the state would pay the expenses, and also grants the appellant leave to file any motions deemed desirable, no support exists for the claim of ineffective assistance of counsel. *Clayton v. State*, 156 Ga. App. 285, 274 S.E.2d 682 (1980).

Where record indicated that trial defense counsel was familiar with facts of case; vigorously cross-examined all witnesses, made objections and was sustained on some, one of which kept out evidence prejudicial to defendant; moved for directed verdict on several grounds, and made final argument, defendant was not denied reasonably effective assistance of counsel. *Beecher v. State*, 164 Ga. App. 54, 296 S.E.2d 374 (1982).

Despite a lack of experience in capital cases, court-appointed counsel rendered reasonably effective assistance where counsel (a) moved to sever for purposes of trial the four count indictment; (b) demanded a list of witnesses; (c) demanded the appointment of an expert at state expense; (d) conducted discovery; (e) objected to introduction of certain evidence at trial; (f) cross-examined the state's witnesses; and (g) presented witnesses and evidence on behalf of the appellant's case. *Jackson v. State*, 249 Ga. 751, 295 S.E.2d 53 (1982).

Trial counsel's alleged failure to file motions to suppress, to conduct adequate voir dire, to give opening statement and to make certain objections did not amount to ineffective assistance where the record showed that counsel had filed several pretrial motions and orally presented several more, and succeeded in getting material fingerprint evidence excluded and otherwise handicapping the prosecution. *Jamison v. State*, 164 Ga. App. 63, 295 S.E.2d 203 (1982).

The decision to stipulate to the insured status of banks which defendant was charged with robbing was more a tactical decision than an infringement on an "inherently personal right of fundamental importance," regarding which any decision by counsel would require the client's consent. *Poole v. United States*, 832 F.2d 561 (11th Cir. 1987), *cert. denied*, 488 U.S. 817, 109 S. Ct. 54, 102 L. Ed. 2d 33 (1988).

Defense counsel did not render ineffective assistance in permitting the defendant to submit to a three-hour interrogation in which the defendant incriminated the defendant several times, because counsel had agreed to the interrogation in the hope of obtaining some benefit for the defendant in return for information regarding an accomplice. *Bowley v. State*, 261 Ga. 278, 404 S.E.2d 97 (1991).

Defense counsel's error in not challeng-

ing the sufficiency of the evidence underlying the defendant's armed robbery conviction was not sufficient to show that counsel was generally ineffective, where any errors were extremely unlikely to have affected the jury's verdict on the question of guilt or innocence. *Lobosco v. Thomas*, 928 F.2d 1054 (11th Cir. 1991).

Defendant showed no prejudice by defense counsel's performance in failing to object to allegedly patently objectionable questions, failing to question prosecution witnesses about a civil suit they brought against defendant and failing to adequately lay out defendant's theory of defense. *Rogers v. State*, 210 Ga. App. 164, 435 S.E.2d 457 (1993).

Defendant showed no prejudice by defense counsel's performance because defendant was informed by counsel that the defendant had a right to explain the defendant's cross-examination answers. *Stephens v. State*, 210 Ga. App. 77, 435 S.E.2d 463 (1993).

Where the trial court found that trial counsel and the team of paraprofessionals counsel led spent an inordinate amount of time preparing for trial; that the defendant took over the defendant's representation during the presentation of the state's case; and that the motions suggested by the defendant would have been denied had they been filed, counsel's professional assistance was reasonable. *Yizar v. State*, 263 Ga. 312, 431 S.E.2d 114 (1993).

Failure to call defendant to stand was a reasonable trial strategy not amounting to ineffective assistance as was trial counsel's extensive cross-examination which focused on one particular witness who had identified defendant. *Evans v. State*, 207 Ga. App. 358, 427 S.E.2d 837 (1993).

District court properly denied relief on ineffectiveness of counsel claim. — See *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *aff'd*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Ineffective counsel established. — The haphazard defense, the failure to develop strategy of any consequence and absence of counsel during crucial portions of the trial constituted ineffective counsel. *House v. Balkcom*, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Because a defendant, charged with murder, rape and burglary, among other crimes, was represented at trial by two attorneys, each of whom actively participated in the defense, and each attorney espoused a defense at odds with that of the other, causing a discernible split within the ranks of the defense team that prevented counsel from, among other things, effective performance of the duty to assist petitioner in the decision whether to testify in the defendant's own defense, the defendant did not receive the effective assistance of counsel guaranteed the defendant by the constitution. *Ross v. Kemp*, 260 Ga. 312, 393 S.E.2d 244 (1990).

The defendant was denied effective assistance of trial counsel, where counsel had no particular strategy for selecting a jury, was confused about applicable rules of evidence, and failed to question witnesses about prior inconsistent statements. *Wilson v. State*, 199 Ga. App. 900, 406 S.E.2d 293 (1991).

Trial counsel's deficient performance in failing to present the sentencing jury with any evidence regarding the defendant's mental retardation, the defendant's socioeconomic background, the defendant's reputation as a good worker, and the defendant's positive reputation as a member of the defendant's community prejudiced the defendant's ability to receive an individualized sentence. *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).

Trial court's finding that the performance of the defendant's attorney in a rape/child molestation case was not deficient was clearly erroneous, where defense counsel failed to object to similar transaction evidence, questions about the defendant's prior visits to the sex crime unit and questions regarding whether the defendant had sex with two underaged juveniles. *Bryant v. State*, 204 Ga. App. 856, 420 S.E.2d 801 (1992).

Counsel was ineffective because the defendant's trial counsel failed to make minimal inquiries that would have revealed that the arrest of the defendant was predicated on warrants issued without any showing of probable cause before the issuing magistrate; the warrants for the defendant's arrest were apparently issued solely on the basis of the attached affidavits that, although satisfying the requirements of O.C.G.A. § 17-4-41, did not supply the magistrate with sufficient judgment that probable cause existed for the

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issuance of the warrants. *Pitts v. State*, 209 Ga. App. 47, 432 S.E.2d 643 (1993).

When defendant showed that defense counsel, when informed that defendant had no recollection of the incident from which the charge of serious injury by vehicle arose, but that a co-worker may have been driving the involved vehicle, made no effort to locate the co-worker and, although unfamiliar with the elements of the offense, advised defendant's client to plead guilty, made no effort to determine if the evidence established those elements, and, rather than preserving a meaningful adversarial atmosphere, vilified the client before the court, defendant established that defendant was prejudiced by counsel's deficiencies such that, if not for those deficiencies, defendant would not have pled guilty. The record supported a finding that there was a reasonable probability that, had the case been investigated, and a determination made that the co-employee was driving, defendant, who did not know who was driving, would have insisted on going to trial, especially as the evidence did not suit the elements of the crime as to some charges. *Heath v. State*, 268 Ga. App. 235, 601 S.E.2d 758 (2004).

Petitioner's appellate counsel was ineffective by: (1) allowing thirty-three months to pass without making any attempt to obtain a hearing on a motion for new trial; (2) losing the petitioner's case file; and (3) failing to ask that the motion for new trial hearing be transcribed, which resulted in an insufficient record to support a potentially meritorious appellate claim. *White v. Smith*, 281 Ga. 271, 637 S.E.2d 686 (2006).

Ineffective counsel not established. — See *Jacobson v. State*, 201 Ga. App. 749, 412 S.E.2d 859 (1991); *Anderson v. State*, 206 Ga. App. 354, 426 S.E.2d 6 (1992); *York v. State*, 207 Ga. App. 494, 428 S.E.2d 113 (1993); *Causey v. State*, 215 Ga. App. 723, 452 S.E.2d 564 (1994); *White v. State*, 216 Ga. App. 583, 455 S.E.2d 117 (1995); *Jones v. State*, 217 Ga. App. 722, 458 S.E.2d 894 (1995); *McKenzie v. State*, 223 Ga. App. 108, 476 S.E.2d 868 (1996); *Brooks v. State*, 231 Ga. App. 561, 500 S.E.2d 11 (1998); *Whitaker v. State*, 269 Ga. 462, 499 S.E.2d

888 (1998); *Jordan v. State*, 247 Ga. App. 551, 544 S.E.2d 731 (2001); *Potter v. State*, 273 Ga. 325, 540 S.E.2d 184 (2001); *Grier v. State*, 273 Ga. 363, 541 S.E.2d 369 (2001); *Nickerson v. State*, 248 Ga. App. 829, 545 S.E.2d 587 (2001); *Head v. Carr*, 273 Ga. 613, 544 S.E.2d 409, cert. denied, 534 U.S. 905, 122 S. Ct. 238, 151 L. Ed. 2d 172 (2001); *Penny v. State*, 248 Ga. App. 772, 547 S.E.2d 367 (2001); *Bogan v. State*, 249 Ga. App. 242, 547 S.E.2d 326 (2001); *In re F.C.*, 248 Ga. App. 675, 549 S.E.2d 125 (2001); *Williams v. State*, 248 Ga. App. 628, 548 S.E.2d 350 (2001); *Thigpen v. State*, 248 Ga. App. 301, 546 S.E.2d 60 (2001); *Williams v. State*, 248 Ga. App. 316, 546 S.E.2d 74 (2001); *Gosnell v. State*, 247 Ga. App. 508, 544 S.E.2d 477 (2001); *Eggleston v. State*, 247 Ga. App. 540, 544 S.E.2d 722 (2001); *Dorsey v. Chapman*, 262 F.3d 1181 (11th Cir. 2001), cert. denied, 535 U.S. 1000, 122 S. Ct. 1567, 152 L. Ed. 2d 489 (2002); *Hagins v. United States*, 267 F.3d 1202 (11th Cir. 2001), cert. denied, 537 U.S. 1022, 123 S. Ct. 545, 154 L. Ed. 2d 432 (2002); *Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001), cert. denied, 537 U.S. 870, 123 S. Ct. 278, 154 L. Ed. 2d 119 (2002); *Bravo v. State*, 269 Ga. App. 242, 603 S.E.2d 669 (2004).

Defendant's claim of ineffective assistance of counsel was properly dismissed because the defendant's trial counsel discussed the advantages and disadvantages of presenting such evidence with the defendant and it was mutually decided as a matter of trial strategy that neither the defendant nor the co-defendant would be called to testify and because there was no reasonable probability that the result of the proceeding would have been different had these witnesses been called. *Robinson v. State*, 203 Ga. App. 759, 417 S.E.2d 404, cert. denied, 203 Ga. App. 907, 417 S.E.2d 404 (1992).

In a child molestation case, where, during the trial, the state made a request to introduce similar transaction evidence of which the defense had not received the required notice, it was not ineffective assistance of counsel for defense counsel to refuse continuance because defense counsel indicated the counsel was not actually surprised by the testimony and was aware of the previous interviews and video tapes of alleged victim of uncharged offenses and the decision was part of a valid trial strategy. *Penaranda v.*

State, 203 Ga. App. 740, 417 S.E.2d 683, cert. denied, 203 Ga. App. 907, 417 S.E.2d 683 (1992).

Where defense counsel did not object to the opinion testimony of a psychiatric resident and county social worker regarding whether the alleged victim was sexually molested but did discredit their testimonies on cross, defendant was not denied effective assistance of counsel. *Penaranda v. State*, 203 Ga. App. 740, 417 S.E.2d 683, cert. denied, 203 Ga. App. 907, 417 S.E.2d 683 (1992).

Where the trial record indicates that trial counsel conducted thorough and sifting cross-examinations of the state's witnesses, timely interposed objections, presented evidence on defendant's behalf and made strong arguments to the jury, there was no showing of a reasonable probability that, but for trial counsel's alleged deficiencies, the result of the proceeding would have been different. *Taylor v. State*, 203 Ga. App. 210, 416 S.E.2d 554 (1992).

Defendant's attorney did not act deficiently in making tactical decisions not to present testimony from certain witnesses, where the attorney explained that the attorney chose not to present psychiatric testimony because the attorney concluded that the doctor's testimony would be more harmful than helpful and failure to call the defendant's relatives to impeach the state's primary witness was similarly a tactical decision made during the trial. *Gross v. State*, 262 Ga. 232, 416 S.E.2d 284 (1992).

Asserted counsel's failure to request charge on circumstantial evidence, to request charge on manslaughter, to request curative instructions and to adequately investigate the case did not give rise to an ineffective assistance claim where there was not reasonable probability that but for these alleged errors the result of the proceeding would have been different. *Barner v. State*, 263 Ga. 365, 434 S.E.2d 484 (1993).

Trial counsel was not ineffective for not attempting to suppress evidence found in the defendant's home as a result of a search warrant as counsel chose, instead, to challenge a prior patdown search of the defendant which led to the granting of the search warrant on the theory that a successful challenge to the patdown would have led to the exclusion of the evidence found in the defendant's home, as well. *Sikes v. State*, 247 Ga. App. 855, 545 S.E.2d 73 (2001).

In a prosecution for murder in which the evidence of guilt was overwhelming, the defendant was not denied effective assistance of counsel since: (1) the defendant maintained that, despite an entry of a plea of not guilty and defendant's desire to seek a verdict of not guilty, trial counsel pursued a strategy to obtain a guilty but mentally ill verdict, requiring defendant to give false testimony in which defendant admitted to committing the crimes; (2) trial counsel knew that the defendant's proposed version of the events at issue was untrue and believed presentation of it would have offended the intelligence of the jury and cost the lawyers all of their credibility with the jury resulting in the return of a death sentence; and (3) trial counsel testified that after explaining to the defendant why it was best to do as counsel suggested "there was no disagreement after that." *Hicks v. Scott*, 273 Ga. 348, 541 S.E.2d 634 (2001).

The defendant failed to establish ineffective assistance of counsel based on a conflict of interest of his attorney arising from the attorney's prior representation of a witness (defendant's former spouse) in a civil action against the defendant to modify child custody since the witness's assertion of attorney-client privilege would have prevented any attorney, and not just defense counsel, from asking the witness about statements the witness had made to the witness' attorney during that prior representation. *Turner v. State*, 273 Ga. 340, 541 S.E.2d 641 (2001), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

The defendant failed to satisfy the prejudice prong of the sixth amendment analysis with regard to defendant's claim that defense counsel's performance was deficient in the sentencing proceeding as the scale was so heavily weighted with aggravating evidence that there was no reasonable probability that the defendant's sentence would have been different if defense counsel had performed in a different manner. *Moon v. Head*, 285 F.3d 1301 (11th Cir. 2002), cert. denied, 537 U.S. 1124, 123 S. Ct. 863, 154 L. Ed. 2d 807 (2003).

Defendant did not overcome the strong presumption that trial counsel's conduct fell within the broad range of reasonable professional conduct in using a good character defense where defendant did not obtain

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testimony from defendant's trial counsel at defendant's motion for new trial; defendant made no affirmative showing that the purported evidentiary deficiencies in the trial counsel's representation were indicative of ineffectiveness and were not examples of a conscious and deliberate trial strategy. *Parnell v. State*, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Trial court's determination that defendant did not receive ineffective assistance of counsel was not clearly erroneous, as defendant did not show anything defendant's trial counsel did or failed to do that was objectionable or that would have changed the outcome of defendant's case. *Dorsey v. State*, 261 Ga. App. 181, 582 S.E.2d 158 (2003).

Trial court did not err in denying defendant's motion for a new trial on the ground that defendant received ineffective assistance of counsel as defendant did not show that defendant received ineffective assistance of counsel, especially since defendant's trial counsel did not testify at defendant's motion for a new trial and, thus, defendant didn't overcome the presumption that defendant's trial counsel's conduct fell within the wide range of reasonable professional assistance; moreover, defendant did not show defendant's trial counsel was ineffective for failing to present an insanity defense, as the trial court's finding that defendant was not insane at the time the defendant committed the crimes, but was voluntarily under the influence of cocaine, was not clearly erroneous. *Gardner v. State*, 261 Ga. App. 188, 582 S.E.2d 167 (2003).

Trial court's denial of defendant's ineffective assistance of counsel claim was not clearly erroneous, as the record showed that trial counsel's decisions were either strategic in nature or the result of defendant's insistence; accordingly, defendant did not show that trial counsel was inadequately prepared or that trial counsel otherwise rendered ineffective assistance. *Cummings v. State*, 261 Ga. App. 281, 582 S.E.2d 231 (2003), cert. denied, 543 U.S. 824, 125 S. Ct. 40, 160 L. Ed. 2d 35 (2004).

Defendant did not show that defendant received ineffective assistance of counsel

when trial counsel did not request a limiting instruction when the state introduced evidence that defendant had previously been convicted for possession of cocaine with intent to distribute; although defendant wanted that instruction to say that such evidence was limited to a firearms charge against defendant, and should not be considered in connection with the other charge against defendant of possession of cocaine with intent to distribute, the trial court was not required to give that instruction because such evidence was admissible to show defendant's identity, and, thus, trial counsel was not ineffective for not requesting that instruction. *Laye v. State*, 261 Ga. App. 327, 582 S.E.2d 505 (2003).

Trial court did not commit clear error in denying defendant's motion to withdraw defendant's guilty plea, as defendant did not show that defense counsel rendered ineffective assistance of counsel and caused defendant's plea of guilt to first-degree homicide by vehicle to be entered unknowingly and involuntarily; indeed, the record showed that defense counsel properly prepared defendant's case and advised defendant even though the trial court entered a slightly longer sentence than defendant had expected, and as a result, defendant entered defendant's plea knowing the nature of the charges and consequences of the plea. *David v. State*, 261 Ga. App. 468, 583 S.E.2d 135 (2003).

Defendant did not show that defendant received ineffective assistance of counsel when trial counsel did not object to the testimony of an officer who stated that the officer believed defendant was the driver of the van involved in the accident, as trial counsel's decision not to object to testimony that had already been introduced through another witness, but, instead, to attack it on the cross-examination of the officer was a matter of trial tactics and strategy, and did not show that defendant received ineffective assistance of counsel. *Lanning v. State*, 261 Ga. App. 480, 583 S.E.2d 160 (2003).

Defendant did not receive ineffective assistance of counsel when defendant's trial counsel called alibi witnesses who in pretrial interviews told stories that were consistent with defendant's story that defendant was not present at the time of the purse snatchings for which defendant was on trial,

but who on cross-examination told stories that were inconsistent, often conflicting, and harmful to defendant's alibi; the decision to call such witnesses involved a matter of trial strategy and did not amount to ineffective assistance of counsel. *Browne v. State*, 261 Ga. App. 648, 583 S.E.2d 496 (2003).

Trial court did not err in denying defendant's ineffective assistance of counsel claim, as even assuming that defendant's counsel did not object to the admission of certain physical and hearsay evidence, defendant failed to establish the existence of a reasonable probability that the outcome of defendant's trial would have been different had defense counsel objected, especially since the evidence of defendant's guilt was overwhelming. *Ferguson v. State*, 262 Ga. App. 28, 584 S.E.2d 618 (2003).

Defendant did not show that defendant received ineffective assistance of counsel, even though defendant alleged that defense counsel failed to impeach a witness using a purported prior inconsistent statement, that defense counsel did not present a defense of coercion based on the fact that defendant's crimes were committed with another man, and that defense counsel did not call character witnesses, as the trial court's finding on denying defendant's motion for a new trial that the alleged actions all involved strategic decisions by defense counsel was not clearly erroneous. *Washington v. State*, 276 Ga. 655, 581 S.E.2d 518 (2003).

Defendant did not show that defendant received ineffective assistance of counsel when trial counsel asked defendant at trial about a prior conviction, when trial counsel did not attempt to exclude evidence that right before the crime was committed that defendant was using marijuana, and when trial counsel did not redact part of a first statement about whether defendant would take a polygraph test, as defendant did not show that trial counsel's actions, which involved strategic decisions, prejudiced defendant. *Collins v. State*, 276 Ga. 726, 583 S.E.2d 26 (2003).

Defendant failed to meet defendant's burden of showing that defendant's trial counsel was deficient for failing to inform defendant that counsel filed a motion in limine the day defendant entered a guilty plea, because the motion would not have excluded testimony that went to the essential

elements of the crimes with which defendant was charged, and counsel on numerous prior occasions had told defendant that counsel planned to file the motion. *Jones v. State*, 265 Ga. App. 584, 594 S.E.2d 761 (2004).

Trial court properly denied defendant's motion for a new trial as defense counsel did not give ineffective assistance of counsel by failing to request a Jackson-Denno hearing as there was no basis to object to the introduction of defendant's statement to an investigator as: (1) defendant was not under arrest at the time of the statement, nor would a reasonable person have understood that the person was under arrest; (2) there was no evidence that the officer sent to ensure that defendant did not leave the hospital before the investigator arrived had any contact with defendant; (3) that defendant was in pain or taking pain medication did not render defendant's statement involuntary; and (4) defendant failed to show that defendant was prejudiced by the failure to request the hearing. *Alwin v. State*, 267 Ga. App. 236, 599 S.E.2d 216 (2004).

Defendant's ineffective assistance of counsel claim failed as defendant failed to show that defendant was prejudiced by counsel's failure to admit a copy of the book-in sheet, which showed that defendant was not wearing a white cap when defendant was booked; although the victim testified that the assailant was wearing a white cap at the time of the crime, the fact that defendant was not wearing a white cap when defendant was booked did not indicate that defendant was not wearing a white cap at the time of the crime. *Lawrence v. State*, 267 Ga. App. 515, 600 S.E.2d 444 (2004).

Defense counsel did not provide ineffective assistance of counsel in failing to request a charge on individual determination of guilt as the trial court charged the jury that, although four individuals were indicted together, the jury was only to consider the case against defendant. *Botelho v. State*, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

Applying the Strickland standard, the supreme court found no merit in defendant's ineffective assistance of counsel claim, as a review of the transcript of the hearing on defendant's motion for new trial revealed that trial counsel met and communicated with defendant numerous times in the

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months before trial and consulted with defendant on all possible defenses; defendant failed to present any evidence of how further cross-examination of witnesses or the submission of additional photographs of the crime scene would have been necessary or beneficial to the defense. *Jackson v. State*, 277 Ga. 592, 592 S.E.2d 834 (2004).

Trial counsel's failure to object when the court gave jury instructions before closing arguments did not amount to ineffective assistance of counsel where trial counsel explained the process to defendant and defendant agreed to the reversal of the usual process. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Counsel's failure to object or move in limine to exclude testimony that defendant "always" carried a gun, evidence that defendant alleged constituted bad character evidence, did not amount to ineffective assistance since the evidence did not have the prejudicial effect attributed to it by defendant. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Counsel's failure to object when the state asked a police officer whether the "stories" defendant told made sense in light of other evidence did not amount to ineffective assistance since the question and its negative response were not prejudicial to defendant in light of defendant's own testimony in which defendant referred to defendant's several different statements to the police as "stories." *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Where defendant did not prove that trial counsel failed to investigate defendant's mental state or move for a directed verdict, defendant did not prove that defendant was prejudiced by counsel's actions. *Hightower v. State*, 278 Ga. 39, 597 S.E.2d 362 (2004).

Defendant's claims of ineffective assistance of counsel, alleging a failure to request a mistrial or curative instructions when defendant's sister testified as to defendant's character, a failure to object to testimony of an officer who had an arrest warrant for defendant and allegedly testified on the ultimate issue in the case, and a failure to object to improper statements by the prose-

cutor during closing arguments failed where defendant failed to show prejudice as a result of any of the alleged errors made by trial counsel. *Fulton v. State*, 278 Ga. 58, 597 S.E.2d 396 (2004).

Trial court properly found that defense counsel was not ineffective by failing to present a pre-trial plea in bar claim to bar the entry of two separate convictions and sentences in a prosecution of both armed robbery and hijacking a motor vehicle offenses, as defendant's argument that the double jeopardy clause prohibited the imposition of separate sentences lacked merit insofar as defendant failed to adequately show how O.C.G.A. § 16-5-44.1(d) violated defendant's double jeopardy rights. *Holman v. State*, 272 Ga. App. 890, 614 S.E.2d 124 (2005).

Because a child victim testified of defendant's sexual abuse and that defendant showed the victim "pictures or movies in which people didn't have any clothes on," the trial court properly admitted the videotapes and determined that a psychotherapist's testimony was admissible under O.C.G.A. § 24-3-16; consequently, defendant failed to show that trial counsel was ineffective. *Johnson v. State*, 274 Ga. App. 69, 616 S.E.2d 848 (2005), cert. denied, U.S. , 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Because trial counsel met with defendant personally on several occasions, thoroughly interviewed defendant, exchanged correspondence with defendant either by mail or by telephone, discussed discovery in depth with defendant personally after mailing it to defendant in advance and giving defendant the opportunity to ask questions, and detailed the steps counsel took in preparing defendant's case for trial defendant failed to carry the burden of showing that trial counsel's handling of the case was outside the bounds of reasonable professional conduct, and the trial court properly rejected defendant's claims of ineffective assistance of counsel. *Mitchell v. State*, 279 Ga. 158, 611 S.E.2d 15 (2005).

Because defendant failed to support the proposition that defendant would have to serve 20 years before being considered for parole, defendant failed to show that counsel was ineffective. *Seabolt v. State*, 279 Ga. 518, 616 S.E.2d 448 (2005).

Because the state proved venue through testimony that the address of the crime scene was in a specific county and because counsel's actions were within the bounds of reasonable professional conduct, the trial court properly denied defendant's motion for a new trial. *Henry v. State*, 279 Ga. 615, 619 S.E.2d 609 (2005).

Defendant failed to show that defendant's counsel rendered ineffective assistance, as the fact that defendant's counsel only visited defendant one time while defendant was incarcerated did not show that counsel was not adequately prepared because there was evidence that they frequently corresponded by letters and had many phone calls. *Copeland v. State*, 276 Ga. App. 834, 625 S.E.2d 100 (2005).

Although defendant's trial counsel failed to request a limiting instruction as to similar transaction evidence in defendant's criminal trial, as the trial court gave that instruction in its final charge to the jury, defendant was unable to show that but for counsel's deficiency, the outcome of the trial would have been different; accordingly, defendant did not show that defendant's counsel was ineffective. *Copeland v. State*, 276 Ga. App. 834, 625 S.E.2d 100 (2005).

Counsel was not ineffective for failing to make a motion for a change of venue because the defendant had not shown that the jury pool was biased and because the trial court itself had found that not making such a motion was wise as no jury in the county had sentenced a defendant to death; counsel made a tactical decision to refrain from a Batson challenge, no prejudice was shown by admission of certain testimony, the defendant had not shown that testimony of one of the defendant's relatives would have been relevant and favorable to defendant, and the record did not establish that trial counsel was aware of a viable alibi defense via the defendant's former girlfriend and the girlfriend's siblings. *Stokes v. State*, 281 Ga. 825, 642 S.E.2d 82 (2007).

When a witness had originally given a statement that supported the defendant's self-defense claim, but later recanted this statement, defense counsel was not ineffective for calling the witness; the defendant had insisted that the witness be called, and doing so at least allowed the jury to hear the witness's original statement, and further-

more there was no evidence that a change of venue would have been granted or that defense counsel was unprepared for trial. *Shelton v. State*, 281 Ga. 660, 641 S.E.2d 536 (2007).

Failure to file timely appeal. — The trial court properly denied the defendant's motion for an out-of-time appeal, as the motion failed to show any meritorious ground, and the defendant's failure to timely file an appeal did not result from the ineffective assistance of trial counsel, as it was apparent from the transcript of the plea hearing that the issues sought to be raised in the out-of-time appeal completely lacked merit. *Hicks v. State*, 281 Ga. 836, 642 S.E.2d 31 (2007).

The appeals court rejected the defendant's ineffective assistance of counsel claim, based on trial counsel's failure to move for mistrial or seek the removal of a juror who became nauseated during the state's cross-examination of the defendant and left the courtroom with the bailiff, but who thereafter indicated a willingness to continue and was allowed to remain on the jury, as: (1) nothing showed either that the juror was rendered unable by illness to continue or that anything improper occurred while the juror was separated from the others during the juror's temporary illness; (2) the defendant failed to show any prejudice by the lack of an inquiry; and (3) the defendant was not entitled to a presumption of prejudice due to an irregularity in the conduct of a juror. *Jones v. State*, Ga. , S.E.2d , 2007 Ga. LEXIS 354 (May 14, 2007).

Evidentiary hearing as to claim of ineffective assistance. — If a post-conviction defendant has requested an evidentiary hearing regarding ineffectiveness of trial counsel, but has not had an opportunity for one, the defendant is not barred from proceeding with this claim, and a claim of ineffectiveness of post-conviction counsel. *Yizar v. State*, 262 Ga. 33, 413 S.E.2d 448 (1992), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003).

Defense counsel was not ineffective for allowing co-counsel to give the closing argument; lack of experience alone could not constitute grounds for an ineffective assistance of counsel claim, and upon questioning by the trial court, the defendant expressly agreed that the defendant was

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“comfortable” with the decision to allow co-counsel to handle closing. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Trial court’s finding upheld unless clearly erroneous. — A trial court’s finding that a defendant has been afforded effective assistance of counsel must be upheld unless that finding is clearly erroneous. *Timberlake v. State*, 200 Ga. App. 64, 406 S.E.2d 537 (1991), cert. denied, 200 Ga. App. 895, 406 S.E.2d 537 (1991).

6. Waiver

Right to counsel of choice may be waived.

— Just as other constitutional and statutory rights may be waived intelligently by an accused, so too, the constitutional guarantees of the benefit of counsel of choice may be waived by action or declaration. *Williams v. Gooding*, 226 Ga. 549, 176 S.E.2d 64 (1970); *Bradley v. State*, 135 Ga. App. 865, 219 S.E.2d 451 (1975); *Phipps v. State*, 200 Ga. App. 18, 406 S.E.2d 493 (1991); *Singleton v. State*, 240 Ga. App. 240, 522 S.E.2d 734 (1999).

“Waiver” defined. — In determining whether or not an accused has adequately waived the right to counsel and elected to exercise the constitutional right to self-representation, the courts will apply the standard that a waiver is ordinarily an intentional relinquishment of a known right or privilege. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975); *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Effect of waiver. — A defendant who has knowingly waived the right to counsel could not later complain of a lack of counsel when the defendant determines that the court’s warnings were valid. *Reviere v. State*, 231 Ga. App. 329, 498 S.E.2d 332 (1998).

Strict standard must be applied to waiver of counsel whether at trial or in pretrial proceedings. *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Constitutional waiver requires more than a comprehension of rights; there must also be a relinquishment of rights. *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Establishing valid waiver. — When an accused has invoked the right to have counsel

present during custodial interrogation, a valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated custodial interrogation even if the accused has been advised of the accused’s rights. *Barksdale v. State*, 161 Ga. App. 155, 291 S.E.2d 18 (1982).

Pretrial hearing is preferred procedure for determining waiver. — Although a pretrial hearing is the preferred procedure to determine waiver of the right to counsel, the failure to hold such a hearing is not itself constitutional error. As long as the record establishes that the defendant understood the risks of self-representation and freely chose to face them, the waiver may be valid. *Strozier v. Newsome*, 926 F.2d 1100 (11th Cir.), cert. denied, 502 U.S. 930, 112 S. Ct. 350, 116 L. Ed. 2d 289 (1991).

To avoid ambiguity in direct appeals and collateral challenges, the state or federal trial court should conduct a searching pretrial inquiry to determine whether a waiver is knowing and intelligent. *Strozier v. Newsome*, 926 F.2d 1100 (11th Cir.), cert. denied, 502 U.S. 930, 112 S. Ct. 350, 116 L. Ed. 2d 289 (1991).

Overall trial record indicated that the combination of advice from lawyers and the trial judge before trial sufficiently informed the defendant of the disadvantages of self-representation so that the defendant’s choice to proceed pro se was knowing and intelligent. *Strozier v. Newsome*, 926 F.2d 1100 (11th Cir.), cert. denied, 502 U.S. 930, 112 S. Ct. 350, 116 L. Ed. 2d 289 (1991).

Evidentiary hearing was required to determine whether the defendant had knowingly, voluntarily and intelligently waived the right to counsel, where the defendant stated before the trial court that the defendant thought the defendant had counsel but the attorney the defendant thought was representing the defendant was not present, and the court required the defendant to proceed pro se without further questioning. *Smith v. State*, 231 Ga. App. 68, 498 S.E.2d 561 (1998).

Waiver must be knowing and intelligent.

— An accused may waive the right to counsel, provided the accused is capable of doing so and it appears that the accused did so knowingly and intelligently. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, cert. de-

nied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964); *Brown v. State*, 122 Ga. App. 570, 177 S.E.2d 801 (1970); *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972); *United States v. Shea*, 508 F.2d 82 (5th Cir.), cert. denied, 423 U.S. 847, 96 S. Ct. 87, 46 L. Ed. 2d 69 (1975); *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, cert. denied, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980); *Redd v. State*, 264 Ga. 399, 444 S.E.2d 776 (1994).

When a defendant pleads not guilty and proceeds to trial without benefit of counsel, the state must show the decision to proceed pro se was made knowingly and intelligently. *Kirkland v. State*, 202 Ga. App. 356, 414 S.E.2d 502 (1991); *Wilson v. State*, 230 Ga. App. 74, 495 S.E.2d 330 (1998).

Because the record contained nothing showing that the defendant was made aware of the right to counsel or of the dangers of proceeding without counsel, the court was unable to conclude that the defendant validly chose to proceed pro se after voluntarily and knowingly waiving the right to counsel, especially as the trial transcript showed that, acting as the defendant's own counsel, the defendant failed to do anything at the trial to defend against the charges. *Heard v. State*, 236 Ga. App. 625, 513 S.E.2d 35 (1999).

Defendant made a knowing and voluntary waiver of the right to be represented by counsel, pursuant to U.S. Const., amend. 6, where trial counsel sought withdrawal, the defendant agreed on the record with such an action and indicated that the defendant wanted to hire the defendant's own counsel, and that until such time, the defendant wished to proceed pro se; the record clearly reflected that prior to releasing appointed counsel, the trial court admonished the defendant of the dangers of self-representation, that the defendant indicated that the defendant understood, and the defendant signed a waiver of the defendant's right to counsel on the face of the indictment. *Phillips v. State*, 267 Ga. App. 733, 601 S.E.2d 147 (2004).

Waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishment thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the matter in order to be valid. *Gann v.*

Gough, 79 F. Supp. 912 (N.D. Ga.), rev'd on other grounds, *Hiatt v. Gann*, 170 F.2d 473 (5th Cir. 1948), cert. denied, 337 U.S. 920, 69 S. Ct. 1148, 93 L. Ed. 1729 (1949); *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973); *Blue v. State*, 144 Ga. App. 378, 241 S.E.2d 36 (1977); *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

Waiver depends on facts and circumstances of the case. — The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Bradley v. State*, 135 Ga. App. 865, 219 S.E.2d 451 (1975); *United States v. White*, 617 F.2d 1131 (5th Cir. 1980); *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Absent any showing that a petitioner is aware of the right to appointed counsel, if the defendant is in fact indigent, it cannot be said that the defendant intentionally abandoned or waived that right. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Judge must make penetrating and comprehensive examination of circumstances. — A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969); *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973); *Blue v. State*, 144 Ga. App. 378, 241 S.E.2d 36 (1977); *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

Trial judge cannot rely solely upon an assumption that the solicitor has done everything necessary to determine whether waiver is knowing and intelligent. *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973).

Trial judge has the serious and weighty responsibility of determining whether there is an intelligent and competent waiver by the accused. *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Right cannot be waived unless an offer of counsel has been made. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

No valid waiver. — Trial court's decision that defendant's custodial statements were

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not admissible when made after defendant invoked defendant's right to counsel, but an officer continued to speak to defendant, as the officer repeatedly questioned defendant about defendant's attorney and stressed that, once defendant obtained counsel, the officer "really needed" to talk to defendant, and, therefore, defendant had not validly waived counsel when defendant made the statements, was not clearly erroneous. *State v. Langlands*, 276 Ga. 721, 583 S.E.2d 18 (2003).

State failed to prove a valid waiver of the right to counsel, and a trial court erred in allowing the defendant to proceed pro se since the trial court never informed the defendant of the dangers of proceeding without counsel; appointed stand-by counsel sat through the trial with the defendant, but provided no assistance during the trial, and, before trial, potentially made things worse by failing to voir dire any potential jurors and by failing to object to the defendant being visibly handcuffed and shackled during the trial or even to request a curative instruction that the restraints should not have been considered evidence of defendant's guilt, so there was no reason to conclude that the conviction was independent of the defendant's decision to proceed pro se. *Davis v. State*, 279 Ga. App. 628, 631 S.E.2d 815 (2006).

If the trial court merely ascertains that appellant is going to proceed pro se but it does not ascertain that appellant is aware of the right to counsel, there has not been an intelligent and knowing waiver of the right of counsel. *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

Express statement that an individual does not want a lawyer is not required to show that the individual waived the right to have one present. All that the prosecution must show is that the defendant was effectively advised of the defendant's rights and that the defendant then intelligently and understandingly declined to exercise them. *United States v. Daniel*, 441 F.2d 374 (5th Cir. 1971).

Defendant's rejection of public defender.

— The trial court was authorized to find that the defendant's rejection of the assistance of a public defender, coupled with the defen-

dant's insistence upon the appointment of counsel of the defendant's own choosing, was the functional equivalent of a knowing and voluntary waiver of counsel, and, in this situation, the trial court could proceed to trial with the defendant acting pro se. *Mercier v. State*, 203 Ga. App. 494, 417 S.E.2d 430 (1992).

Knowing and intelligent waiver of appointed counsel can never be lightly presumed; on the contrary, the presumption is against waiver. *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973).

Presumption is against waiver of the benefit of counsel, which must be done voluntarily, knowingly and intelligently. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973); *Blue v. State*, 144 Ga. App. 378, 241 S.E.2d 36 (1977).

Presumption against waiver of benefit of counsel is a strong one. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

Presumption against waiver of the right to assistance of counsel must be overcome and clearly shown by the record. *Blue v. State*, 144 Ga. App. 378, 241 S.E.2d 36 (1977).

Presumption of waiver from a silent record is impermissible. *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971).

Whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), overruled on other grounds, *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998); *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

It is the responsibility of the court to clearly determine whether there has been a proper waiver. The trial judge must investigate as long and as thoroughly as the circumstances of the case before the judge demand. *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973); *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

New counsel cannot waive by filing notice of appeal. — Decisions holding that the issue of the effectiveness of trial counsel has been waived if new counsel elects to file a direct notice of appeal rather than a motion for new trial, are contrary to the controlling authority of the Supreme Court and are hereby overruled. *King v. State*, 208 Ga. App. 77, 430 S.E.2d 640 (1993).

It must be affirmatively shown that the court furnished the accused with the necessary information upon which the accused could make a voluntary, knowing, and intelligent decision regarding the right to counsel. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973).

Although no “magic words” regarding specific risks or benefits are necessary to prove a waiver, the totality of the evidence in the record must show that the trial court provided sufficient information, assistance, and support to allow defendant to make a truly informed decision to knowingly relinquish the right to counsel. *Hamilton v. State*, 233 Ga. App. 463, 504 S.E.2d 236 (1998).

Trial judge must make a clear record of a proper waiver. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

Defendant was improperly denied assistance of counsel at trial, where the transcript revealed only that at the beginning of the trial the judge informed the jury that defendant had chosen to proceed pro se, and the record was devoid of any evidence that the trial court either informed the defendant of the perils of proceeding pro se or made a finding that the defendant had knowingly and intelligently waived the right to counsel. *Black v. State*, 194 Ga. App. 660, 391 S.E.2d 432 (1990).

Determination of waiver should appear on record. — While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. *Butler v. State*, 198 Ga. App. 217, 401 S.E.2d 43 (1990), cert. denied, 198 Ga. App. 897, 401 S.E.2d 43 (1991).

Where the record reflected only defendant’s request for an attorney or silence, there was not an adequate waiver of the right to counsel. *Butler v. State*, 198 Ga. App. 217, 401 S.E.2d 43 (1990), cert. denied, 198 Ga. App. 897, 401 S.E.2d 43 (1991).

When an indigent criminal defendant elects to waive the right to counsel and proceed pro se during post-conviction proceedings, the record should reflect a finding on the part of the trial court that the defendant has validly chosen to proceed pro se. The record should also show that this choice was made after the defendant was made aware of the right to counsel and the dan-

gers of proceeding without counsel. *Carver v. State*, 198 Ga. App. 676, 403 S.E.2d 230 (1991).

What record must show. — The record must disclose that the defendant voluntarily, knowingly, and intelligently waived counsel and in doing so the defendant must be advised of the right to counsel, if the defendant cannot afford counsel, and the consequences of the defendant’s refusal to accept counsel. *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971); *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973); *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975); *Blue v. State*, 144 Ga. App. 378, 241 S.E.2d 36 (1977); *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980); *Miller v. State*, 156 Ga. App. 469, 274 S.E.2d 818 (1980).

When an indigent criminal defendant elects to waive the right to counsel and proceed pro se during post-conviction proceedings, the record should reflect a finding on the part of the trial court that the defendant has validly chosen to proceed pro se and the record should also show that this choice was made after the defendant was made aware of the right to counsel and the dangers of proceeding without counsel. *Weber v. State*, 203 Ga. App. 356, 416 S.E.2d 868 (1992).

There is no “magic language” a trial judge must use in explaining the implications of a defendant’s waiver of the right to counsel; rather, the judge’s dialogue with the defendant and the determination as to waiver depend on the circumstances of the case. *Reviere v. State*, 231 Ga. App. 329, 498 S.E.2d 332 (1998).

Waiver deemed invalid. — Defendant’s assault conviction was reversed, where nothing in the record showed that the defendant was advised of the right to counsel before announcing the defendant was ready for trial or that an attorney would be appointed by the court to represent the defendant if the defendant could not afford counsel, and the trial court did not determine whether the defendant knowingly and voluntarily waived the right to counsel. *Cain v. State*, 201 Ga. App. 317, 411 S.E.2d 92 (1991).

Because the defendant apparently did not understand the consequences, dangers, and permanency of waiving the right to counsel at the time the defendant sought dismissal of court appointed counsel, and the defendant

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was then unable to obtain counsel despite diligent efforts, the defendant had not waived the right to appointed counsel and a new trial was warranted. *Hasty v. State*, 215 Ga. App. 155, 450 S.E.2d 278 (1994).

The state failed to show that the defendant voluntarily relinquished the right to counsel since the defendant's trial apparently was not reported, and the hearing transcript on the defendant's motion for supersedeas bond contained only a statement by the prosecutor which was insufficient to show that the trial court met its heavy burden of ensuring that the defendant knowingly relinquished the right to counsel. *Spears v. State*, 247 Ga. App. 626, 545 S.E.2d 36 (2001).

There was nothing in the record showing that the trial court made defendant aware of the dangers of self-representation prior to trial, nor did defendant's background, experience, or conduct of the trial show defendant was aware of the dangers and capable of making a valid waiver of counsel. When defendant tried the case on defendant's own, the defendant raised bizarre, ineffective defenses and made an incoherent mess of the case; thus, the appellate court concluded that there was no valid waiver of counsel and defendant was entitled to a new trial. *Ross v. State*, 258 Ga. App. 346, 574 S.E.2d 406 (2002).

Waiver must be made knowingly and intelligently. — Defendant's waiver of defendant's right to counsel was found to be inadequate where the state did not meet its heavy burden of showing that defendant made a knowing, voluntary, free, and intelligent decision to represent oneself in defendant's trial for aggravated assault and false imprisonment; although the trial court engaged defendant in a colloquy about self-representation, there was no showing that defendant was made aware of the dangers of self-representation in that defendant's defense was confused and convoluted and defendant was unfamiliar with the evidentiary rules, which limited defendant's ability to defend oneself. *Banks v. State*, 260 Ga. App. 515, 580 S.E.2d 308 (2003).

Factors to consider in determining whether juvenile's waiver of counsel is vol-

untary. — There are several factors to be considered among the totality of the circumstances in determining whether a juvenile's waiver of counsel was made knowingly and voluntarily: (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge and the nature of the accused's rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends, or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogations; (7) length of interrogations; (8) whether vel non the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extrajudicial statement at a later date. *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983) (burden of showing understanding waiver met).

Question of a voluntary and knowing waiver of the right of a juvenile to counsel depends on the totality of the circumstances. *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983) (burden of showing understanding waiver met).

State has a heavy burden in showing that a juvenile did understand and waive the juvenile's rights. See *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983) (burden of showing understanding waiver met).

Where Miranda warnings are given and the defendant acknowledges the defendant understands them, and on cross-examination on trial, the defendant affirmatively acknowledges that the defendant knew the defendant had the right to counsel when previously interviewed, this course of conduct clearly shows a waiver of the presence of retained counsel. *Williams v. State*, 244 Ga. 485, 260 S.E.2d 879 (1979).

Statements to police in absence of counsel. — Any statements given to police, by a defendant, prior to consultation with the defendant's attorney would, in the absence of a subsequent waiver, be inadmissible, but where a defendant voluntarily gives statements to police without the defendant's attorney present after being informed that the attorney had been appointed to represent the defendant, the statements would be admissible because the accused would have waived the right to have the attorney

present. *Berryhill v. Ricketts*, 242 Ga. 447, 249 S.E.2d 197 (1978), cert. denied, 441 U.S. 967, 99 S. Ct. 2418, 60 L. Ed. 2d 1073 (1979).

Defendant initiated conversations. — Even though the defendant made a request for counsel, because the defendant initiated a conversation with police officers and intelligently waived the right to have counsel present, videotaping of the defendant's confession did not violate the defendant's fifth or sixth amendment rights. *Mosher v. State*, 268 Ga. 555, 491 S.E.2d 348 (1997).

A defendant had knowingly and intelligently waived the defendant's right to counsel in speaking to an investigator and to an assistant district attorney (ADA) outside the presence of the defendant's attorney; the defendant had initiated these conversations and had insisted on talking after being reminded by the investigator and the ADA that they could not discuss the case in the absence of the defendant's attorney. *Davis v. State*, 281 Ga. 871, 644 S.E.2d 113 (2007).

When after the defendant had requested an attorney, he initiated further discussions with police, was re-apprised of the *Miranda* rights in full, and signed a written waiver prior to giving a statement, the taint of a prior *Edwards* violation with regard to two earlier statements was overcome and the last statement was properly admitted into evidence; furthermore, the trial court had considered conflicting expert testimony in conjunction with other evidence of the defendant's intelligence and had concluded that the defendant understood the defendant's rights and the consequences of waiving them. *Height v. State*, 281 Ga. 727, 642 S.E.2d 812 (2007).

Government-initiated conversations invalidating waiver. — Once a criminal defendant invokes the defendant's sixth amendment right to counsel, the defendant's subsequent waiver of that right, even if knowing and voluntary, is presumptively invalid if secured pursuant to government-initiated conversation, and statements obtained in violation of that rule may not be admitted in the state's case-in-chief. *Starks v. State*, 262 Ga. 244, 416 S.E.2d 520 (1992).

Waiver invalid notwithstanding earlier brief consultation with attorney. — Defendant's waiver of the defendant's right to counsel, made at a police-initiated interrogation after the defendant had invoked the

right to counsel, was invalid, notwithstanding the fact that the defendant had earlier been allowed to consult with an attorney briefly on the afternoon of the defendant's interrogation. *Roper v. State*, 258 Ga. 847, 375 S.E.2d 600, cert. denied, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989).

Effect of guilty plea. — Where a person, without counsel, admits the person's guilt of crime and does not ask for or desire a trial, but wishes rather to plead guilty and submit to the mercy of the court, and freely and voluntarily enters such plea, the person's conduct is a competent and intelligent waiver of the person's constitutional right to assistance of counsel. *Erwin v. Sanford*, 27 F. Supp. 892 (N.D. Ga. 1939).

If the defendant is denied the constitutional right to effective assistance of counsel during the critical stage of arraignment, the defendant's guilty plea cannot be said to have been entered intelligently and voluntarily and it is error to refuse the defendant's motion to withdraw the plea. *Cannon v. State*, 136 Ga. App. 479, 221 S.E.2d 674 (1975).

If the accused has no counsel at the time of the accused's conviction a heavy burden rests upon the state to prove an effective waiver. It must substantiate a knowing waiver by evidence which is not so deficient in form that there is doubt as to whether the constitutional requirements have been observed. *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

Defendant who escaped during trial did not automatically waive the right to counsel at sentencing. *Golden v. Newsome*, 755 F.2d 1478 (11th Cir. 1985).

Interrogation not suspended in absence of unequivocal request for counsel. — Because the defendant was informed of the defendant's *Miranda* rights three times immediately preceding the interrogation in question, and where the defendant spoke with the defendant's spouse on the phone during a break in that interrogation, the defendant's statement to police that "my wife informed me to go get an attorney" could not be considered an equivocal request for counsel that required the officers to suspend the interrogation and seek clarification of the request. *State v. Summers*, 173 Ga. App. 24, 325 S.E.2d 419 (1984).

If, during interrogation, defendant's request for counsel centered on specific func-

Right to Counsel (Cont'd)**6. Waiver (Cont'd)**

tion to be served, such as counsel's presence at the administration of a polygraph test, continued interrogation without presence of counsel was not a violation of the defendant's right to counsel. *Berry v. State*, 254 Ga. 101, 326 S.E.2d 748 (1985), *aff'd*, 255 Ga. 466, 339 S.E.2d 711 (1986).

Where a defendant fails to sign the acknowledgement in a Uniform Traffic Citation Summons and Accusation, that the defendant has been advised of the right to counsel, and the judge fails to sign the portion stating that the judge has advised the defendant of this right, and there is no evidence in the record that the defendant voluntarily waived the right to counsel, a defendant who has been convicted under such circumstances has been denied the right to counsel, and the conviction is subject to reversal. *Swinney v. City of Atlanta*, 176 Ga. App. 823, 338 S.E.2d 52 (1985).

Hearing. — Because an accused who conducts the accused's own defense thereby relinquishes many of the important benefits associated with the right to counsel, a trial judge must conduct a waiver hearing to make sure that the accused understands the dangers and disadvantages of proceeding pro se. *Hance v. Zant*, 696 F.2d 940 (11th Cir.), *cert. denied*, 463 U.S. 1210, 103 S. Ct. 3544, 77 L. Ed. 2d 1393 (1983), *overruled on other grounds*, 762 F.2d 1383 (11th Cir. 1985), *vacated in part*, 478 U.S. 1016, 106 S. Ct. 3325, 92 L. Ed. 2d 732 (1986), 463 U.S. 1210, 103 S. Ct. 3544, 77 L. Ed. 2d 1393 (1983).

A trial judge must conduct a waiver hearing to make sure that the accused understands the risks of proceeding pro se. *Jackson v. James*, 839 F.2d 1513 (11th Cir. 1988).

Statement admissible even where counsel requested and subsequently waived. — Even where a defendant requests an attorney and subsequently waives that right and makes a statement, such statement will be admissible if found to be voluntarily made. Unless clearly erroneous, a trial court's finding as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal. *Baker v. State*, 157 Ga. App. 746, 278 S.E.2d 462 (1981).

Defendant's statement to the officer that the defendant would talk but would not sign

anything not only waived the right to remain silent but the right to the assistance of an attorney. *Graves v. State*, 180 Ga. App. 446, 349 S.E.2d 519 (1986).

Appellant's actions constituted waiver of counsel. — See *Singleton v. State*, 176 Ga. App. 733, 337 S.E.2d 350 (1985).

Effective waiver of counsel. — See *Callahan v. State*, 175 Ga. App. 303, 333 S.E.2d 179 (1985).

There was competent evidence, though conflicting, to authorize the trial court's finding that the state carried its burden of showing the defendant's initiation of the defendant's statements and the defendant's knowing, intelligent, and voluntary waiver of the defendant's right to counsel. *Brown v. State*, 258 Ga. 315, 368 S.E.2d 481, *cert. denied*, 488 U.S. 945, 109 S. Ct. 374, 102 L. Ed. 2d 363 (1988).

Although the defendant asserted the trial court compelled the defendant to proceed to trial without benefit of counsel and to represent the defendant, the record, when examined in toto, revealed that the defendant requested to have appointed counsel relieved and when this failed, by a combination of words and conduct, elected voluntarily, knowingly, and intelligently to represent oneself after adequately being advised, by the trial court during the hearing on the defendant's request, of the defendant's right to appointed counsel and of the perils of self-representation. The defendant's conduct throughout the trial was consistent with this election, and the trial court's finding that the election was freely and knowingly made was not reversed. *Stevens v. State*, 199 Ga. App. 563, 405 S.E.2d 713 (1991).

By merely asking if an attorney was present, the defendant did not make an unambiguous request for counsel during a custodial interrogation; because a detective testified that the detective interviewed the defendant for only 35 to 40 minutes immediately after the defendant's arrest and that the defendant was able to understand the detective and respond appropriately to questions, and because the trial court heard the audiotape of the interview, the trial court did not err in finding that the defendant knowingly and voluntarily waived the right to counsel, and admission of the statement was not improper. *Simon v. State*, 279 Ga. App. 844, 632 S.E.2d 723 (2006).

A defendant's videotaped statement was properly admitted into evidence after a detective advised the defendant of the right to an attorney and repeatedly asked the defendant if the defendant wanted an attorney before the defendant ultimately rejected the right to counsel. *Swanson v. State*, Ga. S.E.2d , 2007 Ga. LEXIS 351 (May 14, 2007).

Unauthorized waiver by counsel. — Where the state submitted the affidavit of trial counsel who averred only that at arraignment in this matter counsel waived jury trial but the defendant also submitted an affidavit in which the defendant stated that trial counsel never discussed with the defendant at any time during the defendant's representation the advantages and disadvantages of a jury trial and further asserted that the defendant did not "knowingly, intelligently, and willingly" waive the right to a jury trial, nor did the defendant "ask or permit" trial counsel to make such a representation at arraignment, the defendant was granted a new trial since the state had not met the burden of showing the waiver was made both intelligently and knowingly. *Hill v. State*, 181 Ga. App. 473, 352 S.E.2d 651 (1987).

Mass arraignment. — Municipal court failed to meet its responsibility to determine whether there had been a proper waiver of the right to counsel when, in the context of a mass arraignment, it informed defendant and other defendants of their rights, including the right to counsel. *Washington v. City of Atlanta*, 201 Ga. App. 876, 412 S.E.2d 624 (1991).

The acceptance of a guilty plea during a mass arraignment outside the presence of defendant's appointed public defender without any inquiry regarding defendant's relinquishment of her right to counsel required reversal. *Waire v. State*, 211 Ga. App. 69, 438 S.E.2d 142 (1993).

Burden of proof of waiver. — The burden is upon the prosecution to affirmatively establish a valid waiver of the right to counsel, and waiver may not be presumed from a silent record. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Standard of proof of waiver. — The burden rests upon the state to demonstrate clearly that the defendant knowingly and intelligently waived the right to counsel. *Smith v. State*, 132 Ga. App. 491, 208 S.E.2d 351 (1974).

Burden of proof that waiver was invalid.

— Where a defendant, without counsel, acquiesces in a trial resulting in the defendant's conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon the defendant to establish that the defendant did not competently and intelligently waive the constitutional right to assistance of counsel. This rule applies with even greater force if the judgment is entered upon an uncoerced plea of guilty freely and voluntarily made. *Erwin v. Sanford*, 27 F. Supp. 892 (N.D. Ga. 1939).

Trial court's conclusions as to waiver must be upheld unless clearly erroneous. — Because the trial court concludes that the accused had freely and voluntarily waived the rights to silence and an attorney and had chosen to give a statement, the appellate court must accept those factual determinations by the trial court unless those findings are shown to be clearly erroneous. *Lawrence v. State*, 235 Ga. 216, 219 S.E.2d 101 (1975).

7. Self-Representation

Defendant has right to proceed without counsel. — A defendant in a criminal trial has a constitutional right to proceed without counsel when the defendant voluntarily and intelligently elects to do so, and the state may not force a lawyer upon a defendant who properly asserts that right. *Lepiscopo v. United States*, 469 F.2d 650 (5th Cir. 1972); *Taylor v. Ricketts*, 239 Ga. 501, 238 S.E.2d 52 (1977); *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977); *Burney v. State*, 244 Ga. 33, 257 S.E.2d 543 (1979); *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980); *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981); *Hayes v. State*, 203 Ga. App. 143, 416 S.E.2d 347 (1992); 203 Ga. App. 906, 416 S.E.2d 347 (1992), cert. denied.

A state may not constitutionally hale a person into its criminal courts and force a lawyer upon that person, when that person insists that the person wants to conduct one's own defense. *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

Self representation when represented by counsel is in court's discretion. — If a party is represented by counsel, it is a matter

Right to Counsel (Cont'd)**7. Self-Representation (Cont'd)**

within the sound discretion of the trial judge upon timely request as to whether such party may or may not conduct part or all of the cause. Such limitation does not violate the constitutional right of an individual to defend oneself. *Hiatt v. State*, 144 Ga. App. 298, 240 S.E.2d 894 (1977).

There is no constitutional right for a defendant to act as co-counsel. *Cross v. United States*, 893 F.2d 1287 (11th Cir. 1990), cert. denied, 498 U.S. 849, 111 S. Ct. 138, 112 L. Ed. 2d 105 (1990).

A defendant is not entitled to represent oneself and also be represented by an attorney. *Moss v. State*, 196 Ga. App. 81, 395 S.E.2d 363 (1990).

Neither the state nor federal constitution provides a defendant with a right to simultaneous representation by counsel and self-representation. *Loden v. State*, 199 Ga. App. 683, 406 S.E.2d 103 (1991).

An individual does not have a right to hybrid representation. Rather, the decision to permit a defendant to proceed as cocounsel rests in the sound discretion of the trial court. *Cross v. United States*, 893 F.2d 1287 (11th Cir. 1990), cert. denied, 498 U.S. 849, 111 S. Ct. 138, 112 L. Ed. 2d 105 (1990).

Pro se demand invalid if defendant has counsel. — Because, at the time defendants filed their pro se demand for discharge pursuant to O.C.G.A. § 17-7-170 they were represented by counsel, the trial court was clearly authorized to find that that pro se demand was of no legal effect whatsoever. *Goodwin v. State*, 202 Ga. App. 655, 415 S.E.2d 472 (1992).

Defendant did not timely assert right to defend pro se because the defendant made the request after arguments on pre-trial motions, a jury had been selected and sworn, and completion of direct examination of the state's first witness, although the defendant had stated this wish several weeks earlier, but was discouraged by counsel. *Williams v. State*, 207 Ga. App. 595, 428 S.E.2d 648 (1993).

Denial of defendant's request to for self-representation, a request made after the testimony of the state's third witness, could not serve as the basis for reversal since a

defendant cannot frivolously change one's mind in midstream by asserting the right to self-representation in the middle of the trial. *Thaxton v. State*, 260 Ga. 141, 390 S.E.2d 841 (1990).

Trial judge may not impose co-counsel upon a defendant who has raised the right to self-representation. *Potts v. State*, 259 Ga. 812, 388 S.E.2d 678 (1990).

Defendant is not deprived of the defendant's constitutional rights when a trial court honors the defendant's request to conduct the defendant's own defense. *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

Demand for self-representation must be honored as timely if made before the jury is selected, absent an affirmative showing that it was a tactic to secure delay. *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977).

To invoke right, clear request required. — In order to invoke the right to self-representation and trigger the need for a hearing on the issue, a defendant must unambiguously communicate to the court the desire to proceed pro se. The request must be so clear that no reasonable person can say that the request was not made. *United States v. Moody*, 763 F. Supp. 589 (M.D. Ga. 1991), aff'd, 977 F.2d 1420 (11th Cir. 1992), cert. denied, 507 U.S. 944, 113 S. Ct. 1348, 122 L. Ed. 2d 729 (1993).

Because the defendant failed to make an unequivocal assertion of a right to self-representation, and raised no objection after being informed that defense counsel and an associate would assist in the defense, that right was not violated. *Moore v. State*, 280 Ga. App. 894, 635 S.E.2d 253 (2006).

Effect of improper questioning of defendant's knowledge of death penalty law. — Death penalty defendant was improperly denied the defendant's constitutional right to self-representation because the trial court properly found the defendant was mentally competent to waive the defendant's right to counsel, but, instead of determining if the defendant knowingly and intelligently waived the right to counsel, questioned the defendant about the knowledge of death penalty law, which was irrelevant to the defendant's ability to waive the defendant's

right to counsel, and the record showed the defendant had a sound general knowledge of the charges against the defendant and the trial process, understood the dangers of self-representation that were explained to the defendant, and knew the benefit counsel could provide. *Lamar v. State*, 278 Ga. 150, 598 S.E.2d 488 (2004).

Once the right to self-representation has been invoked initially, the trial court must conduct a hearing or engage the defendant in a colloquy to ensure that the defendant's decision is made knowingly, voluntarily, and intelligently. *Cross v. United States*, 893 F.2d 1287 (11th Cir. 1990), cert. denied, 498 U.S. 849, 111 S. Ct. 138, 112 L. Ed. 2d 105 (1990).

Trial court should conduct a hearing on the record in which the judge ensures that the decision to proceed pro se is being made knowingly and voluntarily. The judge should do more than ask pro forma questions; the judge should explain the difficulties inherent in any criminal trial, including the importance of evidentiary rules. *Strozier v. Newsome*, 871 F.2d 995 (11th Cir. 1989), cert. denied, 502 U.S. 930, 112 S. Ct. 350, 116 L. Ed. 2d 289 (1991).

Waiver hearing is beneficial though not essential. — Although a waiver hearing explaining the disadvantages of proceeding pro se is not essential under the sixth amendment, it is extremely beneficial. *Greene v. United States*, 880 F.2d 1299 (11th Cir. 1989), cert. denied, 494 U.S. 1018, 110 S. Ct. 1322, 108 L. Ed. 2d 498 (1990).

Although a defendant need not have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, the defendant should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that the defendant knows what the defendant is doing and the choice is made with eyes open. *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Record should contain findings as to validity of choice to proceed pro se. — Recognizing the dilemma facing trial courts when an accused expresses a desire to represent oneself, in future cases, the record should reflect a finding on the part of the trial court that the defendant has validly chosen to proceed pro se. The record should also show that this choice was made after the defendant was made aware of the defendant's

right to counsel and the dangers of proceeding without counsel. *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Where the record showed that the defendant was first represented by appointed counsel, discharged that attorney and hired counsel at the defendant's own expense, and later fired that attorney, it was clear that the defendant's choice was made after the defendant was aware of the right to counsel and that the defendant was aware of the dangers of proceeding without counsel. *Harris v. State*, 196 Ga. App. 796, 397 S.E.2d 68 (1990).

Defendant did not choose to proceed pro se. — Where defendant contended that defendant was wrongly convicted of four traffic misdemeanors because the trial court forced defendant to trial without counsel, the trial court's affidavit regarding its usual procedure in dealing with defendants who refused appointed counsel did not meet the state's burden to show that defendant made a knowing and intelligent decision to proceed pro se after being warned of the risks inherent in that choice; accordingly, a new trial was required. *Jones v. State*, 260 Ga. App. 251, 581 S.E.2d 315 (2003).

Trial court's failure to make inquiry of the defendant as to the defendant's background or experience and to warn the defendant of the dangers of proceeding without counsel was harmless error, where the court appointed an attorney to sit with the defendant during trial in order to advise the defendant as to procedural matters, where the court gave the defendant considerable latitude in the defendant's cross-examination and in the presentation of the defendant's defense, and the record disclosed that the defendant was well prepared to defend pro se and did so in a credible fashion. *McCook v. State*, 178 Ga. App. 276, 342 S.E.2d 757 (1986).

Nature of colloquy. — Defendant was improperly held in contempt and sentenced to two days imprisonment because a trial court failed to inform defendant of the dangers of self-representation and did not obtain from defendant a knowing waiver of the constitutional right to counsel where the only mention of counsel was a vague colloquy between defendant and the trial court. *Merritt v. State*, 261 Ga. App. 597, 583 S.E.2d 283 (2003).

When the competency of a defendant is placed in issue, it is not permissible to let a

Right to Counsel (Cont'd)**7. Self-Representation (Cont'd)**

possibly incompetent defendant represent oneself without the concurrent assistance of counsel. *Almond v. State*, 180 Ga. App. 475, 349 S.E.2d 482 (1986).

Trial court cannot deny the defendant freedom to self-representation if competent to make the choice. — even if the defendant obviously lacks the skill and knowledge necessary to present a good defense, and even if it seems that the choice would foreclose any likelihood of success because a defendant's technical legal knowledge, as such, is not relevant to an assessment of the defendant's knowing exercise of the right to proceed pro se. *Bell v. Hopper*, 511 F. Supp. 452 (S.D. Ga. 1981).

Defendant's admitted inability to represent oneself. — Where defendant requested self representation at trial but, upon hearing the trial court's warnings about self-representation admitted to being incapable of self-representation, the trial court did not err by proceeding with the trial with the previously appointed counsel representing defendant. Furthermore, the subsequent failure of defense counsel to object to the trial court's refusal of self representation was not ineffective assistance of counsel. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Denial of request when waiver not voluntary. — Defendant's complete lack of knowledge of the law and the basic essentials of conducting the defendant's own defense and lack of understanding of the nature of the defense being offered, meant that the defendant was not waiving the right to counsel knowingly and voluntarily. *Williams v. State*, 207 Ga. App. 595, 428 S.E.2d 648 (1993).

Defendant must abide by consequences of the defendant's choice. — A necessary corollary to the doctrine that a trial court cannot deny a defendant the freedom to choose to represent oneself so long as the defendant is competent to make the choice is that a defendant who makes this choice must abide by the consequences of this choice. *Bell v. Hopper*, 511 F. Supp. 452 (S.D. Ga. 1981).

No error after proper advice and assistance of counsel. — Because the defendant

chose to proceed pro se after being informed of the defendant's right to counsel and the dangers of proceeding without counsel, and after counsel was made available for the defendant's consultation and that attorney participated in the defense, there was no error in permitting the defendant to proceed pro se, particularly given the strength and simplicity of state's evidence. *Graham v. State*, 172 Ga. App. 660, 324 S.E.2d 518 (1984).

To constitute reversible error, the trial court's denial of an accused's request for self-representation must come after the defendant has made an unequivocal assertion of the right to represent oneself. *Hayes v. State*, 203 Ga. App. 143, 416 S.E.2d 347 (1992), cert. denied, 203 Ga. App. 906, 416 S.E.2d 347 (1992).

Defendant's request not to proceed pro se. — Because the defendant announced after the jury was empaneled that the defendant had dismissed the defendant's attorney and had no confidence in the attorney, the defendant also admitted that "I'm not qualified to defend myself, Your Honor ... I do want an attorney, but I'd like to have one that I have confidence in," it was evident the defendant requested different counsel rather than unequivocally asserting the desire to proceed pro se. *Hayes v. State*, 203 Ga. App. 143, 416 S.E.2d 347 (1992), cert. denied, 203 Ga. App. 906, 416 S.E.2d 347 (1992).

Request for change of counsel as dilatory tactic. — Where the trial court was authorized to conclude that defendant was attempting to use the demand for a change of counsel as a dilatory tactic, which was the functional equivalent of a knowing and voluntary waiver of appointed counsel, the court could properly proceed to trial with the defendant as pro se counsel. *Staples v. State*, 209 Ga. App. 802, 434 S.E.2d 757 (1993).

Failure of pro se defendant or court-appointed cocounsel to raise objection. — In prosecution for burglary, a defendant who elected to serve as the defendant's own lead counsel at trial in conjunction with appointed assistant counsel and made no objection when stipulated testimony was read into evidence could not contend that the defendant was denied effective assistance of counsel because the defendant's

assistant counsel did not object to the testimony's being read into evidence. *Wallis v. State*, 170 Ga. App. 354, 317 S.E.2d 331 (1984).

Refusal of cocounsel status not unconstitutional. — Defendant was not deprived of the defendant's constitutional right of self-representation through the trial court's refusal to permit the defendant to serve as cocounsel in the defendant's own defense. *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987).

Appointment of counsel after defendant fails to act as counsel valid. — Although the trial judge had originally given the defendant the right to self-representation but retracted that right and reappointed a public defender after the defendant refused to participate in the trial, the defendant was not denied the right to represent oneself. *Spencer v. State*, 176 Ga. App. 313, 335 S.E.2d 661 (1985).

Demand for law library by one in state custody. — A criminal defendant certainly has a right, correlative with the right to assistance of counsel, to dispense with counsel, and conduct the defense in *propria persona*, but having asserted this right, the defendant in the lawful custody of the state does not have the right to demand and receive for the defendant's use a \$15,000.00 law library. *Bell v. Hopper*, 511 F. Supp. 452 (S.D. Ga. 1981).

Prisoner who wishes to represent oneself on appeal is entitled protection against any unconstitutional discrimination or abuse of discretion in the dispensing of those privileges granted to the prison population as a whole. *Lee v. Stynchcombe*, 347 F. Supp. 1076 (N.D. Ga. 1972).

Violation of the accused's right to represent oneself as cocounsel may be harmless error. *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

Public defender may provide assistance to defendant. — The trial court did not abuse its discretion in acceding to the defendant's expressed preference to represent oneself rather than be represented by the public defender, while instructing the public defender to sit at the defense table and provide the defendant with such assistance during the trial as the defendant might desire. *Turner v. State*, 199 Ga. App. 836, 406 S.E.2d 512 (1991).

8. Counsel on Appeal

Accused as witness. — Trial court properly found that defense counsel was not ineffective in the representation of defendant, insofar as in advising defendant against testifying, the counsel adequately advised defendant against doing so in order to avoid: (1) corroboration of the victim's testimony; (2) subjecting defendant to the state's cross-examination on that issue; and (3) opening the door to testimony surrounding defendant's acquaintance and the circumstances of the acquaintance's death a few days after the offenses defendant allegedly committed. *Holman v. State*, 272 Ga. App. 890, 614 S.E.2d 124 (2005).

Adequate representation by counsel must be provided a criminal defendant through appeal. — Effective assistance of counsel "through appeal" means "through" to the very end of that first appeal. *Moye v. Georgia*, 330 F. Supp. 290 (N.D. Ga. 1971).

Purpose of right to counsel for indigents on appeal. — An indigent has the right to be represented by counsel on appeal of the defendant's conviction because a rich person enjoys the benefit of counsel's examination of the record, research of the law, and marshaling of arguments on person's behalf, while the indigent without counsel is forced to shift for oneself. *Reid v. State*, 235 Ga. 378, 219 S.E.2d 740 (1975).

Rights of indigent on appeal generally. — Indigent defendant is entitled to the appointment of counsel to assist the defendant on the defendant's first appeal and that appointed counsel must function in the active role of an advocate. *Goforth v. Dutton*, 409 F.2d 651 (5th Cir. 1969).

On an appeal granted or by right an indigent may not be denied assistance of counsel. *Moye v. Georgia*, 330 F. Supp. 290 (N.D. Ga. 1971).

Indigent has the right to appointed counsel to assist on direct appeal. *Roberts v. Caldwell*, 230 Ga. 223, 196 S.E.2d 444 (1973).

An indigent defendant has the right to be represented by counsel upon appeal of a criminal conviction, and the defendant has the right to be advised of and insist upon the right of appeal, subject to the right of appointed counsel not to be required to pursue a wholly frivolous appeal. *Reid v. State*, 235 Ga. 378, 219 S.E.2d 740 (1975).

Right to Counsel (Cont'd)**8. Counsel on Appeal (Cont'd)**

An indigent defendant is entitled to have counsel appointed to represent the defendant on the first level of appellate review. *Weber v. State*, 203 Ga. App. 356, 416 S.E.2d 868 (1992).

Indigency may not foreclose any phase of appellate review. — If the petitioner is granted an appeal in forma pauperis, all subsequent necessary proceedings until final decision on appeal represent steps in the trial of the case at which the petitioner is entitled to counsel. The fact that the appeal in forma pauperis is allowed is a finding by the court that the trial is not ended, but extends until final determination upon appeal. *Reid v. Sanford*, 42 F. Supp. 300 (N.D. Ga. 1941).

Once the state chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. *Moye v. Georgia*, 330 F. Supp. 290 (N.D. Ga. 1971).

Indigent who intends to appeal need not specifically request appointment of counsel. — An individual desiring an appeal need not, once a responsible state authority knows of the desire to appeal and knows of the status of indigency, specifically request appointment of appellate counsel. *Roberts v. Caldwell*, 230 Ga. 223, 196 S.E.2d 444 (1973).

Failure to provide indigent with appellate counsel. — The failure to grant an indigent defendant seeking initial review of the defendant's conviction the services of an advocate violates the petitioner's rights to fair procedure and equality under U.S. Const., amend. 14. *Chenoweth v. Smith*, 225 Ga. 572, 170 S.E.2d 235 (1969).

Lack of counsel for indigent during appeal of right. — Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel in a state criminal case, there has been a discrimination between the rich and the poor which violates U.S. Const., amend. 14. *Chenoweth v. Smith*, 225 Ga. 572, 170 S.E.2d 235 (1969).

Right to appointed counsel in habeas proceedings. — The United States Supreme Court has never held that prisoners have a constitutional right to counsel when mount-

ing collateral attacks upon their convictions; in federal habeas proceedings, appointment of counsel prior to an evidentiary hearing is necessary only when the process or the "interests of justice" require it. *McBride v. Sharpe*, 25 F.3d 962 (11th Cir. 1994), cert. denied, 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 401 (1994).

Record need not reflect that the defendant made a knowing and intelligent decision not to appeal before the defendant can be precluded from appellate review. *Murphy v. Balkcom*, 245 Ga. 13, 262 S.E.2d 784 (1980).

Valid waiver of appellate counsel. — The defendant knowingly, voluntarily, and intelligently waived the defendant's right to appellate counsel; furthermore, since the sixth amendment does not require the court to appoint standby counsel or counsel to assist in specific technical matters, the court will not do so. *United States v. Moore*, 903 F. Supp. 44 (S.D. Ga. 1995), aff'd without op, 106 F.3d 415 (11th Cir. 1997), cert. denied, 522 U.S. 849, 118 S. Ct. 137, 139 L. Ed. 2d 85 (1997).

Self-representation during appeal not ineffective. — Trial court's denial of defendant's motion to allow an out-of-time appeal without conducting an evidentiary appeal was not an abuse of discretion as defendant explained to the trial court that defendant decided, as a matter of strategy, to file a pro se motion in arrest of judgment under O.C.G.A. § 17-9-61 rather than an immediate direct appeal; there was no need to inquire further into whether defendant received ineffective assistance of counsel in failing to file an immediate direct appeal. *Smith v. State*, 263 Ga. App. 414, 587 S.E.2d 787 (2003).

Duty of attorney as to decision whether to appeal. — An attorney renders effective assistance of counsel with regard to the decision whether to appeal when the attorney advises the client of the client's appellate rights and does not preempt the client's decision to appeal. *Murphy v. Balkcom*, 245 Ga. 13, 262 S.E.2d 784 (1980).

Merely filing notice of appeal does not discharge that duty. — The requirement of effective assistance of counsel on appeal is not met by the mere filing of the notice to appeal without the submission of the requisite enumeration of errors, a brief, and oral

argument. *Moye v. Georgia*, 330 F. Supp. 290 (N.D. Ga. 1971).

Appointed counsel has no duty to press counsel's services upon reluctant recipients as part of the defendant's right to counsel on appeal. *Dixon v. Hopper*, 237 Ga. 811, 229 S.E.2d 656 (1976).

Procedure where counsel believes appeal to be frivolous. — If counsel finds the case for appeal to be wholly frivolous, after a conscientious examination of it, counsel should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed the indigent to raise any points that the indigent chooses; the court, not counsel, then proceeds, after a full examination of all the proceeding, to decide whether the case is wholly frivolous. *Byrd v. Smith*, 407 F.2d 363 (5th Cir. 1969); *Moye v. Georgia*, 330 F. Supp. 290 (N.D. Ga. 1971); *Bolick v. State*, 127 Ga. App. 542, 194 S.E.2d 302 (1972); *Thornton v. Ault*, 233 Ga. 172, 210 S.E.2d 683 (1974); *Reid v. State*, 235 Ga. 378, 219 S.E.2d 740 (1975); *Fegan v. State*, 154 Ga. App. 791, 270 S.E.2d 211 (1980).

Counsel not required to prepare brief setting forth meritless grounds. — The Constitution does not require an appeal of meritorious grounds by the counsel of an indigent defendant to be accompanied by a brief prepared by the counsel of meritless grounds urged by the defendant. *Reid v. State*, 235 Ga. 378, 219 S.E.2d 740 (1975).

Grounds as to which defendant, but not counsel, urges review. — An indigent defendant's right to be represented by counsel on appeal does not include the right to insist that appointed counsel enumerate as error specified rulings of the trial court as to which defendant, but not counsel, urges appellate review. *Reid v. State*, 235 Ga. 378, 219 S.E.2d 740 (1975).

If the court finds the appeal frivolous it may grant the request to withdraw and dismiss the appeal. *Byrd v. Smith*, 407 F.2d 363 (5th Cir. 1969); *Fegan v. State*, 154 Ga. App. 791, 270 S.E.2d 211 (1980).

If the court finds any of the issues arguable on their merits, it must then furnish counsel to argue the appeal. *Byrd v. Smith*, 407 F.2d 363 (5th Cir. 1969); *Fegan v. State*,

154 Ga. App. 791, 270 S.E.2d 211 (1980).

Unless counsel appointed to argue meritorious issues on appeal, a defendant is deprived of adequate representation of counsel on appeal in violation of U.S. Const., amend. 14. *Byrd v. Smith*, 407 F.2d 363 (5th Cir. 1969).

Although this procedure is not followed, constitutional requirements may yet be satisfied where the appellate court has carefully reviewed the transcript of the trial and given full consideration to all legal points that might be involved. *Bolick v. State*, 127 Ga. App. 542, 194 S.E.2d 302 (1972).

Where appointed counsel has examined the record, researched the law, and evaluated the arguments, the constitutional requirements have been met and the obligations of appellate counsel have been satisfied. *Reid v. State*, 235 Ga. 378, 219 S.E.2d 740 (1975).

Refusal of attorney to pursue an appeal of the defendant's conviction, where the defendant has escaped from custody and rendered the appeal dismissible as moot, does not constitute ineffective representation of counsel. *Johnson v. Caldwell*, 458 F.2d 505 (5th Cir. 1972).

What constitutes denial of counsel on appeal. — To constitute denial of right to counsel where trial attorney is retained it must be known to the court or some other responsible state official that the defendant is indigent and that the defendant desires to appeal. However, when the defendant is represented by court-appointed counsel a different standard applies, and the focus of the inquiry is not on what the defendant made known to the state, but on what the state, acting through court-appointed counsel, revealed to the defendant. *Thornton v. Ault*, 233 Ga. 172, 210 S.E.2d 683 (1974).

Standard of assistance on appeal. — Trial counsel did not render ineffective assistance in direct appeal of defendant's case. Claims that counsel could have written more effectively, cited additional cases, and presented issues in a more articulate manner failed to demonstrate that counsel's assistance fell below the standard of reasonably effective assistance; a court does not grade counsel's performance when assessing an ineffective assistance claim. *Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745 (1995), cert. denied, 516 U.S. 829, 116 S. Ct. 100, 133 L. Ed. 2d 54 (1995).

Right to Counsel (Cont'd)**8. Counsel on Appeal (Cont'd)**

Failure to fully inform client of appellate rights. — Representation is inadequate and the right of appeal is denied where appointed counsel fails to fully inform the client of the client's appellate rights. *Gregory v. United States*, 446 F.2d 498 (5th Cir. 1971); *Thornton v. Ault*, 233 Ga. 172, 210 S.E.2d 683 (1974).

An indigent accused is denied effective assistance of counsel at a critical stage of the criminal process when the court-appointed attorney fails to advise the accused of the right to appeal, the procedure and time limits involved, and of the accused's right to appointed counsel on appeal. *Lumpkin v. Smith*, 439 F.2d 1084 (5th Cir. 1971).

Abandonment of appeal by counsel without notice or consent. — Counsel's abandonment of a criminal appeal, without notice and without the defendant's consent, deprives the defendant of the right to counsel and the right to appeal. *Chapman v. United States*, 469 F.2d 634 (5th Cir. 1972).

Abandonment of appeal by appointed counsel without consent. — The right to appeal is violated if the appointed lawyer deliberately foregoes the direct appeal without first obtaining the client's consent. *Gregory v. United States*, 446 F.2d 498 (5th Cir. 1971); *Thornton v. Ault*, 233 Ga. 172, 210 S.E.2d 683 (1974).

Abandonment of appeal by retained counsel without notice. — Petitioner is denied the constitutionally protected right of counsel when the petitioner's retained trial counsel abandons the petitioner's requested appeal without notice. *Williams v. Hopper*, 243 Ga. 475, 254 S.E.2d 854 (1979).

Failure of privately-retained counsel to perfect an appeal, when requested to do so, amounts to such a dereliction of duty as to deprive the defendant of both the effective aid of counsel at a critical stage of the proceedings and the right to appeal. *Chapman v. United States*, 469 F.2d 634 (5th Cir. 1972).

Defendant may not complain of effectiveness of retained counsel. — If the defendant has privately retained counsel, counsel's tactics and abilities are attributed to the defendant, and the defendant cannot therefore complain of the ineffectiveness of counsel.

Allen v. Hopper, 234 Ga. 642, 217 S.E.2d 156 (1975).

Proof of denial of appellate counsel where defendant retained counsel at trial. — If the defendant is represented by retained counsel at the trial there are two prerequisites in showing denial of counsel for purposes of appeal: (1) it must be known to the court that the criminal defendant is indigent, and (2) it must be known to the court that the defendant wishes to appeal. *Goforth v. Dutton*, 409 F.2d 651 (5th Cir. 1969).

Failure of counsel to seek appeal despite belief that grounds exist. — If trial counsel, although believing that there are meritorious grounds for an appeal, deliberately fails to move for a new trial or to file a notice of appeal and also fails to advise the client of the grounds and of the time limits on taking an appeal, counsel is ineffective to the extent that U.S. Const., amend. 6's standards are not met. *Worts v. Dutton*, 395 F.2d 341 (5th Cir. 1968).

Ineffectiveness resulting in dismissal of appeal. — Ineffectiveness of appellate counsel can result in the dismissal of an appeal of right without violating the defendant's right to due process as long as the right to an appeal is protected by the availability of a remedy, such as an out-of-time appeal. *Rowland v. State*, 264 Ga. 872, 452 S.E.2d 756 (1995).

Dismissal of an appeal because of counsel's failure to timely file an appeal is a violation of due process because the defendant is thereby deprived of the effective assistance of counsel. *Campbell v. State*, 178 Ga. App. 814, 344 S.E.2d 745 (1986).

Counsel not necessary on appeal of probation-revocation order concerning evidentiary question. — If the only question on appeal of a probation-revocation order is an evidentiary one, or one that addresses itself to the discretion of the probation authorities, appointment of counsel will not be necessary. *Chamlee v. State*, 251 Ga. 519, 307 S.E.2d 501 (1983).

Free transcript for collateral attack on sentence. — While there is a basic right to a free transcript to perfect a timely direct appeal, there is no absolute right to a free transcript just so the prisoner may have it, and some justification for use in a habeas corpus or related proceeding must be shown in order to be entitled to such records in a

collateral attack on the sentence. *Garrett v. State*, 159 Ga. App. 27, 282 S.E.2d 683 (1981).

Effective assistance of counsel at trial and on first appeal. — The State of Georgia recognizes the right to effective assistance of counsel at trial and on first appeal as of right and has provided for ameliorative relief in the form of an out-of-time appeal. An appellant who is denied effective assistance of counsel in attempting to appeal a conviction shall be allowed, if the appellant so desires, to file an out of time appeal to the proper appellate court. *Brantley v. State*, 190 Ga. App. 642, 379 S.E.2d 627 (1989).

Furnishing of trial transcripts. — Because adequate and effective appellate review is impossible without a trial transcript or adequate substitute, states must provide trial records to inmates unable to buy them. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

Hearing required on motion for substitute counsel. — When the issue of the effective-

ness of appointed counsel is raised in motions for substitute counsel and for a new trial, the trial court, in order to insure that the defendant's sixth amendment right has been and will continue to be afforded, should conduct a hearing as to the basis of the defendant's motion for appointment of new counsel. Thus, the trial court's failure to conduct a hearing on the defendant's claim of ineffective assistance of counsel was error. *DeLoach v. State*, 198 Ga. App. 880, 403 S.E.2d 866 (1991).

Effectiveness of appellate counsel. — Trial court erred in denying petitioner's application for habeas corpus relief, as petitioner's appellate counsel was ineffective for failing to contend on appeal that the state failed to establish the chain of custody of the substance identified at trial as cocaine, as any competent attorney would have raised that issue on appeal, the appellate attorney provided deficient representation in failing to do so, and the error was prejudicial to the petitioner because the error, if raised, would have led to a different outcome on appeal. *Phillips v. Williams*, 276 Ga. 691, 583 S.E.2d 4 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Compensation for representation at commitment hearing. — Where accused is not indicted by grand jury, court-appointed counsel representing the accused at a com-

mitment hearing is not entitled to payment by the county for legal services. 1962 Op. Att'y Gen. p. 120.

RESEARCH REFERENCES

Am. Jur. Trials. — Defending Against Claim of Ineffective Assistance of Counsel, 30 Am. Jur. Trials 607.

Strategies for Enforcing the Right to Effective Representation, 46 Am. Jur. Trials 571.

ALR. — Discharge of accused under a limitation statute as a bar to a subsequent prosecution for the same offense, 3 ALR 519.

Right of defendant in criminal case to conduct defense in person, 17 ALR 266; 77 ALR2d 1233.

Right to jury trial in case of seizure of property alleged to be illegally used, 17 ALR 568; 50 ALR 97.

Incompetency, negligence, illness or the

like of counsel as ground for new trial or reversal in criminal case, 24 ALR 1025; 64 ALR 436.

Constitutionality of statute making certificate of result of chemical analysis evidence, 29 ALR 289.

Presence of accused during view by jury, 30 ALR 1357; 90 ALR 597.

Constitutionality of statute requiring party demanding jury to pay jury fees or charges incidental to summoning or impaneling of jurors, 32 ALR 865.

Constitutional guaranty of right to appear by counsel as applicable to misdemeanor case, 42 ALR 1157.

Remedy for delay in bringing accused to trial or to retrial after reversal. 58 ALR 1510.

Comment by prosecution on failure of defendant to call character witnesses, 80 ALR 227.

Statutes in relation to subject-matter or form of instructions by court as impairing constitutional right to jury trial, 80 ALR 906.

Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel, 84 ALR 544.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case, 90 ALR 377.

Brief voluntary absence of defendant from courtroom during trial of criminal case as ground of error, 100 ALR 478.

Waiver of right to jury trial as operative after expiration of term during which is was made, or as regards subsequent trial, 106 ALR 203.

Constitutional or statutory right of accused to speedy trial as affected by his incarceration for another offense, 118 ALR 1037.

Waiver or loss of defendant's right to speedy trial in criminal case, 129 ALR 572; 57 ALR2d 302.

Admissibility of plea of guilty at preliminary hearing, 141 ALR 1335.

Right of defendant to waive right of trial by jury where he is not represented by counsel, 143 ALR 445.

Revel of judgment by constructive service of process upon nonresident, as affected by due process and full faith and credit clauses, 144 ALR 403.

Relief in habeas corpus for violation of accused's right to assistance of counsel, 146 ALR 369.

Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed, for, a co-defendant, 148 ALR 183.

Plea of guilty without advice of counsel, 149 ALR 1403.

Exclusion of public during criminal trial, 156 ALR 265; 48 ALR2d 1436.

Competency of juror as affected by his participation in a case of similar character, but not involving the party making the objection, 160 ALR 753.

Right to aid of counsel in application or hearing for habeas corpus, 162 ALR 922.

Requiring submission to physical examination or test as violation of constitutional rights. 164 ALR 967; 25 ALR2d 1407.

Effect of, and remedies for, exclusion of eligible class of persons from jury to list in civil case, 166 ALR 1422.

Duty to advise accused as to right to assistance of counsel, 3 ALR2d 1003.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction, 9 ALR2d 661.

Absence of accused during making of tests or experiments as affecting admissibility of testimony concerning them, 17 ALR2d 1078.

Absence of accused at return of verdict in felony case, 23 ALR2d 456.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 ALR2d 780.

Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination, 45 ALR2d 1354.

Withdrawal of waiver of right to jury trial in criminal case, 46 ALR2d 919.

Accused's right to poll of jury, 49 ALR2d 619.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 55 ALR2d 1072.

Right to an appointment of counsel in juvenile court proceedings, 60 ALR2d 691.

Counsel's right in civil case to argue law or to read lawbooks to the jury, 66 ALR2d 9.

Power to try, in his absence, one charged with misdemeanor, 68 ALR2d 638.

Incompetency of counsel chosen by accused as affecting validity of conviction, 74 ALR2d 1390; 2 ALR4th 27; 2 ALR4th 807.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial, 85 ALR2d 980.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law, 85 ALR2d 1111; 23 ALR4th 955.

Right to counsel in insanity or incompetency adjudication proceedings, 87 ALR2d 950.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 ALR2d 796.

Admissibility of confession, admission, or incriminatory statement of accused as af-

fectured by fact that it was made after indictment and in the absence of counsel, 90 ALR2d 732.

Sufficiency of waiver of full jury, 93 ALR2d 410.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution, 93 ALR2d 747.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof, 97 ALR2d 549.

Accused's right to assistance of counsel at or prior to arraignment, 5 ALR3d 1269.

Scope and extent and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 ALR3d 1360.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 ALR3d 181.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 ALR3d 834.

Maintenance of lawyer reference system by organization having no legal interest in proceedings, 11 ALR3d 1206.

Accused's right to interview witness held in public custody, 14 ALR3d 652.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 ALR3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 ALR3d 1321.

Right of attorney appointed by court for indigent accused to, and court's power to award, compensation by public, in absence of statute or court rule, 21 ALR3d 819.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under *Miranda v. Arizona*, 25 ALR3d 1076.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation, 31 ALR3d 565.

Right to assistance by counsel in administrative proceedings, 33 ALR3d 229.

Circumstances giving rise to conflict of interest between or among criminal co-defendants precluding representation by same counsel, 34 ALR3d 470.

Applicability, in proceedings under stat-

utes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Right of indigent defendant in criminal case to aid of state by appointment of investigator or expert, 34 ALR3d 1256; 71 ALR4th 638; 72 ALR4th 874; 74 ALR4th 388; 81 ALR4th 259; 85 ALR4th 19.

Permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case, 37 ALR3d 238.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case, 38 ALR3d 1012.

Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

Right of exonerated arrestee to have fingerprints, photographs, or other criminal identification or arrest records expunged or restricted, 46 ALR3d 900.

Statute reducing number of jurors as violative of right to trial by jury, 47 ALR3d 895.

Censorship of convicted prisoners' "legal" mail, 47 ALR3d 1150.

Censorship of convicted prisoners' "non-legal" mail, 47 ALR3d 1192.

Right of accused to have press or other media representatives excluded from criminal trial, 49 ALR3d 1007.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice, 50 ALR3d 760.

Right to counsel in contempt proceedings, 52 ALR3d 1002.

Admissibility of videotape film in evidence in criminal trial, 60 ALR3d 333; 41 ALR4th 812; 41 ALR4th 877.

Sufficiency of notice and hearing before revocation or suspension of motor vehicle driver's license, 60 ALR3d 427.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Right to withdraw guilty plea in state criminal proceeding where court refuses to grant concession contemplated by plea bargain, 66 ALR3d 902.

Indigent accused's right to choose particular counsel appointed to assist him, 66 ALR3d 996.

Separation of jury in criminal case before introduction of evidence — modern cases, 72 ALR3d 100.

Separation of jury in criminal case during trial — modern cases, 72 ALR3d 131.

Separation of jury in criminal case after submission of cause — modern cases, 72 ALR3d 248.

Law enforcement officers as qualified jurors in criminal cases, 72 ALR3d 895.

Former law enforcement officers as qualified jurors in criminal cases, 72 ALR3d 958.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance, 73 ALR3d 725.

Right to a jury trial on motion to vacate judgment, 75 ALR3d 894.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 ALR3d 769.

Illness or incapacity of judge, prosecuting officer, or prosecution witness as justifying delay in bringing accused speedily to trial — state cases, 78 ALR3d 297.

Antagonistic defenses as ground for separate trials of co-defendants in criminal case, 82 ALR3d 245.

Right of defendants in prosecution for criminal conspiracy to separate trials, 82 ALR3d 366.

Right to cross-examine witness as to his place of residence, 85 ALR3d 541.

Sufficiency of courtroom facilities as affecting rights of accused, 85 ALR3d 918.

Propriety and prejudicial effect of permitting nonparty to be seated at counsel table, 87 ALR3d 238.

Disruptive conduct of accused in presence of jury as ground for mistrial or discharge of jury, 89 ALR3d 960.

Propriety and prejudicial effect of gagging, shackling, or otherwise physically restraining accused during course of state criminal trial, 90 ALR3d 17.

Interference with defense counsel's pre-trial interrogation of witnesses, 90 ALR3d 1231.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 ALR3d 1138.

Admissibility, as against interest, in criminal case of declaration of commission of criminal act, 92 ALR3d 1164.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case, 94 ALR3d 15.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 ALR3d 852.

Validity and efficacy of accused's waiver of unanimous verdict, 97 ALR3d 1253.

Accused's right to represent himself in state criminal proceedings — modern state cases, 98 ALR3d 13.

Validity, construction, and application of interstate agreement on detainers, 98 ALR3d 160.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 ALR3d 1060.

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case as ground of complaint by accused, 99 ALR3d 1261.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client, 2 ALR4th 27.

Waiver or estoppel in incompetent legal representation cases, 2 ALR4th 807.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial, 3 ALR4th 601.

Right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination, 3 ALR4th 910.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters, 6 ALR4th 1208.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 ALR4th 180.

Adequacy of defense counsel's representation of criminal client regarding venue and recusal matters, 7 ALR4th 942.

Validity of state statute prohibiting award of government contract to person or business entity previously convicted of bribery or attempting to bribe state public employee, 7 ALR4th 1202.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining, 8 ALR4th 660.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense, 8 ALR4th 1160.

Waiver, after not guilty plea, of jury trial in felony case, 9 ALR4th 695.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas, 10 ALR4th 8.

Right of indigent criminal defendant to polygraph test at public expense, 11 ALR4th 733.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 ALR4th 318.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 ALR4th 533.

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Continuances at instance of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial, 16 ALR4th 1283.

Conditions interfering with accused's view of witness as violation of right of confrontation, 19 ALR4th 1286.

Waiver of right to counsel by insistence upon speedy trial in state criminal case, 19 ALR4th 1299.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea, 23 ALR4th 251.

Sufficiency of access to legal research facilities afforded defendant confined in state prison or local jail, 23 ALR4th 590.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions, 23 ALR4th 955.

Existence and extent of right of litigant in civil case, or of criminal defendant, to represent himself before state appellate courts, 24 ALR4th 430.

Validity and efficacy of minor's waiver of right to counsel — modern cases, 25 ALR4th 1072.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial, 29 ALR4th 659.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial, 31 ALR4th 676.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 ALR4th 429.

Propriety of order forbidding news media from publishing names and addresses of jurors in criminal cases, 36 ALR4th 1126.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury, 37 ALR4th 304.

Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

Application of speedy trial statute to dismissal or other termination of prior indictment and bringing of new indictment or information, 39 ALR4th 899.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 812.

Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution, 41 ALR4th 877.

Constitutionality with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Drunk driving: motorist's right to private sobriety test, 45 ALR4th 11.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 ALR4th 310.

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony, 46 ALR4th 1047.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 ALR4th 367.

Paternity proceedings: right to jury trial, 51 ALR4th 565.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 ALR4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 ALR4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 ALR4th 1196.

False light invasion of privacy — accusation or innuendo as to criminal conduct, 58 ALR4th 902.

Closed-circuit television witness examination, 61 ALR4th 1155.

Relief available for violation of right to counsel at sentencing in state criminal trial, 65 ALR4th 183.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of guilty plea — state cases, 65 ALR4th 719.

Validity of law or rule requiring state court party who requires jury trial in civil case to pay costs associated with jury, 68 ALR4th 343.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time, 70 ALR4th 632.

Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 ALR4th 638.

Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 ALR4th 874.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 ALR4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis, 74 ALR4th 388.

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public, 74 ALR4th 476.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 ALR4th 536.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 ALR4th 1102.

Right of indigent defendant in state criminal case to assistance of investigators, 81 ALR4th 259.

What constitutes assertion of right to counsel following Miranda warnings — state cases, 83 ALR4th 443.

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When does delay in imposing sentence violate speedy trial provision, 86 ALR4th 340.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant, 86 ALR4th 698.

Necessity that waiver of accused's right to testify in own behalf be on the record, 90 ALR4th 586.

Ineffective assistance of counsel: compulsion, duress, necessity, or "hostage syndrome" defense, 8 ALR5th 713.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 ALR5th 871.

Criminal defendant's representation by person not licensed to practice law as violation of right to counsel, 19 ALR5th 351.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-Batson state cases, 20 ALR5th 398; 47 ALR5th 259.

Determination of indigency entitling accused in state criminal case to appointment of counsel on appeal, 26 ALR5th 765.

Right to appointment of counsel in contempt proceedings, 32 ALR5th 31.

Right of accused to have evidence or court proceedings interpreted, because accused or other participant in proceedings is not proficient in the language used, 32 ALR5th 149.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 ALR5th 423.

Adequacy of defense counsel's representation of criminal client — issues of mental matters concerning persons, other than counsel's client, who are involved in criminal case, 80 ALR5th 55.

Examination and challenge of state case jurors on basis of attitudes toward homosexuality, 80 ALR5th 469.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving — cases focusing on presence of inculpatory evidence other than statements by accused and cases focusing on absence of particular inculpatory evidence, 90 ALR5th 225.

Adequacy of defense counsel's representa-

tion of criminal client-conduct at trial regarding issues of insanity, 95 ALR5th 125.

Denial of, or interference with, accused's right to have attorney initially contact accused, 96 ALR5th 327.

Validity and efficacy of minor's waiver of right to counsel — cases decided since application of *Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), 101 ALR5th 351.

Right to jury trial in child neglect, child abuse, or termination of parental rights proceedings, 102 ALR5th 227.

Denial of accused's request for initial contact with attorney — drunk driving cases, 109 ALR5th 611.

Validity and application of computerized jury selection practice or procedure, 110 ALR5th 329.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Motions and objections during trial and matters other than pretrial motions, 117 ALR5th 513.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving — Cases focusing on presence of inculpatory statements, 124 ALR5th 1.

Modern status of rule as to test in federal court of effective representation by counsel, 26 ALR Fed. 218.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel — Federal cases, 53 ALR Fed. 140.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration

consequences of guilty plea—federal cases, 90 ALR Fed. 748.

Adequacy of counsel's representation of alien in deportation proceedings, 91 ALR Fed. 394.

Adequacy of counsel's representation of alien in exclusion proceedings, 92 ALR Fed. 656.

Ineffective assistance of counsel: failure to seek judicial recommendation against deportation under § 241(b) of Immigration and Nationality Act of 1952 (8 USCS § 1251(b)), 94 ALR Fed. 868.

Trial court's order that accused and his attorney not communicate during recess in trial as reversible error under sixth amendment guaranty of right to counsel, 95 ALR Fed. 601.

Waiver of minor's right to counsel in deportation proceedings, 98 ALR Fed. 879.

Excessiveness or adequacy of awards of compensatory damages in civil actions for deprivation of rights under 42 USCS § 1983 — modern cases, 99 ALR Fed. 501.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of waiver of jury trial, 103 ALR Fed. 867.

Grounds for disqualification of criminal defendant's chosen and preferred attorney in federal prosecution, 127 ALR Fed. 667.

Who are "agricultural laborers" exempt from coverage of National Labor Relations Act § 2(3) (29 USCS § 152(3)), 130 ALR Fed. 1.

Right of enemy combatant to counsel, 184 ALR Fed. 527.

[AMENDMENT VII]

[Trial by Jury in Civil Cases]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Cross references. — Right to trial by jury, §§ 9-11-38, 9-11-39.

Editor's notes. — This amendment curtails the appellate jurisdiction of the United States Supreme Court granted in U.S. Const., art. III, sec. II, as to questions of fact.

Law reviews. — For article, "Jury Trials in

Contempt Cases," see 20 Ga. B.J. 297 (1957). For article on the judicial development of the due process clause of U.S. Const., Amend. 14 and the selective incorporation of the Bill of Rights, see 22 Mercer L. Rev. 533 (1971). For article, "Mass Torts and Litigation Disasters," see 20 Ga. L. Rev. 429

(1986). For article, "A Comment on Mass Torts and Litigation Disasters," see 20 Ga. L. Rev. 455 (1986). For article, "The Endangered Right of Jury Trials in Dispospossories," see 24 Ga. St. B.J. 126 (1988). For article, "The Structure of Rights," see 27 Ga. L. Rev. 415 (1993). For article, "Rights as Trumps," see 27 Ga. L. Rev. 463 (1993). For article, "Further Reflections on Rights and Interests: A Reply," see 27 Ga. L. Rev. 489 (1993). For article, "Utopian Dangers: Chemerinsky's 'Right to Minimum Subsistence'," see 44 Mercer L. Rev. 553 (1993). For article, "The Peremptory Challenge: A Lost Cause," see 44 Mercer L. Rev. 579 (1993). For article, "Article II Courts," see 44 Mercer L. Rev. 825 (1993). For article on constitutional criminal procedure, see 52 Mercer L. Rev. 1305 (2001). For article, "The Right to a Jury Decision on Sentencing Facts after Booker: What the Seventh Amendment Can Teach the Sixth," 39 Ga. L. Rev. 895 (2005).

For note discussing televised and photographic coverage of court proceedings in light of the individuals' right to a fair trial, see 29 Mercer L. Rev. 1099 (1978). For note, "In re Grabill Corporation; Appeal of NCNB

National Bank of North Carolina: Four to One Against Jury Trials in Bankruptcy Courts," see 44 Mercer L. Rev. 1415 (1993).

For comment on *Hibdon v. United States*, 204 F.2d 834 (6th Cir. 1953), reversing a felony conviction decided by a majority verdict upon the accused's waiver of a unanimous verdict induced by the trial court, see 16 Ga. B.J. 234 (1953). For comment discussing limits on the military's jurisdiction and the constitutional rights of servicemen in light of *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), see 21 Mercer L. Rev. 311 (1969). For comment discussing the forcible medication of involuntarily committed mental patients with antipsychotic drugs in light of *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), see 15 Ga. L. Rev. 739 (1981). For comment on *Cotten v. Witco Chem. Corp.*, 651 F.2d 274 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3565 (Jan. 18, 1982), and discussion of complex cases and the seventh amendment, see 33 Mercer L. Rev. 1353 (1982). For comment, "Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court," see 37 Emory L.J. 171 (1988).

JUDICIAL DECISIONS

Scope and purpose generally. — U.S. Const., amend. 7 preserves the right which existed under the common law when the amendment was adopted: The phrase "common law" found in U.S. Const., amend. 7 is used in contradistinction to equity, admiralty, and maritime jurisprudence. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. It does not apply where the proceeding is not in the nature of a suit at common law. *Wirtz v. Alapaha Yellow Pine Prods., Inc.*, 217 F. Supp. 465 (M.D. Ga. 1963).

U.S. Const., amend. 7 preserves to litigants the right to jury trial in suits at common law not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. In a just sense, U.S. Const., amend. 7 then may

well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403 (N.D. Ga. 1976), aff'd, in part and rev'd in part, 570 F.2d 1226 (5th Cir. 1978).

By "common law," the framers of U.S. Const., amend. 7 meant not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. *FDIC v. New London Enters., Ltd.*, 619 F.2d 1099 (5th Cir. 1980).

U.S. Const., amend. 7 was declaratory of the existing law, for it required only that jury trial in suits at common law was to be "preserved." It thus did not purport to require a jury trial where none was required before. *Atlas Roofing Co. v. Occupational*

Safety & Health Review Comm'n, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977).

The phrase "suits at common law" has been construed to refer to cases tried prior to the adoption of U.S. Const., amend. 7 in courts of law in which jury trial was customary, as distinguished from courts of equity or admiralty, in which jury trial was not. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977).

Right extends beyond common-law actions recognized at time of adoption. — Although the thrust of U.S. Const., amend. 7 was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. *FDIC v. New London Enters., Ltd.*, 619 F.2d 1099 (5th Cir. 1980).

This right extends beyond common-law causes of action that existed at the time of the amendment's adoption. *Sibley v. Fulton DeKalb Collection Serv.*, 677 F.2d 830 (11th Cir. 1982).

U.S. Const., amend. 7 requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty. *Sibley v. Fulton DeKalb Collection Serv.*, 677 F.2d 830 (11th Cir. 1982).

Right to jury trial only when issues of material fact in dispute. — The right to a jury trial is not infringed where the jury would have no role because there are no issues of material fact in dispute. *CM3, Inc. v. Associated Realty Investors/Prado*, 201 Ga. App. 428, 411 S.E.2d 320 (1991).

Jury trial is allowed and guaranteed only for the resolution of legal claims. *Schofield v. Stetson*, 459 F. Supp. 998 (M.D. Ga. 1978).

If a case involves only equitable issues, trial by jury is not guaranteed by U.S. Const., amend. 7. *Duncan v. First Nat'l Bank*, 597 F.2d 51 (5th Cir. 1979).

Where the whole case is equitable in nature there is no constitutional or statutory right to a jury trial. *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6 (5th Cir. 1981).

Jury trial dependent on whether issue is legal or equitable. — Whether a party is entitled to a jury trial depends on whether the issue before the court is legal or equita-

ble. *Stamps v. Sexton Bros. Tire Co.* (In re Major Tire Co.), 64 Bankr. 305 (Bankr. N.D. Ga. 1986).

Where legal claims are joined with equitable claims, the right to a jury trial on the legal claims, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal relief sought as being incidental to the equitable claim. *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403 (N.D. Ga. 1976), aff'd in part and rev'd in part, 570 F.2d 1226 (5th Cir. 1978).

Jury trial if legal issues. — Where both legal and equitable issues are presented in a case, even when the legal issues are incidental to the equitable issues, the legal issues must be presented to a jury. *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232 (N.D. Ga. 1968), rev'd on other grounds, 421 F.2d 888 (5th Cir. 1970).

When legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both. *Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir.), cert. denied, 464 U.S. 826, 104 S. Ct. 97, 78 L. Ed. 2d 102 (1983).

It makes no difference if the equitable cause clearly outweighs the legal cause so that the basic issue of the case taken as a whole is equitable; as long as any legal cause is involved the jury rights it creates control. *United States v. McMahan*, 569 F.2d 889 (5th Cir. 1978); *Duncan v. First Nat'l Bank*, 597 F.2d 51 (5th Cir. 1979).

Loss of right to jury trial through prior determination of equitable claims. — Where both legal and equitable issues are presented in a single case, only under the most imperative circumstances can the right to a jury trial of legal issues be lost through prior determination of equitable claims. This applies whether the trial judge chooses to characterize the legal issues presented as incidental to equitable issues or not. *United States v. McMahan*, 569 F.2d 889 (5th Cir. 1978).

Right applies to federal courts. — The right of trial by jury, under U.S. Const., amend. 7, applies to federal courts. *Porter v. Watkins*, 217 Ga. 73, 121 S.E.2d 120 (1961).

Right does not apply to suits in state courts. *Butler v. Claxton*, 221 Ga. 620, 146 S.E.2d 763 (1966); *Smith v. Milliken & Co.*, 189 Ga. App. 897, 377 S.E.2d 916 (1989).

Trial court's entry of summary judgment against a life estate claimant in an action against a former daughter-in-law did not violate seventh amendment rights, as that federal constitutional amendment did not apply to suits in state court; moreover, the claimant's rights were not infringed because summary judgment was granted due to the finding that there were no issues of material fact in dispute. *Crane v. Poteat*, 275 Ga. App. 669, 621 S.E.2d 501 (2005), cert. denied, 127 S. Ct. 52, 2006 U.S. LEXIS 5965, 166 L. Ed. 2d 51 (2006).

Trial court's dismissal of a driver's negligence lawsuit filed against an insured's insurer did not deprive the driver of any seventh amendment right to a jury trial or right of access to the courts under Ga. Const. 1983, Art. I, Sec. I, Para. XII, given that the seventh amendment did not apply to suits in state courts and Ga. Const. 1983, Art. I, Sec. I, Para. XII dealt with a litigant's choice of either self-representation or representation by counsel, not access to the courts. *Crane v. Lazaro*, 281 Ga. App. 127, 635 S.E.2d 319 (2006), cert. denied, 2006 Ga. LEXIS 907 (Ga. 2006); cert. dismissed, mot. denied, 2007 U.S. LEXIS 1335 (U.S. 2007).

Effect of Federal Rules of Civil Procedure. — The Federal Rules of Civil Procedure have not abrogated the common-law right to jury consideration of legal issues, such as title to land in trespass and ejectment actions, after timely demand. *United States v. Williams*, 441 F.2d 637 (5th Cir. 1971).

Request for attorney fees. — The mere inclusion of a request for attorney's fees, where the plaintiff's other claims are exclusively equitable in nature, does not entitle the defendant to a jury trial pursuant to the seventh amendment. *Wheless v. Gelzer*, 765 F. Supp. 741 (N.D. Ga. 1991).

Right to revoke the waiver of the right to a jury trial is subject only to proof of special circumstances showing that its exercise would substantially delay or impede the cause of justice. *Brumbalow v. State*, 128 Ga. App. 581, 197 S.E.2d 380 (1973).

Parties may waive unanimity requirements in civil cases. — If the parties to a civil case may validly agree to have their rights determined without any jury or with a jury of 11 or less members, it follows that they may with equal validity consent to accept a verdict arrived at by a specified number of jurors,

even that of a bare majority. A party may waive constitutional rights designed for that party's benefit and the Federal Rules of Civil Procedure authorize civil litigants to stipulate for majority verdicts. *Phillips v. Meadow Garden Hosp.*, 139 Ga. App. 541, 228 S.E.2d 714 (1976).

Parties may not be deprived of unanimity requirement by statute. — In federal courts, civil litigants cannot be deprived by statute of their right under U.S. Const., amend. 7 to a unanimous verdict. *Phillips v. Meadow Garden Hosp.*, 139 Ga. App. 541, 228 S.E.2d 714 (1976).

U.S. Const., amend. 7 requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973).

U.S. Const., amend. 7 permits expert opinion to have the force of fact when based on facts which sustain it. *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973).

U.S. Const., amend. 7 does not require that inferences be made from withheld facts. — U.S. Const., amend. 7 does not require that experts or the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has the evidence of them in the party's peculiar knowledge and possession, but elects to keep it so. *Lashley v. Ford Motor Co.*, 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973).

Summary judgment is authorized where there are no issues of material fact in dispute. In such circumstances the jury, as trier of fact, has no role, and appellant's rights under U.S. Const., amend. 7 are not infringed. *Barrett v. Independent Order of Foresters*, 625 F.2d 73 (5th Cir. 1980).

When a buyer claiming the buyer was fraudulently sold real estate argued, on appeal, that the trial court's summary dismissal of the buyer's complaint under O.C.G.A. §§ 9-11-12(b)(6) and 9-11-56 deprived the buyer of the right to a jury trial, this claim

had no merit because, when the opposing parties filed an affidavit with their motion for summary judgment claiming that the misrepresentation alleged in the buyer's complaint did not occur, and the buyer did not respond to that motion, the evidence in the record was undisputed that the misrepresentation, which was the crux of the buyer's claims, did not happen, so there was no fact-finding role for a jury to perform and therefore no infringement on the buyer's seventh amendment rights. *Crane v. Samples*, 267 Ga. App. 895, 600 S.E.2d 624 (2004), cert. denied, 544 U.S. 927, 125 S. Ct. 1650, 161 L. Ed. 2d 488 (2005).

Remittitur as condition precedent to denial of new trial. — Where a definite and readily ascertainable portion of a verdict should not have been awarded to the plaintiff, a court, as a matter of law, can condition the denial of a new trial on a remittitur of that portion of the judgment by the plaintiff. Such a remittitur does not infringe upon U.S. Const., amend. 7's guaranty of trial by a jury. *Woodbury v. Whitmire*, 246 Ga. 349, 271 S.E.2d 491 (1980).

Conditioning the grant of defendant's motion for a new trial on the plaintiff's refusal to remit portion of the jury award that the court determined was excessive did not violate plaintiff's constitutional right to a jury trial. *Lisle v. Willis*, 265 Ga. 861, 463 S.E.2d 108 (1995).

Matters assigned to administrative agencies. — When Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating U.S. Const., amend. 7's injunction that jury trial is to be preserved in suits at common law. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977).

Jury trials are incompatible with the whole concept of administrative adjudication and would substantially interfere with an agency's role in the statutory scheme. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 518 F.2d 990 (5th Cir. 1975), aff'd, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977).

Failure to meet rule-required prerequisites to trial. — No constitutional right to a trial exists when, after notice and a reason-

able opportunity, a party fails to make the rule-required demonstration that some dispute of material fact exists which a trial could resolve. *Oglesby v. Terminal Transp. Co.*, 543 F.2d 1111 (5th Cir. 1976).

Where a legislature creates an action unheard of at common law, U.S. Const., amend. 7 requires a trial by jury if that action involves rights and remedies of the sort traditionally enforced in an action at law. *FDIC v. New London Enters., Ltd.*, 619 F.2d 1099 (5th Cir. 1980).

Statutory actions which create a right to recover damages have been held to be actions enforcing legal rights. *FDIC v. New London Enters., Ltd.*, 619 F.2d 1099 (5th Cir. 1980).

Statutorily conferred legal rights and remedies. — A jury trial is required by U.S. Const., amend. 7 when a statute confers rights and remedies of a legal nature as opposed to an equitable nature. *Schofield v. Stetson*, 459 F. Supp. 998 (M.D. Ga. 1978).

Injunctive relief. — No constitutional right to a jury trial exists in equity actions for injunctive relief. *United States v. Northside Realty Assocs.*, 324 F. Supp. 287 (N.D. Ga. 1971).

State drug forfeiture proceedings. — U.S. Const., amend. 7 guarantees a jury trial in federal drug forfeiture actions and is inapplicable to similar actions conducted at the state level pursuant to O.C.G.A. § 16-13-49. *Swails v. State*, 263 Ga. 276, 431 S.E.2d 101, cert. denied, 510 U.S. 1011, 114 S. Ct. 602, 126 L. Ed. 2d 567 (1993).

Violation of municipal ordinance. — The constitutional guarantee of a right to a trial by a jury does not extend to one charged in a municipal court with violation of a municipal ordinance. *Key v. Stewart*, 228 Ga. 516, 186 S.E.2d 739 (1972).

Constitutional guarantee of trial by jury does not extend to eminent domain proceedings. *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

Condemnation suit brought under Code 1933, § 36-301 et seq. (see O.C.G.A. § 22-1-1 et seq.) is not a suit at common law within the meaning of U.S. Const., amend. 7 and, therefore, a common-law jury trial in such a case is not guaranteed by it. *United States v. Kennesaw Mt. Battlefield Ass'n*, 99 F.2d 830 (5th Cir. 1938), cert. denied, 306 U.S. 646, 59 S. Ct. 587, 83 L. Ed. 1045 (1939).

Stockholder's derivative suits. — The right under U.S. Const., amend. 7 to trial by jury extends to a stockholder's derivative suit with respect to those issues as to which the corporation, had it been suing in its own right, would have been entitled to a jury trial. *United States v. Northside Realty Assocs.*, 324 F. Supp. 287 (N.D. Ga. 1971).

Stockholder's refusal to accept tender offer. — Federal district court's determination that a dissenting shareholder's refusal to accept a stock tender offer was "arbitrary, vexatious, or otherwise not in good faith" did not violate the shareholder's seventh amendment right to have a jury decide whether the shareholder had acted arbitrarily. *Columbus Mills, Inc. v. Freeland*, 918 F.2d 1575 (11th Cir. 1990).

Obscenity cases. — A judge may act as a finder of fact in civil proceedings involving obscenity. *Penthouse Int'l, Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978).

Former Code 1933, § 92-7301 (see **O.C.G.A. § 48-3-1**) is not violative of Ga. Const. 1877, Art. VI, Sec. XVIII, Para. I (see Ga. Const. 1983, Art. I, Sec. I, Para. XI), or of U.S. Const., amend. 7. *Hicks v. Stewart Oil Co.*, 182 Ga. 654, 186 S.E. 802 (1936).

Claim for back wages in an action is one for breach of an employment contract, and as such is clearly within the jury trial guarantee of U.S. Const., amend. 7. *Johnson v. Georgia Hwy. Express, Inc.*, 47 F.R.D. 327 (N.D. Ga. 1968), rev'd on other grounds, 417 F.2d 1122 (5th Cir. 1969).

Denial of jury trial on back pay issue under 42 U.S.C. § 2000e-5(g). — In a case under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(g)), comes into where the gravamen of the complaint is injunctive and declaratory relief against racial discrimination in employment, and back pay is one of the modes of relief that a court can grant, denial of defendant's demand for a jury trial on the issue of back pay does not contravene the Constitution. *Hayes v. Seaboard Coast Line R.R.*, 46 F.R.D. 49 (S.D. Ga. 1968).

Avoidance of lien on exempt property is equitable in nature. — As an equitable action, the proceeding is not a suit at common law in which legal, as opposed to equitable, rights are to be determined. Neither the seventh amendment of the United States Constitution nor the Bankruptcy Code pro-

vide support for a creditor's demand for a jury trial in such a case. *Caruthers v. Fleet Fin., Inc.*, 87 Bankr. 723 (Bankr. N.D. Ga. 1988).

Interrogatory answers to be interpreted so as to eliminate inconsistency. — U.S. Const., amend. 7 requires a court to interpret a jury's answers to special interrogatories, if at all possible, so that there is no inconsistency. In doing so, the court must consider all the circumstances, especially the issues submitted to the jury, the instructions to the jury, and any expressions of the jury extrinsic to their answers to the interrogatories. *Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir. 1987).

Standard for review of federal court's denial or grant of new trial. — The general rule is that a federal district court's denial or grant of a new trial is within its discretion and is ordinarily nonreviewable save for an abuse of that discretion or misapprehension of the law. To protect a litigant's rights under U.S. Const., amend. 7 and to prevent improper intrusion on the jury's function, a somewhat broader review applies to an order granting a new trial as opposed to an order denying such a motion, and the greatest degree of scrutiny is exercised when a new trial is granted on the ground that the verdict is against the weight of the evidence. *Evers v. Equifax, Inc.*, 650 F.2d 793 (5th Cir. 1981).

Implied waiver of jury trial. — The right to a jury trial is impliedly waived by participating in a bench trial and by failing to protest or object to a bench trial. *Goss v. Bayer*, 184 Ga. App. 730, 362 S.E.2d 768, cert. denied, 184 Ga. App. 909, 362 S.E.2d 768 (1987).

Issuance of writ of possession. — A debtor's constitutionally guaranteed right to a jury trial was not infringed when the trial court issued a writ of possession without the benefit of a jury, where there were no issues of material fact in dispute. *Bledsoe v. Central Ga. Prod. Credit Ass'n*, 180 Ga. App. 598, 349 S.E.2d 821 (1986).

Violation of county zoning ordinance. — An indictment charging violation of a county zoning ordinance is a charge of a violation of state law for failure to comply with the local zoning ordinances and, where such violation is a misdemeanor under state law, the defendant is entitled to trial by jury. *Clark v. State*, 157 Ga. App. 486, 277 S.E.2d 738 (1981).

Back pay under Civil Rights Act. — An action for reinstatement and back pay under Title VII of the Civil Rights Act of 1964 is by nature equitable and entails no rights under U.S. Const., amend. 7. *Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir.), cert. denied, 464 U.S. 826, 104 S. Ct. 97, 78 L. Ed. 2d 102 (1983).

Bankruptcy proceedings. — Defendant had no seventh amendment right to a jury trial in a bankruptcy proceeding, where all claims presented by plaintiff-trustee were of an equitable nature. *Stamps v. Sexton Bros. Tire Co.* (In re Major Tire Co.), 64 Bankr. 305 (Bankr. N.D. Ga. 1986).

Presiding over a jury trial in a core proceeding by a bankruptcy court would not violate the seventh amendment. *Ellenberg v. Bouldin*, 125 Bankr. 851 (N.D. Ga. 1990).

The seventh amendment would be violated where a district court reviews de novo the verdict of a jury trial conducted by a bankruptcy court in a noncore proceeding. *Ellenberg v. Bouldin*, 125 Bankr. 851 (N.D. Ga. 1990).

Debtor waived its seventh amendment right to a jury trial by bringing a noncore adversary proceeding in the bankruptcy court. *Haile Co. v. R.J. Reynolds Tobacco Co.*, 132 Bankr. 979 (Bankr. S.D. Ga. 1991).

The seventh amendment applied to a case where the remedy sought and most of the claims sounded in law, as opposed to equity. *Ways v. Equitex, Inc.* (In re RDM Sports Group, Inc.), 260 Bankr. 915 (Bankr. N.D. Ga. 2001).

Trustee did not waive seventh amendment right to a jury trial where three of the four claims at issue were legal claims, they were only incidentally related to the bankruptcy case, they did not have anything to do with the claims process and/or the restructuring of the debtor-creditor relationship, and they were asserted against non-creditor third parties only to generate funds for distribution to creditors. *Ways v. Equitex, Inc.* (In re RDM Sports Group, Inc.), 260 Bankr. 915 (Bankr. N.D. Ga. 2001).

Fraudulent conveyance by bankruptcy debtors. — U.S. Const., amend. 7 did not grant bankruptcy debtors the right to a trial by jury in a suit by the trustee-in-bankruptcy against the debtors seeking to avoid an allegedly fraudulent conveyance of property. *Pettigrew v. Graham*, 747 F.2d 1383 (11th Cir. 1984).

Claims under Postal Reorganization Act. — There is no right for Postal Reorganization Act claims against the postal service to be tried by a jury. *Griffin v. United States Postal Serv.*, 635 F. Supp. 190 (N.D. Ga. 1986).

Actions against federal government. — The seventh amendment right to trial by jury does not apply in actions against the federal government because of the doctrine of sovereign immunity. *Griffin v. United States Postal Serv.*, 635 F. Supp. 190 (N.D. Ga. 1986).

Constitutional limit on punitive damage award. — Upon determination of the constitutional limit on a particular award, the district court may strike the unconstitutional excess from a jury's punitive damage award and enter judgment for that amount. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), cert. denied, 528 U.S. 931, 120 S. Ct. 329, 145 L. Ed. 2d 256 (1999).

Excessive jury award. — A federal court has no general authority to reduce the amount of a jury's verdict; however, when a court finds that a jury's award of damages is excessive, it may grant the defendant a new trial. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), cert. denied, 528 U.S. 931, 120 S. Ct. 329, 145 L. Ed. 2d 256 (1999).

Because a jury's award of punitive damages does not constitute a finding of fact, appellate review of a trial court's determination that an award is consistent with due process does not implicate U.S. Const., amend. 7 concerns. *Kent v. White*, 253 Ga. App. 492, 559 S.E.2d 731 (2002), overruled in part, *Time Warner Entm't Co. v. Six Flags Over Ga., L.L.C.*, 254 Ga. App. 598, 563 S.E.2d 178 (2002), cert. denied, 538 U.S. 977, 123 S. Ct. 1783, 155 L. Ed. 2d 665 (2003).

Cited in *Reynolds v. Brosnan*, 170 Ga. 773, 154 S.E. 264 (1930); *Threatt v. American Mut. Liab. Ins. Co.*, 173 Ga. 350, 160 S.E. 379 (1931); *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935); *Green v. Page*, 9 F. Supp. 844 (S.D. Ga. 1935); *King v. Stuart Motor Co.*, 52 F. Supp. 727 (N.D. Ga. 1943); *McCord v. Atlantic Coast Line R.R.*, 185 F.2d 603 (5th Cir. 1950); *Hardin v. McAvoy*, 216 F.2d 399 (5th Cir. 1954); *Atlantic Coast Line R.R. v. Kammerer*, 239 F.2d 115 (5th Cir.

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(1975); *Collins v. Seaboard Coast Line R.R.*, 681 F.2d 1333 (11th Cir. 1982); *Williams v. City of Valdosta*, 689 F.2d 964 (11th Cir. 1982); *Scott v. Donovan*, 539 F. Supp. 255 (N.D. Ga. 1982); *Chambers v. Weinberger*, 591 F. Supp. 1554 (N.D. Ga. 1984); *Catchpole v. Health 1st, Inc.*, 821 F. Supp. 1482 (N.D. Ga. 1993).

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Right of defendant to waive right of trial by jury where he is not represented by counsel, 102 ALR 802.

Waiver of right to jury trial as operative after expiration of term during which it was made, or as regards subsequent trial, 106 ALR 203.

Right to jury trial in suit to remove cloud, quiet title, or determine adverse claims, 117 ALR 9.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 ALR 383.

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Constitutionality of arbitration statutes, 55 ALR2d 432.

Withdrawal or disregard of waiver of jury trial in civil action, 9 ALR4th 1041.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 ALR2d 1162.

Sufficiency of waiver of full jury, 93 ALR2d 410.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 ALR3d 1321.

Right of indigent to proceed in marital action without payment of costs, 52 ALR3d 844.

Right to counsel in contempt proceedings, 52 ALR3d 1002.

Right to a jury trial on motion to vacate judgment, 75 ALR3d 894.

Religious belief, affiliation, or prejudice of prospective jurors as proper subject of inquiry or grounds for challenge on voir dire, 95 ALR3d 172.

Validity and efficacy of accused's waiver of unanimous verdict, 97 ALR3d 1253.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 ALR4th 1041.

Right to jury trial in stockholder's derivative action, 32 ALR4th 1111.

Jury trial waiver as binding on later state civil trial, 48 ALR4th 747.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 ALR4th 343.

Right to jury trial in action under state civil rights law, 12 ALR5th 508.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 ALR5th 245.

Contractual jury trial waivers in state civil cases, 42 ALR5th 53.

Right to jury trial in child neglect, child abuse, or termination of parental rights proceedings, 102 ALR5th 227.

Failure of state prosecutor to disclose pre-trial statement made by crime victim as violating due process, 102 ALR5th 327.

Contractual jury trial waivers in federal civil cases, 92 ALR Fed. 688.

Right to jury trial in action by Secretary of Labor to recover back wages under 29 USCS § 217 and liquidated damages under 29 USCS § 216(c) for violation of wage and hour provisions of Fair Labor Standards Act, 95 ALR Fed. 861.

Right to jury trial on issue of damages in copyright infringement actions under 17 USCA § 504, 163 ALR Fed. 467.

[AMENDMENT VIII]

[Bails, Fines, Punishments]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Cross references. — Rights protected under amendment generally, Ga. Const. 1983, Art. I, Sec. I, Para. XVII. Cruel and unusual punishment, Ga. Const. 1983, Art. I, Sec. I, Para. XXI and §§ 38-2-460, 42-4-5, 42-5-58. Excessive bail, §§ 17-6-1 et seq., 17-7-171, 17-13-36. Death penalty, § 17-10-30 et seq.

Editor's notes. — The United States Supreme Court has declared that the due process clause of U.S. Const., amend. 14, protects a person from cruel and unusual punishment inflicted by state, as well as federal, agencies. See *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). The Supreme Court has not had occasion to decide if the prohibition against excessive bail is similarly applicable to state proceedings, but the court has intimated that it is. See *Schilb v. Kuebel*, 404 U.S. 357, 92 S. Ct. 479, 30 L. Ed. 2d 502 (1972). At least one federal court, however, has held that U.S. Const., amend. 8 and the due process clause of U.S. Const., amend. 14, does prohibit excessive bail in state proceedings. See *Pilkington v. Circuit Court*, 324 F.2d 45 (8th Cir. 1963).

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JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EXCESSIVE BAIL
FINES AND PUNISHMENTS
CAPITAL PUNISHMENT

General Consideration

Eighth amendment applies only after a prisoner is convicted. *United States v. Myers*, 972 F.2d 1566 (11th Cir. 1992), cert. denied, 507 U.S. 1017, 113 S. Ct. 1813, 123 L. Ed. 2d 445 (1993).

Eighth amendment protection excludes claim under due process. — Since the eighth amendment provides explicit protection to prisoners against cruel and unusual punishment, a prisoner could not bring a separate civil rights claim for the same behavior based on substantive due process under the fourteenth amendment. *Lee v. Sikes*, 870 F. Supp. 1096 (S.D. Ga. 1994).

Waiver of fourth amendment rights constitutional. — Waiver by defendant, while free on bond for drug offenses, of rights under U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII as a bond condition, was constitutional under U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII; it was a reasonable exercise of the trial court's function of balancing the rights of the accused with public safety

interests. *Rocco v. State*, 267 Ga. App. 900, 601 S.E.2d 189 (2004).

Evidence as to parole. — Fact that defendant was an habitual violator and thus upon conviction would have to serve 20 years without parole did not relate to defendant's character, his prior record, or circumstances of his offense; thus policy forbidding argument regarding one's ability or inability to make parole did not run afoul of either U.S. Const., amend. 8 or 14 and trial court did not err in refusing to allow such argument. *Horton v. State*, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 837, 74 L. Ed. 2d 1030 (1983).

Imposition of death sentence by electrocution is not cruel and unusual within the meaning of the prohibition of U.S. Const., amend. 8. *Mitchell v. Hopper*, 538 F. Supp. 77 (S.D. Ga. 1982), supplemented by 564 F. Supp. 780 (S.D. Ga. 1983), aff'd in part, rev'd in part sub nom. *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985), aff'd in part sub nom. *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir.), rev'd in part sub nom. *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986), cert.

General Consideration (Cont'd)

denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987), 500 U.S. 960, 111 S. Ct. 2276, 114 L. Ed. 2d 727 (1991).

Death penalty for codefendant not proven to have directly committed murderous act. — Because the defendant was not only present but active and participating throughout commission of kidnapping, rape, murder, and aggravated assault of which the defendant was convicted, imposition of death penalty was not excessive or disproportionate to the penalty imposed in similar cases even though it was not established whether the defendant or the codefendant fired the gunshots that killed the victim. *Johnson v. Zant*, 249 Ga. 812, 295 S.E.2d 603 (1982), cert. denied, 459 U.S. 1228, 103 S. Ct. 1236, 75 L. Ed. 2d 469 (1983).

Dismissal of police department employees when their urine tested positive for marijuana did not in any manner involve cruel and unusual punishment within the meaning of the eighth amendment. *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986).

Discretion to impose death penalty circumscribed by secular law. — The use by deliberating jurors of an extrajudicial code (not already embodied in their own characters) cannot be reconciled with the eighth amendment's requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channelled and circumscribed by the secular law of the jurisdiction. *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

It was constitutional error for the court to permit the Christian Bible to go into the jury room at the request of the jurors apparently for consultation in connection with their deliberations after a murder trial. *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

Admissibility at trial of defendant's testimony at bail hearing. — Absent objections grounded on the fifth amendment at the bail hearing, the decision of defense counsel to bring the extraneous issue of guilt or innocence into the bail proceeding did not preclude, on fifth amendment grounds, the use at trial of incriminating testimony given at such hearing. *Cowards v. State*, 266 Ga. 191, 465 S.E.2d 677 (1996).

Punitive damages. — In an action against a truck manufacturer, a punitive damages award of \$2 million was not so excessive as to violate the due process clauses of the Georgia and United States Constitutions, the eighth amendment of the United States Constitution, and the excessive fines clause of the Ga. Const. 1983, Art. I, Sec. I, Para. XVII. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993).

Federal abstention. — The Court of Appeals abstained from exercising its equitable jurisdiction to hear a class action claim that Georgia's indigent defense system was inherently incapable of providing constitutionally adequate services and that the system therefore violated the sixth, eighth, and fourteenth amendments to the United States Constitution. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

Civil forfeiture. — Excessive fines analysis should center upon whether the confiscated property has a close enough relationship to the offense. *United States v. One 1990 Ford Ranger Truck*, 888 F. Supp. 1170 (N.D. Ga. 1995).

Because the forfeited currency was used in the purchase of cocaine, the forfeiture did not violate the excessive fines clause. *Lundy v. State*, 226 Ga. App. 197, 482 S.E.2d 516 (1997).

Inapplicable to civil forfeiture cases. — See *United States v. All Tract 686.64 Acres of Property*, 820 F. Supp. 1433 (M.D. Ga. 1993).

Proper consideration of an eighth amendment challenge to a civil forfeiture should encompass both instrumentality and proportionality analyses. *United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283 (N.D. Ga. 1995), vacated in part on other grounds, *reaff'd* in part, 888 F. Supp. 1170 (N.D. Ga. 1995).

Cited in *Reynolds v. Brosnan*, 170 Ga. 773, 154 S.E. 264 (1930); *Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938); *Delinski v. Dunn*, 207 Ga. 723, 64 S.E.2d 44 (1951); *Hilliard v. State*, 209 Ga. 497, 74 S.E.2d 65 (1953); *Hilliard v. State*, 87 Ga. App. 769, 75 S.E.2d 173 (1953); *United States v. Jenkins*, 141 F. Supp. 499 (S.D. Ga. 1956); *Massey v. State*, 220 Ga. 883, 142 S.E.2d 832 (1965); *Beckett v. Kearney*, 247 F. Supp. 219 (N.D. Ga. 1965); *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118 (1966); *Cook v. State*, 114 Ga. App. 309, 151 S.E.2d 155 (1966); *Carmichael v. Allen*, 267

F. Supp. 985 (N.D. Ga. 1966); *Stuart v. State*, 117 Ga. App. 183, 160 S.E.2d 409 (1968); *Grice v. State*, 224 Ga. 376, 162 S.E.2d 432 (1968); *Burger v. State*, 118 Ga. App. 328, 163 S.E.2d 333 (1968); *Henderson v. Dutton*, 397 F.2d 375 (5th Cir. 1968); *Hess v. Blackwell*, 409 F.2d 362 (5th Cir. 1969); *Goodine v. Griffin*, 309 F. Supp. 590 (S.D. Ga. 1970); *Morris v. State*, 228 Ga. 39, 184 S.E.2d 82 (1971); *Ward v. Smith*, 228 Ga. 137, 184 S.E.2d 592 (1971); *Trammell v. State*, 125 Ga. App. 39, 186 S.E.2d 438 (1971); *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Fryer v. Stynchcombe*, 228 Ga. 576, 186 S.E.2d 885 (1972); *Mitchell v. Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972); *Richards v. Smith*, 464 F.2d 1029 (5th Cir. 1972); *Hamlin v. Laird*, 371 F. Supp. 806 (S.D. Ga. 1972); *Jackson v. State*, 230 Ga. 181, 195 S.E.2d 921 (1973); *Pollard v. State*, 128 Ga. App. 470, 197 S.E.2d 158 (1973); *Russell v. Henderson*, 475 F.2d 1138 (5th Cir. 1973); *Goughf v. State*, 232 Ga. 178, 205 S.E.2d 844 (1974); *Beavers v. State*, 132 Ga. App. 94, 207 S.E.2d 550 (1974); *Reed v. State*, 134 Ga. App. 47, 213 S.E.2d 147 (1975); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Shields v. Hopper*, 519 F.2d 1131 (5th Cir. 1975); *Crawford v. State*, 236 Ga. 491, 224 S.E.2d 365 (1976); *Inmates of Henry County Jail v. Parham*, 430 F. Supp. 304 (N.D. Ga. 1976); *Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978); *Gunn v. State*, 244 Ga. 51, 257 S.E.2d 538 (1979); *Seagraves v. Harris*, 629 F.2d 385 (5th Cir. 1980); *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980); *A.J. Kellos Constr. Co. v. Balboa Ins. Co.*, 495 F. Supp. 408 (S.D. Ga. 1980); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981); *Zant v. Nelson*, 250 Ga. 152, 296 S.E.2d 590 (1982); *Moore v. Zant*, 722 F.2d 640 (11th Cir. 1983); *Davis v. State*, 170 Ga. App. 126, 316 S.E.2d 573 (1984); *Bowden v. Francis*, 733 F.2d 740 (11th Cir. 1984); *Hamm v. DeKalb County*, 774 F.2d 1567 (11th Cir. 1985); *Gravitt v. Graves*, 609 F. Supp. 925 (N.D. Ga. 1985); *Johnson v. Jones*, 178 Ga. App. 346, 343 S.E.2d 403 (1986); *Davis v. Pringle*, 642 F. Supp. 171 (N.D. Ga. 1986); *Patterson v. Fuller*, 654 F. Supp. 418

(N.D. Ga. 1987); *Howell v. Roberts*, 656 F. Supp. 1150 (N.D. Ga. 1987); *Kilgo v. Department of Cors.*, 202 Ga. App. 50, 413 S.E.2d 507 (1991); *Fiscus v. City of Roswell*, 832 F. Supp. 1558 (N.D. Ga. 1993); *United States v. \$633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993); *Thorp v. State*, 217 Ga. App. 275, 457 S.E.2d 234 (1995); *Rabern v. State*, 221 Ga. App. 874, 473 S.E.2d 547 (1996), remanded, 231 Ga. App. 84, 497 S.E.2d 631 (1998); *Carter v. State*, 248 Ga. App. 821, 547 S.E.2d 613 (2001).

Excessive Bail

Excessive bail provisions apply to misdemeanors. — The constitutional prohibitions against excessive bail set forth in U.S. Const., amend. 8 and Ga. Const. 1945, Art. I, Sec. I, Para. IX (Ga. Const. 1983, Art. I, Sec. I, Para. XVII) conviction. *Jones v. Grimes*, 219 Ga. 585, 134 S.E.2d 790 (1964).

When bail may be denied generally. — The command that excessive bail shall not be required at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons. *Sellers v. United States*, 396 U.S. 9, 90 S. Ct. 27, 24 L. Ed. 2d 9 (1969).

A person convicted of an offense punishable by death has no constitutional right to bail pending appeal. *Wilcox v. Carter*, 545 F. Supp. 1043 (M.D. Ga. 1982).

Reasonably necessary bail constitutional. — Bail set at an amount higher than that which is reasonably necessary to insure a defendant's presence at trial is unconstitutionally "excessive," in violation of the eighth amendment as applied to the states through the fourteenth amendment; however, any requirement which is necessary to provide reasonable assurance of an accused's presence at trial is constitutionally permissible. *Gresham v. Dell*, 630 F. Supp. 1135 (N.D. Ga. 1986).

Retention of appearance bond to pay fine violates Constitution. — The addition of any condition to an appearance bond to the effect that it shall be retained by the clerk to pay any fine that may subsequently be levied against the defendant after the criminal trial is over is for a purpose other than that for which bail is required to be given under the eighth amendment. Such provision is therefore "excessive" and is in violation of the

Excessive Bail (Cont'd)

Constitution. *United States v. Rose*, 791 F.2d 1477 (11th Cir. 1986).

Defendant failed to prove that the defendant was injured by allegedly excessive bail for drug offenses, since the defendant made no showing that had the drug charges been dismissed, as they allegedly should have been, the defendant could have bond on the remaining non-drug charge. *Lambert v. McFarland*, 612 F. Supp. 1252 (N.D. Ga. 1984).

\$100,000 bail in cocaine case held not excessive. — Setting bail in the total amount of \$100,000 in a case involving two charges of selling crack cocaine was not excessive, because the trial judge was apprised of the defendant's lengthy residency in the community and the defendant's financial status, and weighed these factors against the serious nature and potential consequences of the charges. *Mayfield v. State*, 198 Ga. App. 252, 401 S.E.2d 297 (1990).

\$250,000 bail in murder case held not excessive. — In a prosecution for murder, based upon the seriousness of the offense charged and the likelihood that defendant would not appear at trial, the trial court did not abuse its discretion in holding that bail of \$250,000 originally set was not excessive. *Mullinax v. State*, 271 Ga. 112, 515 S.E.2d 839 (1999).

Bail in the amount of \$750,000 was not excessive where defendant had prior felony convictions and the trial court's decision to increase bail at this habeas proceeding was based on other information not available at the first hearing. *Pullin v. Dorsey*, 271 Ga. 882, 525 S.E.2d 87 (2000).

Fines and Punishments

Prohibition applies to conviction for criminal offenses. — The prohibition against cruel and unusual punishment has relation to punishment imposed by sentences on conviction for criminal offenses. *Hill v. State*, 119 Ga. App. 612, 168 S.E.2d 327 (1969).

The prescription against cruel and unusual punishment applies only after a criminal conviction. *Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir. 1984), modified en banc, 774 F.2d 1495 (11th Cir. 1985), cert. denied, 476 U.S. 1115, 106 S. Ct. 1970, 90 L. Ed. 2d 654, cert. denied, 476 U.S. 1124, 106

S. Ct. 1993, 90 L. Ed. 2d 673 (1986), cert. denied, 493 U.S. 817, 110 S. Ct. 70, 107 L. Ed. 2d 37 (1989).

The eighth amendment protects convicted prisoners and does not apply to pre-trial detainees. *McDay ex rel. McDay v. City of Atlanta*, 740 F. Supp. 852 (N.D. Ga. 1990), aff'd, 927 F.2d 614 (11th Cir. 1991).

Cruel and unusual punishment prohibition applicable to convicts only. — The prohibition against cruel and unusual punishments protects only those who have been convicted of a crime. *Metz v. McKinley*, 583 F. Supp. 683 (S.D. Ga.), aff'd, 747 F.2d 709 (11th Cir. 1984).

Applicable to states through U.S. Const., amend. 14. — Cruel and unusual punishment clause is made applicable to the states through U.S. Const., amend. 14. *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977).

Standards for determining constitutionality of punishment generally. — When a form of punishment in the abstract rather than in the particular is under consideration, the inquiry into excessiveness has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

U.S. Const., amend. 8 prohibits the unnecessary and wanton infliction of pain, as well as gross disproportion between punishment and crime. Any punishment must demonstrably serve some valid penological justification in order to withstand constitutional scrutiny. *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977).

A punishment is excessive and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering, or is grossly out of proportion to the severity of the crime. *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); *Cox v. State*, 241 Ga. 154, 244 S.E.2d 1 (1978).

U.S. Const., amend. 8 demands that punishment must not be disproportionate to the offense and that suffering cannot be gratuitously inflicted with no purpose. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Among the standards in the Fifth Circuit

for finding a punishment violative of U.S. Const., amend. 8 are: whether the conditions of confinement shock the court's conscience; whether the sentence imposed is grossly disproportionate to the offense; or whether the sentence imposed offends evolving notions of decency. *Cerrella v. Hanberry*, 650 F.2d 606 (5th Cir.), cert. denied, 454 U.S. 1034, 102 S. Ct. 573, 70 L. Ed. 2d 478 (1981).

A sentence is disproportionate for eighth amendment purposes if the punishment is grossly disproportionate when compared with the nature of the crime. *United States v. Elkins*, 885 F.2d 775 (11th Cir. 1989), cert. denied, 494 U.S. 1005, 110 S. Ct. 1300, 108 L. Ed. 2d 477 (1990).

Defendant's five-year sentence for interfering with government property was not cruel and unusual punishment within the meaning of U.S. Const., amend. 8, as: (1) it was within the sentencing range specified by O.C.G.A. § 16-7-24(a); (2) it was not so disproportionate to the act as to shock the conscience; (3) the sentence was not retaliatory; and (4) there was no support for defendant's claim that, although convicted of a felony offense, defendant should have received a misdemeanor sentence because defendant committed the offense while in jail for a probation violation. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Pre-deportation detention is not punishment because it is incidental to the government's power to control its borders. *Sengchanh v. Lanier*, 89 F. Supp. 2d 1356 (N.D. Ga. 2000).

Excessive fines clause findings required. — Where the trial court did not make findings regarding, or even specifically mentioning, the factors that must be considered in analyzing an excessive fines clause claim, vacation and remand for a new order including findings of fact and conclusions of law on those factors was required. *Mitchell v. State*, 236 Ga. App. 335, 511 S.E.2d 880 (1999).

Different degrees of culpability among co-defendants are relevant to the individualized sentencing mandated by the eighth amendment. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990).

Requirements of U.S. Const., amend. 8 are defined by reference to the evolving

standards of decency that mark the process of a maturing society. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Cruel and unusual punishment clause is a nonstatic, moral precept designed to curb treatment which offends contemporary standards of decency. *Polakoff v. Henderson*, 370 F. Supp. 690 (N.D. Ga. 1973), aff'd, 488 F.2d 977 (5th Cir. 1974).

Inquiry in § 1983 cases. — In determining whether a state officer has crossed the constitutional line that would make physical abuse actionable in a case alleging cruel and unusual punishment under 42 U.S.C. § 1983, a court must inquire into the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer. *Brown v. Diaz*, 184 Ga. App. 409, 361 S.E.2d 490 (1987), cert. denied, 485 U.S. 1037, 108 S. Ct. 1600, 99 L. Ed. 2d 914 (1988).

Sodomy sentence not cruel and unusual. — Defendant's sentence of five years imprisonment and ten years' probation for violation of sodomy statute does not constitute cruel and unusual punishment because it does not shock the conscience. *King v. State*, 265 Ga. 440, 458 S.E.2d 98 (1995).

Provisions of the Tort Reform Act (O.C.G.A. § 51-12-5.1), relating to punitive damages, violated the due process and equal protection clauses of the federal and state constitutions, violated the excessive fines provisions of both constitutions, and violated the double jeopardy provision of the fifth amendment to the federal constitution. *McBride v. GMC*, 737 F. Supp. 1563 (M.D. Ga. 1990).

Legislative discretion in devising punishments. — So long as the General Assembly does not provide cruel and unusual punishments such as disgraced the civilization of former ages, and make one shudder with horror to read of them as drawing, quartering, burning, etc., U.S. Const., amend. 8 does not put any limit upon legislative discretion. *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964); *Evans v. State*, 228 Ga. 867, 188 S.E.2d 861 (1972).

Where sentences imposed are within the statutory limits, they are not subject to the attack that they constitute cruel and unusual punishment. *Johnston v. State*, 152 Ga. App. 133, 262 S.E.2d 161 (1979); *Covington v. State*, 157 Ga. App. 371, 277 S.E.2d 744

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(1981); *Cerrella v. Hanberry*, 650 F.2d 606 (5th Cir.), cert. denied, 454 U.S. 1034, 102 S. Ct. 573, 70 L. Ed. 2d 478 (1981); *Cook v. State*, 235 Ga. App. 104, 508 S.E.2d 473 (1998).

O.C.G.A. § 17-10-6.1, imposing mandatory minimum sentences in certain cases, does not impose unconstitutionally excessive punishment, and the fact that defendants were 18 years old at the time of sentencing and may have been first offenders did not render the statute unconstitutional as applied to them. *Campbell v. State*, 268 Ga. 44, 485 S.E.2d 185 (1997).

A determinate sentence which falls within statutorily mandated parameters is not subject to attack on eighth amendment grounds. *Pollard v. State*, 230 Ga. App. 159, 495 S.E.2d 629 (1998); *Inglett v. State*, 239 Ga. App. 524, 521 S.E.2d 241 (1999); *Strange v. State*, 244 Ga. App. 635, 535 S.E.2d 315 (2000).

Sentence of five consecutive life sentences for conviction of five counts of selling cocaine was not cruel and unusual punishment, since it was within the statutory sentencing limits for such an offense. *Reviere v. State*, 231 Ga. App. 329, 498 S.E.2d 332 (1998).

Where the defendant was sentenced as a recidivist to twenty years, ten to serve and the remaining ten suspended, on a count of theft by taking, and twelve months to serve consecutively for giving a false name, these sentences were well within the statutory limits and not so disproportionate as to shock the conscience. *Reid v. State*, 235 Ga. App. 887, 510 S.E.2d 851 (1999).

Where a defendant was sentenced to five years imprisonment for possession of cocaine, it was within the statutory limits of two to fifteen years, and was not so overly severe or excessive as to shock the conscience. *Palmore v. State*, 236 Ga. App. 285, 511 S.E.2d 624 (1999).

Defendant's 10-year sentence, to be served consecutively to defendant's related sentence for theft by taking, was statutorily authorized, and, therefore, presumptively did not violate the eighth amendment's guarantee against cruel and unusual punishment, and defendant did not rebut that presumption by showing this legislatively au-

thorized punishment was so overly severe or excessive in proportion to the offense as to shock the conscience. *Howard v. State*, 262 Ga. App. 214, 585 S.E.2d 115 (2003).

Defendant's 25-year sentence for two counts of aggravated child molestation and one count of statutory rape was not cruel and unusual punishment, as defendant's sentence was within the statutory limits of O.C.G.A. § 16-6-4(d)(1) and was not so disproportionate to shock the conscience; defendant knew the victim's age and engaged in the sexual misconduct for an extended period of time. *Hunter v. State*, 263 Ga. App. 747, 589 S.E.2d 306 (2003).

Degree of culpability may be considered by the sentencing judge in the judge's discretion. *Edwards v. United States*, 795 F.2d 958 (11th Cir. 1986), cert. denied, 481 U.S. 1019, 107 S. Ct. 1899, 95 L. Ed. 2d 506 (1987).

Imposition of a higher sentence by a jury upon retrial does not violate the Constitution, unless the increased punishment can be shown to be the product of vindictiveness. *Grace v. Caldwell*, 231 Ga. 407, 202 S.E.2d 49 (1973).

There is no absolute constitutional bar to imposing a more severe sentence upon resentencing, but vindictiveness must not be the motivating force behind the increased sentence. *Pressley v. State*, 158 Ga. App. 638, 281 S.E.2d 364 (1981).

Reasons for more severe penalty upon retrial must affirmatively appear. — In order to assure the absence of such a motivation whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for the judge's doing so must affirmatively appear. *Pressley v. State*, 158 Ga. App. 638, 281 S.E.2d 364 (1981).

Reasons for imposing more severe sentence must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. *Pressley v. State*, 158 Ga. App. 638, 281 S.E.2d 364 (1981).

Factual data upon which an increased sentence is based must be made part of record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. *Pressley v. State*, 158 Ga. App. 638, 281 S.E.2d 364 (1981).

Mandatory child molestation sentence. — Mandatory sentence for aggravated child

molestation of 10 years without parole pursuant to O.C.G.A. §§ 16-6-4(d)(1) and 17-10-6.1 was not cruel and unusual punishment as applied to the defendant, despite the fact that the defendant was 18 years old at the time of the act and the victim was only 4 years younger. *Widner v. State*, 280 Ga. 675, 631 S.E.2d 675 (2006).

Life sentence for felony murder. — Defendant's felony murder conviction and life sentence for felony murder did not violate the eighth amendment. *Rainwater v. State*, 260 Ga. 807, 400 S.E.2d 623 (1991), overruled on other grounds, *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993) and, overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

Life sentence for repeat drug conviction constitutional. — O.C.G.A. § 16-13-30(d), which mandates a sentence of life imprisonment upon a second conviction for selling cocaine, is not unconstitutional; and it does not violate the fourteenth and the eighth amendments to the Constitution of the United States. *Grant v. State*, 258 Ga. 299, 368 S.E.2d 737 (1988); *Crutchfield v. State*, 218 Ga. App. 360, 461 S.E.2d 555 (1995).

O.C.G.A. § 16-13-30(d), which mandates a sentence of life imprisonment upon a second conviction for selling cocaine, does not violate due process or equal protection and does not violate state or federal constitutional guarantees against cruel and unusual punishment. *Isom v. State*, 261 Ga. 596, 408 S.E.2d 701 (1991).

A mandatory life sentence imposed upon a defendant convicted of a second offense of selling cocaine under O.C.G.A. § 16-13-30 does not constitute cruel and unusual punishment under the eighth and fourteenth amendments. *Rucks v. State*, 201 Ga. App. 142, 410 S.E.2d 206 (1991).

Life sentence for recidivism. — Imposition of sentence of life imprisonment for armed robbery under recidivist statute, is not cruel and unusual punishment. *Chappell v. State*, 164 Ga. App. 77, 296 S.E.2d 629 (1982).

The imposition of a mandatory life sentence for recidivism under O.C.G.A. § 17-10-7 does not violate the eighth amendment proscription against cruel and unusual punishment. *Howard v. State*, 233 Ga. App. 724, 505 S.E.2d 768 (1998), overruled on other grounds, *Wilson v. State*, 277 Ga. 195,

586 S.E.2d 669 (2003).

Specific jury finding that defendant killed or intended killing not required. — A specific jury finding, upon imposition of the death penalty, that the defendant killed, attempted to kill, or intended that a killing or lethal force would be employed, was not required. *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985).

Effect of jury finding. — In a malice murder case involving the imposition of the death penalty, in which the jury was instructed on malice murder, and its verdict, supported by the evidence, necessarily established its finding of intent, the federal appellate court was not required to examine the record to determine whether the defendant killed or attempted to kill, or whether the defendant intended or contemplated that life be taken. *Johnson v. Kemp*, 759 F.2d 1503 (11th Cir. 1985).

Maltreatment occurring prior to trial constitutes no part of the sentences imposed as a result of the trial and, therefore does not constitute cruel and unusual punishment. *Hill v. State*, 119 Ga. App. 612, 168 S.E.2d 327 (1969).

Due process requires that a pretrial detainee not be punished; therefore, where punishment is imposed without adjudication, the pertinent constitutional guarantee is the due process clause, not the eighth amendment. *McQuirter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Pretrial detainees protected by fourteenth amendment. — Civil rights action by a pretrial detainee against a prison guard, alleging that the guard assaulted the detainee and used excessive force, was properly brought under the fourteenth amendment, not the eighth amendment. *Telfair v. Gilberg*, 868 F. Supp. 1396 (S.D. Ga. 1994), aff'd, 87 F.3d 1330 (11th Cir. 1996).

Cruel and unusual punishment of pretrial detainee. — A pretrial detainee, who had inadequate food, no blankets or bedding, no sanitation, inadequate medical care, no shelter from the elements other than a concrete cell with broken windows permitting the passage of cold air, all of which endangered the detainee's health, was subject to cruel and unusual punishment. *Goodson v. City of Atlanta*, 763 F.2d 1381 (11th Cir. 1985).

Use of restraints by correction officers to reduce or eliminate plaintiff's ability to in-

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flict physical harm against either oneself or the officers did not constitute excessive force. *Campbell v. Sikes*, 169 F.3d 1353 (11th Cir. 1999).

Codefendants need not receive the same sentence. *Edwards v. United States*, 795 F.2d 958 (11th Cir. 1986), cert. denied, 481 U.S. 1019, 107 S. Ct. 1899, 95 L. Ed. 2d 506 (1987).

Punishment appropriate for diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly U.S. Const., amend. 8. *United States v. Kitowski*, 729 F.2d 1418 (11th Cir. 1984).

Uncertain time of commencement of sentence. — Sentences given to two defendants which were to be consecutive to their release from detention as illegal aliens were not illegal despite the uncertainty as to when the exact date the sentences were to begin. *United States v. Buide-Gomez*, 744 F.2d 781 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1774, 84 L. Ed. 2d 833 (1985).

Denial of parole for 30 years under O.C.G.A. § 42-9-39(c) not cruel and unusual punishment. — Since in pleading guilty to four counts of murder and one count of aggravated assault, the defendant admitted a number of acts that a jury could reasonably consider “aggravating circumstances” under O.C.G.A. § 17-10-30(b), and in both Georgia and other jurisdictions, the defendant might well have been sentenced to death, a sentence denying the defendant consideration of parole for 30 years, under O.C.G.A. § 42-9-39(c), did not constitute “cruel and unusual punishment.” *McClendon v. State*, 256 Ga. 480, 350 S.E.2d 235 (1986).

Sentences not excessive. — Where defendant pled guilty to two counts each of driving under the influence of alcohol (DUI) and driving with a suspended license, and one count each of driving without proof of insurance, improper lane usage, unlawful use of license, giving a false name, impeding traffic, and violation of a county open container ordinance, and was sentenced on the DUI counts to a 12-month consecutive term, a \$1,000 fine, and a \$25 assessment for costs of publishing defendant's photo and, on the remaining charges, to concurrent 12-month terms and a \$200 fine for driving without

proof of insurance, the sentence was not unconstitutionally excessive. *McClure v. State*, 218 Ga. App. 365, 460 S.E.2d 884 (1995).

Where the trial court sentenced defendant to consecutive 20-year sentences on two aggravated battery convictions, after defendant was convicted of breaking the victim's ribs and both orbital bones of the victim's eyes, the sentences were not cruel and unusual under the eighth amendment; the sentences were within the statutory limits under O.C.G.A. § 16-5-24(a), (b), and (h) and did not shock the conscience. *Ware v. State*, 259 Ga. App. 267, 576 S.E.2d 649 (2003).

Permitting unlicensed person to drive. — A sentence of six months in jail, six months on probation, and a fine of \$1,000.00 for permitting an unlicensed person to drive a car did not constitute cruel and unusual punishment. *Means v. State*, 255 Ga. 537, 340 S.E.2d 612 (1986).

Penalty for dogfighting. — A \$5,000.00 fine and an optional one year in prison does not amount to cruel and unusual punishment for those convicted of dogfighting. *Hargrove v. State*, 253 Ga. 450, 321 S.E.2d 104 (1984).

Twenty-year maximum sentence imposed for aggravated sodomy did not shock the conscience, and therefore did not impose cruel and unusual punishment. *Rodgers v. State*, 261 Ga. 33, 401 S.E.2d 735 (1991).

Ten-year sentence for sodomy. — Since the legislature has provided for a maximum sentence of confinement of 20 years, where the trial court sentenced defendant to ten years confinement followed by probation for repeated acts of sodomy committed against a minor, the sentence did not shock the conscience. *Gordon v. State*, 257 Ga. 439, 360 S.E.2d 253 (1987).

Defendant who was sentenced to ten years for sodomy could not complain of the maximum twenty-year sentence under the statute, as it is the sentence actually imposed, not a potentially greater sentence, which must be subjected to the constitutional scrutiny. *Ray v. State*, 259 Ga. 868, 389 S.E.2d 326 (1990), overruled on other grounds, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003).

Six month sentence for criminal trespass. — A sentence of six months imprisonment and six months probation for trespass at a

university was not cruel and unusual punishment where the defendant had a prior conviction for trespassing at the university and an ordinance violation for picketing at the university. *McCrosky v. State*, 234 Ga. App. 321, 506 S.E.2d 400 (1998).

Unnecessary and wanton infliction of pain. — Not every governmental action affecting the interests or well-being of a prisoner is subject to eighth amendment scrutiny. After incarceration, only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the eighth amendment. *Alford v. Osei-Kawsi*, 203 Ga. App. 716, 418 S.E.2d 79, cert. denied, 203 Ga. App. 905, 418 S.E.2d 79 (1992).

The question of whether a measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Alford v. Osei-Kawsi*, 203 Ga. App. 716, 418 S.E.2d 79, cert. denied, 203 Ga. App. 905, 418 S.E.2d 79 (1992).

Officer's actions of kneeling plaintiff in the groin violated contemporary standards of decency when the officer was faced with the plaintiff as a rebellious prisoner. In determining whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm, the court may consider the following factors: first, the extent of injury; second, the need for application of force; third, the relationship between the need for force and the amount of force used; fourth, the threat reasonably perceived by the officer; and, fifth, any efforts made to temper the severity of a forceful response. Although plaintiff's surgery could not be attributed solely to the officer's kneeling, neither could the surgery solely be attributed to a pre-existing condition; therefore, based on the preceding analysis the officer acted maliciously and sadistically in causing plaintiff harm. *Culver ex rel. Bell v. Fowler*, 862 F. Supp. 369 (M.D. Ga. 1994).

Prison guards and restoration of order. — Guards may use force when necessary to restore order and need not wait until disturbances reach dangerous proportions before responding. *Alford v. Osei-Kawsi*, 203 Ga. App. 716, 418 S.E.2d 79, cert. denied, 203 Ga. App. 905, 418 S.E.2d 79 (1992).

In determining whether a guard used excessive force, three factors are considered: the need for the force, the relationship between the need and the amount of force used, and the extent of the injury inflicted. *Alford v. Osei-Kawsi*, 203 Ga. App. 716, 418 S.E.2d 79, cert. denied, 203 Ga. App. 905, 418 S.E.2d 79 (1992).

The use by the court of the Eleventh Circuit pattern jury instruction on excessive force in an action against prison guards was proper, notwithstanding the assertion by the defendants that the instructions failed to inform the jury that the defendants must have acted with specific intent, failed to instruct the jury on all of the factors essential to a determination of whether they had used force maliciously and sadistically for the very purpose of causing harm, and failed to inform the jury as to the deference given to prison officials in maintaining prison security and the presumption that they properly discharged their duties. *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002).

Hurling prisoner down fire escape stairs unconstitutional. — Correctional officer lacked good faith motivation in restoring discipline when the officer shoved a handcuffed, non-resisting inmate down a flight of metal stairs, entitling the inmate to prevail on an eighth amendment claim for cruel and unusual punishment and on the inmate's compensatory and punitive damages claim for permanent physical impairments. *Davis v. Moss*, 841 F. Supp. 1193 (M.D. Ga. 1994).

Use of force by prison officials did not violate an inmate's constitutional rights, where the need for the use of force was established by undisputed evidence that the inmate had created a disturbance, and the inmate's injuries were minimal. *Bennett v. Parker*, 898 F.2d 1530 (11th Cir. 1990), cert. denied, 498 U.S. 1103, 111 S. Ct. 1003, 112 L. Ed. 2d 1085 (1991).

Use of Taser gun. — Where Taser was used on pregnant inmate, a § 1983 action was maintained, although there was no proof of serious physical injury. *Alford v. Osei-Kawsi*, 203 Ga. App. 716, 418 S.E.2d 79, cert. denied, 203 Ga. App. 905, 418 S.E.2d 79 (1992).

Sexual harassment. — Prisoners are entitled to the protection of the eighth amendment from sexual harassment at the hands

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of prison staff. *Battle v. Seago*, 208 Ga. App. 516, 431 S.E.2d 148 (1993).

Certain constitutional rights follow a person into state prison through U.S. Const., amend. 14, and among these is the protection of U.S. Const., amend. 8 against cruel and unusual punishment. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga.), *aff'd*, 393 U.S. 266, 89 S. Ct. 477, 21 L. Ed. 2d 425 (1968).

Duty to protect prisoners. — The state has a responsibility under U.S. Const., amend. 8 to protect the safety of its prisoners. *Streeter v. Hopper*, 618 F.2d 1178 (5th Cir. 1980); *Yizar v. Ault*, 265 Ga. 708, 462 S.E.2d 141 (1995).

Consecutive life sentences do not violate U.S. Const., amend. 8's ban on cruel and unusual punishment. *Nelson v. State*, 247 Ga. 172, 274 S.E.2d 317, *cert. denied*, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981).

Work and labor on the part of prisoners is not in itself unconstitutional or unlawful. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga.), *aff'd*, 393 U.S. 266, 89 S. Ct. 477, 21 L. Ed. 2d 425 (1968).

Hard labor as a penalty for crime is expressly permitted by U.S. Const., amend. 13, and not prohibited by U.S. Const., amend. 8. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga.), *aff'd*, 393 U.S. 266, 89 S. Ct. 477, 21 L. Ed. 2d 425 (1968).

Prison work assignments are considered conditions of confinement subject to scrutiny under the eighth amendment. *Lee v. Sikes*, 870 F. Supp. 1096 (S.D. Ga. 1994).

Prisoner who was attacked by a boar hog while working at the prisoner's assigned duties in a prison hog farm operation failed to show deliberate indifference on the part of prison officials and, even though the evidence showed that the officials were negligent in assigning the prisoner to the hog barn without proper training and equipment, such negligence was not enough to constitute a constitutional violation. *Lee v. Sikes*, 870 F. Supp. 1096 (S.D. Ga. 1994).

Provision of safety equipment for prisoners. — County's failure to provide a prisoner with protective goggles and provide the prisoner with prompt medical care when the prisoner was injured while working on county equipment was not a violation of the

cruel and unusual punishment clause. *Webb v. Carroll County*, 229 Ga. App. 584, 494 S.E.2d 196 (1997).

Conditions of confinement. — In construing the cruel and unusual punishment clause of U.S. Const., amend. 8, the court must inquire whether conditions of confinement shock the conscience, are greatly disproportionate to the offense, or offend evolving notions of decency. *United States v. Thevis*, 526 F.2d 989 (5th Cir. 1976), *cert. denied*, 429 U.S. 928, 97 S. Ct. 335, 50 L. Ed. 2d 299 (1977).

Substandard sanitation and deficient medical care of inmates at a county jail was unconstitutional, and necessitated releasing some inmates to relieve overcrowding until construction of a new jail was completed. *Fambro v. Fulton County*, 713 F. Supp. 1426 (N.D. Ga. 1989).

Driving while intoxicated and theft by taking. — A sentence of 10 years on a conviction for theft by taking and a consecutive sentence of 12 months for driving under the influence did not constitute cruel and unusual punishment where the defendant's actions caused significant personal injuries and property damage. *Burgos v. State*, 233 Ga. App. 897, 505 S.E.2d 543 (1998).

Long prison sentences. — Imposition of sentence of life imprisonment for armed robbery under recidivist statute, is not cruel and unusual punishment. *Chappell v. State*, 164 Ga. App. 77, 296 S.E.2d 629 (1982).

Long prison sentences do not constitute cruel and unusual punishment where the sentences are within statutory limits. *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Conviction as "guilty but mentally ill" not unconstitutional. — Simply because O.C.G.A. § 17-7-131 provides that the defendant convicted as "guilty but mentally ill" will be treated with funds to be appropriated, and there may exist a possibility that funds may run out or not be appropriated, there is no violation of constitutional guarantees against cruel and unusual punishment. *Cooper v. State*, 253 Ga. 736, 325 S.E.2d 137 (1985).

Imprisonment in certain jails may amount to cruel and unusual punishment in violation of U.S. Const., amend. 8. *Stroman v. Griffin*, 331 F. Supp. 226 (S.D. Ga. 1971).

Solitary confinement is not per se an unconstitutional form of punishment. It is permissible where its object is protection of the general prison population or the personnel, protection of the prisoner, for disobedience of orders or for prevention of the prisoner's escape. *Krist v. Smith*, 309 F. Supp. 497 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971).

Visitation rights. — Utilizing the standards of “barbarous” and “shocking to the conscience” as a touchstone the denial to prisoners of conjugal visits cannot be characterized as cruel and unusual punishment. *Polakoff v. Henderson*, 370 F. Supp. 690 (N.D. Ga. 1973), *aff'd*, 488 F.2d 977 (5th Cir. 1974).

Although there is no constitutional right to visitation in and of itself, the visitation procedures can be the subject of equitable relief once it is found that the totality of the circumstances in a prison violate U.S. Const., amend. 8. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Minimally adequate medical care. — It is settled that federal and state governments have a constitutional obligation to provide adequate medical care to those whom they are punishing by incarceration. *Barker v. Brantley County*, 832 F. Supp. 346 (S.D. Ga. 1993), *aff'd*, 19 F.3d 37 (11th Cir. 1994).

The fact the county contracted with a local medical services provider to provide medical care at the detention center and that it relied on the provider to provide such care, did not amount to an intentionally corrupt or impermissible policy which would violate a citizen's rights under U.S. Const., amend. 8. *Epps v. Gwinnett County*, 231 Ga. App. 664, 499 S.E.2d 657 (1998).

Medical treatment for a prisoner is required when a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty: that the prisoner's symptoms evidence a serious disease or injury; that such disease or injury is curable or may be substantially alleviated; and that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial. *Brown v. Beck*, 481 F. Supp. 723 (S.D. Ga. 1980).

Deliberate indifference standard as to medical care. — For a plaintiff to prevail on a claim that inadequate medical attention

rose to the level of an eighth amendment constitutional violation, the plaintiff must show that a defendant was “deliberately indifferent” to the plaintiff's serious medical needs and caused plaintiff unnecessary and wanton infliction of pain. *Barker v. Brantley County*, 832 F. Supp. 346 (S.D. Ga. 1993), *aff'd*, 19 F.3d 37 (11th Cir. 1994); *Wright v. Thompson*, 883 F. Supp. 724 (S.D. Ga. 1995).

Deliberate indifference to serious medical needs may be shown by proving a policy of deficiencies in staffing or procedures such that the inmate is effectively denied access to adequate medical care. *Hill v. Dekalb Regional Youth Detention Ctr.*, 40 F.3d 1176 (11th Cir. 1994), overruled in part, *Overruled in part*, *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

Plaintiff failed to identify any injury or medical condition for which her husband was denied treatment or any incident in which her husband requested and was refused medical treatment; therefore, plaintiff failed to demonstrate deliberate indifference on the part of the detention center's medical director or the health care services provider to recover for an alleged violation of U.S. Const., amend. 8. *Epps v. Gwinnett County*, 231 Ga. App. 664, 499 S.E.2d 657 (1998).

Knowledge of a substantial risk of serious harm for the purpose of deliberate indifference means an awareness that the inmate needs medical care because of a serious risk of harm from illness or injury, as evidenced by the clinical signs and symptoms that are readily observable by a reasonable person; it does not require a final diagnosis, correct diagnosis, or a complete medical history when the inmate has not been allowed to see and to be examined by a physician or when medical care has been unreasonably delayed. *Howard v. City of Columbus*, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

Subjective deliberate indifference may be proven as a reasonable inference drawn from circumstantial evidence of the surrounding facts and circumstances. *Howard v. City of Columbus*, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

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Omissions by a physician in the face of the physician's knowledge of plaintiff's vascular history and colleagues continually informing the physician that plaintiff's condition was unimproved and that the patient was in severe pain raised a jury issue as to whether or not the physician knowingly disregarded a serious medical risk and was deliberately indifferent to plaintiff's medical needs. *Seals v. Shah*, 145 F. Supp. 2d 1378 (N.D. Ga. May 4, 2001).

Prisoner's claims that medication was not administered properly and that the prisoner was subjected to harassment were not supported by evidence sufficient to show deliberate indifference. *Herndon v. Whitworth*, 924 F. Supp. 1171 (N.D. Ga. 1995).

Deliberate indifference negates official's qualified immunity. — Sheriff's knowledge of the prisoner's need for medical care and the sheriff's intentional refusal to provide that care constituted "deliberate indifference," and the sheriff lost the sheriff's entitlement to qualified immunity to suit under § 1983 for violating the prisoner's fifth, eighth and fourteenth amendment rights. *Harris v. Coweta County*, 21 F.3d 388 (11th Cir. 1994).

State prison inmates' pro se complaint alleging a significant and uncomfortable health problem, repeated efforts to obtain treatment, and a total lack of treatment for the problem alleged enough to take this case arguably beyond an allegation of medical malpractice, and should not have been dismissed without conducting an inquiry although the complaint presented an arguable basis in law and contained fanciful facts. *Moreland v. Wharton*, 899 F.2d 1168 (11th Cir. 1990).

Allegations of excessive and unnecessary medication administered after a prison inmate's objections to the treatment implicate eighth amendment concerns. *Battle v. Central State Hosp.*, 898 F.2d 126 (11th Cir. 1990).

Courts must generally yield to the discretion of correction officials in the area of confinement, but the general adequacy of conditions of confinement of prisoners, such as medical treatment, hygienic materials, and physical facilities, is clearly subject to scrutiny under U.S. Const., amend. 8.

Dorrough v. Hogan, 563 F.2d 1259 (5th Cir. 1977), cert. denied, 439 U.S. 850, 99 S. Ct. 153, 58 L. Ed. 2d 153 (1978).

Deliberate indifference to an inmate's severe and obvious injuries is tantamount to an intentional infliction of cruel and unusual punishment. *Harris v. Chanclor*, 537 F.2d 203 (5th Cir. 1976).

While deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, a medical decision not to order an x-ray or like measures, does not represent cruel and unusual punishment. *Brown v. Beck*, 481 F. Supp. 723 (S.D. Ga. 1980).

Adequacy of medical treatment. — The plaintiff in a civil rights action, a state prisoner, produced sufficient evidence from which it could be concluded that the county jail doctor acted recklessly in the performance of the doctor's professional duties, in that the doctor, while rendering some medical treatment to the plaintiff, who had aching and pain in the plaintiff's eyes and blurred vision, and who later went blind, allegedly failed to perform any diagnostic test or take eye secretion cultures, precluding summary judgment. Summary judgment was also inappropriate on behalf of the county sheriff, who allegedly never investigated overcrowding conditions in the jail and who decided not to meet certain minimal requirements of the American Medical Association. *Weaver v. Jarvis*, 611 F. Supp. 40 (N.D. Ga. 1985).

Inmate failed to show that the medical treatment the inmate received for an injured foot was so grossly incompetent, inadequate, or excessive as to shock the conscience, or to be intolerable to fundamental fairness, or that the medical care was so inappropriate as to evidence intentional maltreatment or refusal to provide essential care. *Cantrell v. Thurman*, 231 Ga. App. 510, 499 S.E.2d 416 (1998).

Prisoner's action for cruel and unusual punishment based on the prisoner's claim of lack of medical care was not established due to the lack of evidence regarding the culpable state of mind of the jailers and the actual causation of the prisoner's injury. *Merritt v. Athens Clarke County*, 233 Ga. App. 203, 504 S.E.2d 41 (1998).

Repeated denial, delay, insufficient, or inappropriate medical care of an obviously

sick inmate in serious need of medical care constitutes circumstantial evidence of subjective, deliberate indifference. *Howard v. City of Columbus*, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

Temporary denial of a wheelchair did not constitute deliberate indifference to medical needs. *Brown v. Thompson*, 868 F. Supp. 326 (S.D. Ga. 1994).

Denial of food and medical attention are, *prima facie*, clearly established violations of the eighth amendment; however, they are not violations *per se* because the duration of the deprivations, the context in which they occur, and the intent of the prison officials implicated are all elements affecting a claim of deliberate indifference. *Brown v. Thompson*, 868 F. Supp. 326 (S.D. Ga. 1994).

Failure to provide medical care. — Where an inmate failed to provide evidence that he had a “serious medical need,” the court could not determine his claim of deliberate indifference by prison officials. *Ruble v. King*, 911 F. Supp. 1544 (N.D. Ga. 1995).

Deliberate indifference to serious psychological or psychiatric needs of an inmate results in the infliction of pain proscribed by the eighth amendment. *Waldrop v. Evans*, 681 F. Supp. 840 (M.D. Ga. 1988), *aff’d*, 871 F.2d 1030 (11th Cir. 1989).

Providing inmate with inadequate psychiatric care can violate the inmate’s eighth amendment right not to be subjected to cruel and unusual punishment. *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990).

Indifference to psychiatric needs of mentally ill prisoners. — Evidence creating an inference that a pattern of deliberate indifference to the psychiatric needs of mentally ill prisoners existed at the jail, which city policymakers should have been aware of, established issues of material fact with respect to whether defendant suffered constitutional deprivations. *Young v. City of Augusta ex rel. DeVaney*, 59 F.3d 1160 (11th Cir. 1995).

Requiring prisoner to sleep on mattress on floor not violation of constitutional rights. — Where a prisoner filed a civil complaint and amendment alleging that the prisoner was required to sleep on a mattress on the floor for a period of time and was thus deprived of the prisoner’s constitu-

tional rights under the eighth amendment, the trial court did not err in finding the practice not to be inhumane and in dismissing the complaint for failure to state a claim, where nothing in the complaint suggested that the prisoner was required to sleep on a floor mattress as a permanent method of placement while there was an empty and available bed which the prisoner was arbitrarily denied, nor that it resulted in torture or in pain without any penological purpose such as relief from overcrowded conditions or even as a penalty, or amounted to unquestioned and serious deprivation of the prisoner’s basic human needs, that it in fact caused the prisoner any particular grievous and insupportable detriment. *Hall v. Jones*, 180 Ga. App. 454, 349 S.E.2d 469 (1986), cert. denied, 484 U.S. 831, 108 S. Ct. 105, 98 L. Ed. 2d 64 (1987).

Deliberate indifference to serious medical needs of prisoners violates the eighth amendment prohibition of cruel and unusual punishment. *Rogers v. Evans*, 792 F.2d 1052 (11th Cir. 1986); *Thomas v. Evans*, 880 F.2d 1235 (11th Cir. 1989), cert. denied, 498 U.S. 901, 111 S. Ct. 261, 112 L. Ed. 2d 218 (1990).

A prison inmate has the right under the eighth amendment to be free from deliberate indifference to serious physical or psychiatric needs. *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989); *Howard v. Jonah*, 208 Ga. App. 542, 430 S.E.2d 833 (1993).

Delay in access to medical attention. — To state an eighth amendment violation for inadequate medical care it must be shown that treatment was “so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness or where the medical care is so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care.” *Alford v. Osei-Kawsi*, 203 Ga. App. 716, 418 S.E.2d 79, cert. denied, 203 Ga. App. 905, 418 S.E.2d 79 (1992).

Delay in access to medical attention can violate the eighth amendment, when it is “tantamount to ‘unnecessary and wanton infliction of pain.’” *Hill v. Dekalb Regional Youth Detention Ctr.*, 40 F.3d 1176 (11th Cir. 1994); *Overruled in part*, *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

Delay or even denial of medical treatment

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for superficial, nonserious physical conditions does not constitute an eighth amendment violation. *Hill v. Dekalb Regional Youth Detention Ctr.*, 40 F.3d 1176 (11th Cir. 1994), overruled in part, *Overruled in part*, *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

Evidence insufficient to support deliberate indifference claim. — Plaintiff did not have evidence to establish the subjective mental prong of deliberate indifference necessary to allege mistreatment under U.S. Const., amend. 8 while incarcerated. *Campbell v. Sikes*, 169 F.3d 1353 (11th Cir. 1999).

Mistakes, negligence, and medical malpractice are not constitutional violations merely because the victim is a prisoner; also, differences in medical opinion do not amount to a constitutional violation. *Wright v. Thompson*, 883 F. Supp. 724 (S.D. Ga. 1995).

Jury question as to prisoner's medical needs. — There was a jury question whether a prisoner, who had a history of head injuries and who asked to see a doctor about severe headaches and dizziness allegedly caused by an injury received during the prisoner's recent arrest, had a serious medical need and whether the doctor who responded to the prisoner's request, but refused to examine the prisoner, stating the doctor would "doctor [the prisoner's] records," showed deliberate indifference to the prisoner's needs. *United States v. Roark*, 753 F.2d 991 (11th Cir. 1985).

AIDS patients. — Georgia Department of Corrections was not "deliberately indifferent" to the serious medical needs of prisoners who had tested positive to the AIDS virus, where its policy for treatment of such patients was similar to that of other reputable national and local agencies. *Hawley v. Evans*, 716 F. Supp. 601 (N.D. Ga. 1989).

Statement of claim for denial of medical care and treatment. — To state a claim of constitutional magnitude for the denial of medical care and treatment, prisoners must show that prison officials were deliberately indifferent to their serious medical needs. Negligence, without deliberately indifferent or wanton conduct, is not cruel and unusual punishment. *Hawley v. Evans*, 716 F. Supp. 601 (N.D. Ga. 1989).

Fine for cocaine trafficking held constitutional. — Where the defendant was convicted of trafficking cocaine in violation of O.C.G.A. § 16-13-31 and was sentenced to 20 years imprisonment and fined \$100,000, the fine was not out of proportion to the severity of the crime and not constitutionally infirm either because of its mandatory nature or its amount. *Wyatt v. State*, 259 Ga. 208, 378 S.E.2d 690 (1989).

Forfeiture of property. — Case involving the forfeiture of 5.1 acres of land and a dwelling house on the basis of the discovery of 8.8 ounces of marijuana would be remanded to the trial court for consideration in light of the decision in *Thorp v. State*, 264 Ga. 712, 450 S.E.2d 416 (1994). *Evans v. State*, 217 Ga. App. 646, 458 S.E.2d 859 (1995).

In analyzing a claim that forfeiture amounted to an excessive fine, the court should look at the gravity of the offense, as compared with the harshness of the penalty, whether the property seized was close enough to the offense to render it "guilty," and whether the criminal activity involving the property seized was extensive, in terms of time or space. *Mitchell v. State*, 236 Ga. App. 335, 511 S.E.2d 880 (1999).

Finding that a portion of real property was used to facilitate drug activities did not make the entire tract of land contraband and, thus, forfeiture of a residence and the 5.2 acres of land upon which it stood was excessive. *Rabern v. State*, 242 Ga. App. 804, 531 S.E.2d 373 (2000).

Federal drug sentencing statute. — Anti-Drug Abuse Act's (21 U.S.C. § 841 et seq.) punishment for cocaine base offenses did not constitute cruel and unusual punishment within the meaning of U.S. Const., amend. 8 in light of evidence adducing distinguishing risks and dangers of this drug. *United States v. Mosley*, 808 F. Supp. 1572 (N.D. Ga. 1992).

A fine representing an amount less than the net profit of an illegal transaction does not violate the eighth amendment absent a showing of severe, particularized hardship suffered by defendant. *United States v. Elkins*, 885 F.2d 775 (11th Cir. 1989), cert. denied, 494 U.S. 1005, 110 S. Ct. 1300, 108 L. Ed. 2d 477 (1990).

Life sentence for felony murder based on "status" offense. — Life sentence is not too

severe for a felony-murder conviction based upon a "status" offense, such as possession of a firearm by a convicted felon, the sentence being within the limits provided by O.C.G.A. § 16-5-1(d). *Hall v. State*, 259 Ga. 243, 378 S.E.2d 860 (1989), overruled on other grounds, *Heard v. State*, 261 Ga. 262, 403 S.E.2d 438 (1991).

What constitutes punishment of inmates. — Punishment within the meaning of U.S. Const., amend. 8, is an action by prison guards or a condition of confinement that is applied to an inmate for a penal or disciplinary purpose and is at least apparently authorized or acquiesced in by high prison officials. *George v. Evans*, 633 F.2d 413 (5th Cir. 1980).

Where evidence does not show that action by guards is apparently authorized or acquiesced in by high prison officials for a penal or disciplinary purpose, there is no violation of the prisoner's rights under U.S. Const., amend. 8. *George v. Evans*, 633 F.2d 413 (5th Cir. 1980).

Due process protection against use of undue force by guard. — Even though a violation of U.S. Const., amend. 8 may not be established, the use of undue force by a prison guard is actionable as a deprivation of due process rights under U.S. Const., amend. 14. *George v. Evans*, 633 F.2d 413 (5th Cir. 1980).

Emergency circumstances — i.e., large scale rioting — justified departing from terms of consent decree governing use of a jail. *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985).

Where an officer beat an inmate who was handcuffed and shackled, the defense of qualified immunity could not be successfully asserted. *Ruble v. King*, 911 F. Supp. 1544 (N.D. Ga. 1995).

Where an officer failed to intervene when the officer was aware that another officer was using excessive force on an inmate, the defense of qualified immunity could not be successfully asserted. *Ruble v. King*, 911 F. Supp. 1544 (N.D. Ga. 1995).

Remedy for mistreatment of prisoner. — Assuming *arguendo* that a prisoner's allegations of mistreatment demonstrate cruel and unusual punishment, the prisoner still would not be entitled to release from prison, the appropriate remedy being to enjoin continuance of any practices or require correc-

tion of any conditions causing the prisoner cruel and unusual punishment. *Cook v. Hanberry*, 596 F.2d 658 (5th Cir.), cert. denied, 442 U.S. 932, 99 S. Ct. 2866, 61 L. Ed. 2d 301 (1979).

Habeas corpus is not available to prisoners complaining only of mistreatment during their legal incarceration. The relief from such unconstitutional practices, if proved, is in the form of equitably imposed restraint, not freedom from otherwise lawful incarceration. *Cook v. Hanberry*, 592 F.2d 248 (5th Cir.), supplemented, 596 F.2d 658 (5th Cir.), cert. denied, 442 U.S. 932, 99 S. Ct. 2866, 61 L. Ed. 2d 301 (1979).

Although openly advocating insubordination in a prison is a serious matter, it does not call for several months or years of harsh confinement in a special disciplinary facility. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Allowable conditions of probation. — The court had the authority to impose as a condition of probation the requirement that defendant wear a fluorescent pink plastic bracelet imprinted with the words "D.U.I. CONVICT." Such a requirement did not impose cruel and unusual punishment or deprive defendant of equal protection and it was not an impermissibly indeterminate condition. *Ballenger v. State*, 210 Ga. App. 627, 436 S.E.2d 793 (1993).

Disenfranchisement of persons convicted of certain crimes. — Although Ga. Const. 1945, Art. II, Sec. II, Para. I (see Ga. Const. 1983, Art. II, Sec. I, Para. III and Art. II, Sec. II, Para. III) serves to abridge the plaintiff's right to vote, disenfranchisement is a nonpenal exercise of a state's power to regulate the vote and is not cruel and unusual punishment. *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

Possession of marijuana. — Code 1933, Ch. 79A-9, prior to Ga. L. 1974, p. 221 (See O.C.G.A. Art. 2, Ch. 13, T. 16), concerning the possession of marijuana is not subject to constitutional attack under U.S. Const., amend. 8. *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974).

Punishment for driving after license revoked. — A mandatory one to five-year sentence for driving a motor vehicle after one's license has been revoked under O.C.G.A. § 40-5-58 is neither barbaric nor excessive under U.S. Const., amend. 8. *Cox*

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v. State, 241 Ga. 154, 244 S.E.2d 1 (1978).

Refusal of statute to sell liquor tax stamps or grant liquor license. — A statute which makes it unlawful to possess or sell liquor without obtaining a license and without paying any tax imposed upon such liquor, where the defendant cannot purchase a license or pay the tax because the state refuses to sell such license or revenue stamps, does not violate U.S. Const., amend. 8 or U.S. Const., amend. 14. *Akins v. State*, 224 Ga. 650, 164 S.E.2d 125 (1968).

Review. — Where the appellate court did not find the defendant's sentences unconstitutionally excessive, this did not affect the defendant's right to take the defendant's contention to the sentence review board as provided under former O.C.G.A. § 17-10-6. *Reid v. State*, 235 Ga. App. 887, 510 S.E.2d 851 (1999).

Military jurisdiction to be narrowly construed. — Although trial by a military tribunal deprives one of trial by jury and other constitutional rights, it is not unconstitutional. However, military jurisdiction is restricted to the narrowest limits consistent with the power granted Congress in U.S. Const., art. I, sec. VIII, cl. 14. *Torres v. Connor*, 329 F. Supp. 1025 (N.D. Ga. 1970).

Right to wear one's hair as one sees fit has not been found to be within the periphery of any of our specific constitutional rights. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), *aff'd*, 505 F.2d 868 (5th Cir. 1975).

There is no constitutionally protected right, plainly expressed or within the penumbra, the shadow, of U.S. Const., amend. 1, 8, 9, 10, and 14, to wear one's hair in a public high school in the length and style that suits the wearer. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), *aff'd*, 505 F.2d 868 (5th Cir. 1975).

Forfeiture for drug possession excessive. — Forfeiture of 5.1 acres of land, including a house, based on the recovery of a few immature marijuana plants growing on a small portion of the property was excessive under U.S. Const., amend. 8 and mitigation of the forfeiture was not practicable. *State v. Evans*, 225 Ga. App. 402, 484 S.E.2d 70 (1997).

Civil in rem forfeitures. — The constitutional prohibition against excessive fines ap-

plies to civil in rem forfeitures. *Thorp v. State*, 264 Ga. 712, 450 S.E.2d 416 (1994).

Factors for evaluating whether a civil in rem forfeiture is excessive are: (1) consideration of the inherent gravity of the offense compared with the harshness of the penalty; (2) whether the property was close enough to the offense to render it "guilty"; and (3) whether the criminal activity involving the property was extensive in terms of time and/or spatial use. *Thorp v. State*, 264 Ga. 712, 450 S.E.2d 416 (1994).

Forfeiture of medical license under federal law. — Forfeiture of the defendant's medical license under 21 U.S.C. § 853 did not constitute an excessive fine in violation of U.S. Const., amend. 8. *United States v. Dictor*, 198 F.3d 1284 (11th Cir. 1999), *cert. denied*, 531 U.S. 828, 121 S. Ct. 77, 148 L. Ed. 2d 40 (2000).

Capital Punishment

Death penalty does not amount to cruel and unusual punishment forbidden by the federal Constitution. *Miller v. State*, 224 Ga. 627, 163 S.E.2d 730 (1968).

Punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Constitutionality of death penalty. — The punishment of death does not invariably violate the Constitution. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Death penalty is not invariably cruel and unusual punishment within the meaning of U.S. Const., amend. 8. It is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

Lethal injection not cruel and unusual. — Death by lethal injection is not unconstitutional under U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII, both of which prohibit cruel and unusual punishment. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), *cert. denied*, U.S. , 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Trial court did not err in rejecting a

defendant's claim that lethal injection was unconstitutional as the defendant proffered no evidence to sustain the claim. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006).

Defendant's pre-trial motion regarding lethal injection and the defendant's amended motion for a new trial addressing lethal injection were properly denied as the defendant failed to identify any particular aspect of the evidence admitted in the trial court that would require a departure from the prior decisions holding that lethal injection was a constitutional form of execution. *Williams v. State*, 281 Ga. 87, 635 S.E.2d 146 (2006).

This state's death penalty statute is not subject to attack under U.S. Const., amend. 8. *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974).

Power of state courts as to capital sentencing standards. — As long as a state's capital sentencing procedures meet constitutional requirements, the state's courts are free to adopt additional standards governing its capital sentencing procedures. *Goodwin v. Balkcom*, 501 F. Supp. 317 (M.D. Ga. 1980), rev'd on other grounds, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983).

State's duty as to death penalty generally. — If a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates standardless sentencing discretion. *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

System of capital punishment that does not clearly define standards to guide the exercise of sentencing discretion is constitutionally intolerable. *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977).

Death sentencing procedures posing risk of arbitrary and capricious imposition. — The death sentence cannot be imposed under sentencing procedures that create a substantial risk that it will be inflicted in an arbitrary and capricious manner. *Goodwin v. Balkcom*, 501 F. Supp. 317 (M.D. Ga. 1980), rev'd on other grounds, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983), cert.

denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983).

Electrocution is not cruel and unusual. — The manner of execution in this state is not unconstitutional and death by electrocution is not repugnant to U.S. Const., amend. 8. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

The method of execution in this state, electrocution, does not constitute cruel and unusual punishment. *Nelson v. State*, 247 Ga. 172, 274 S.E.2d 317, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981); *Dix v. Newsome*, 584 F. Supp. 1052 (N.D. Ga. 1984).

Electrocution does not inflict unnecessary torture and torment constituting cruel and unusual punishment in violation of U.S. Const., amend. 8 and U.S. Const., amend. 14. *McCorquodale v. Balkcom*, 525 F. Supp. 408 (N.D. Ga. 1981), aff'd in part, rev'd in part, 705 F.2d 1553 (11th Cir. 1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984); *Felker v. Turpin*, 101 F.3d 95 (11th Cir. 1996). *McCorquodale v. Balkcom*. See *Felker v. Turpin*, 101 F.3d 95 (11th Cir. 1996).

The method of execution in Georgia, electrocution, is not unconstitutional. *Godfrey v. Francis*, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Electrocution does not constitute cruel and unusual punishment in violation of the eighth amendment. *Sears v. State*, 270 Ga. 834, 514 S.E.2d 426 (1999).

Mitigating factors must be considered in capital cases. — U.S. Const., amend. 8 and U.S. Const., amend. 14 require that the sentencing judge or jury must be allowed to consider, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir. 1978); *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert.

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denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002); *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980); *Goodwin v. Balkcom*, 501 F. Supp. 317 (M.D. Ga. 1980), rev'd on other grounds, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983); *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Mitigating factors must be considered in all but the rarest kind of capital case. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002); *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980); *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Statute providing for death penalty must allow sentencing body discretion to weigh all aspects of defendant's character and record as well as circumstances of the offense. *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980), cert. denied, 450 U.S. 936, 101 S. Ct. 1402, 67 L. Ed. 2d 372 (1981).

Implied unanimity requirement on mitigating circumstances. — Court's requiring of a written finding on mitigating circumstances, signed by the foreman, implicitly imposed an improper unanimity requirement on mitigating circumstances in violation of U.S. Const., amend. 8. *Brantley v. State*, 262 Ga. 786, 427 S.E.2d 758 (1993), cert. denied, U.S. , 118 S. Ct. 449, 139 L. Ed. 2d 384 (1997).

Mitigating evidence otherwise inadmissible under evidentiary rules. — The Constitution requires that evidence which would be inadmissible under an evidentiary rule must not automatically be excluded if tendered in a capital case in mitigation of punishment, rather, the potentially mitigat-

ing influence of the testimony must be weighed against the harm resulting from the violation of the evidentiary rule, and in close cases the doubt should be resolved in favor of admissibility. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

Imposition of the death penalty on circumstantial evidence alone is not unconstitutional. *Nelson v. State*, 247 Ga. 172, 274 S.E.2d 317, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981).

Effect of Interstate Agreement on Detainers on capital punishment. — A state need not reduce a capital sentence which is authorized under its own laws merely because of the effects of another state's judicial processes, brought about by the operation of the Interstate Agreement on Detainers (see O.C.G.A. T. 42, Ch. 6, Art. 2). *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979).

Death penalty for capital offenses. — Evidence was sufficient to show defendant was an active participant in capital offenses so that imposition of a death penalty was not unconstitutional under *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), which rejected the imposition of a death penalty that was based on a conviction for felony-murder. *Stanley v. Zant*, 697 F.2d 955 (11th Cir. 1983), cert. denied, 467 U.S. 1219, 104 S. Ct. 2667, 81 L. Ed. 2d 372 (1984).

Death penalty may not be imposed for rape, armed robbery, or kidnapping where victim is not killed. *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977).

Rape. — A sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by U.S. Const., amend. 8 as cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

Felony murder. — The imposition of the death penalty on proof of a felony murder does not lead to the freakish and wanton executions because procedural safeguards have been enacted in order to prevent such

abuses and have been held to be constitutionally adequate in that regard. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

Because the defendant did not aid and abet a felony but the defendant committed murder, the death sentence for felony murder did not violate the eighth amendment. *Jefferson v. State*, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987), 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

Murder. — A sentence to death by electrocution for murder is not cruel and unusual punishment under U.S. Const., amend. 8. *Trimble v. State*, 220 Ga. 229, 138 S.E.2d 274 (1964).

The death penalty for the crime of murder is not cruel and unusual punishment. *Whisman v. State*, 221 Ga. 460, 145 S.E.2d 499 (1965), cert. denied, 384 U.S. 895, 86 S. Ct. 1977, 16 L. Ed. 2d 1001 (1966).

Infliction of death as punishment of murder is not without justification and thus is not unconstitutionally severe. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931 (1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 108 L. Ed. 2d 965 (1990).

Standing to challenge death penalty and striking of death-scrupled jurors. — If the defendant is not sentenced to death the defendant has no standing to challenge the constitutionality of the death penalty or the striking of jurors unequivocally opposed to it. *Lindsey v. State*, 234 Ga. 874, 218 S.E.2d 585 (1975).

Failure to specify whether “murder” verdict was for malice murder or felony murder, thus leaving it unclear on face of verdict whether or not defendant was found to be a mere aider and abettor in the underlying felony and thus not susceptible to the death penalty, did not render death penalty erroneous where the evidence clearly indicated defendant’s planning of and direct participation in the murder. *Stevens v. Kemp*, 254 Ga. 228, 327 S.E.2d 185 (1985), cert. denied, 475 U.S. 1031, 106 S. Ct. 1237, 89 L. Ed. 2d 346 (1986).

Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose, and of the option to recommend a life sentence although aggravating circumstances are found, violate the eighth amendment. *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983).

Prosecutors’ discretion. — Defendant’s claim that the prosecutor’s authority to choose in which cases to seek the death penalty permitted the possibility of an arbitrary and capricious abuse of discretion and was unconstitutional was rejected as prosecutors did not have unfettered discretion to seek the death penalty, and challenges to the Georgia legislature’s determination that district attorneys should have the discretion to decide whether a murder defendant met the statutory criteria for the death penalty and whether to pursue the death penalty when a defendant was eligible had been repeatedly rejected. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006).

Express jury finding that defendant killed, or intended to kill, not required. — There is no constitutional requirement that the jury be instructed on, or make an express finding concerning, the requirement that, in order for the defendant to be given the death penalty, the defendant must have killed, attempted to kill, or intended to kill in order for the death penalty to be imposed. However, while this determination may be made by state trial or appellate court judges, instructing the jury thereon is the better practice. *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987).

No merit to enumeration of error that death penalty is unconstitutional. — There is no merit in an enumeration of error contending that the death penalty is cruel and unusual punishment and is thus proscribed by both the United States and the Georgia Constitutions. *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982).

Georgia death penalty scheme is constitutional. *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

U.S. Const., amend. 8 prohibits states from inflicting the death penalty upon a prisoner who is insane; however, consider-

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ation of the defendant's present sanity was premature because the defendant's execution was not imminent. *Hance v. Kemp*, 258 Ga. 649, 373 S.E.2d 184 (1988), cert. denied, 490 U.S. 1012, 109 S. Ct. 1658, 104 L. Ed. 2d 172 (1989).

Racial considerations in capital sentencing. — A complex statistical study that indicated a risk that racial considerations enter into capital sentencing determinations did not prove that a particular defendant's capital sentence was unconstitutional under the eighth amendment or the equal protection clause of the fourteenth amendment. *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Statistical evidence as to discrimination in imposition of death penalty. — Where the defendant proffered statistical evidence that the death penalty statute was applied in an arbitrary and racially discriminatory manner and with inadequate appellate review, the district court was not required to hold an evidentiary hearing in the absence of the proffer demonstrating a reasonable possibility that the evidence might compel an inference of purposeful discrimination. *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985).

A statistical study, while showing a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole, did not support a ruling that the system as a whole was arbitrary and capricious, and was insufficient to show that the defendant's death sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Death penalty is not per se cruel and unusual in violation of U.S. Const., amend. 8. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

Imposition of death penalty upon minor. — The imposition of the death penalty was

not cruel and unusual punishment per se simply because defendant was a minor at the time of the offense. *High v. Zant*, 250 Ga. 693, 300 S.E.2d 654 (1983), cert. denied, 467 U.S. 1220, 104 S. Ct. 2669, 81 L. Ed. 2d 374 (1984); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (eighth amendment forbids imposition of death penalty on juvenile offenders under age 18).

The Constitution does not prohibit a state from imposing the death penalty on one who, while 17 years old, has intentionally and viciously taken a life in cold blood. *High v. Kemp*, 819 F.2d 988 (11th Cir. 1987), cert. denied, 492 U.S. 926, 109 S. Ct. 3264, 106 L. Ed. 2d 609 (1989); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (eighth amendment forbids imposition of death penalty on juvenile offenders under age 18).

Imposition of death penalty on codefendant. — U.S. Const., amend. 8 does not authorize imposition of the death penalty upon a person who has participated in a robbery that results in a killing, if such person is not the person who does the killing, attempts to kill, or intends that the killing take place or that lethal force will be employed. *Jones v. Francis*, 252 Ga. 60, 312 S.E.2d 300, cert. denied, 469 U.S. 873, 105 S. Ct. 228, 83 L. Ed. 2d 157 (1984).

Where the defendant was not only present at the scene of the murder and participated in the assault and rape of two children, but also assisted the codefendant in stripping the children and binding their hands, then turned the defendant's car around in the road, presumably to facilitate a quick getaway and stood by the codefendant in the road while the latter shot the victims, the jury reasonably found that the defendant was an active party in the murder, and the death sentence was not disproportionate to the crime. *Johnson v. Kemp*, 585 F. Supp. 1496 (S.D. Ga. 1984), modified on other grounds, 759 F.2d 1503 (11th Cir. 1985).

Although the defendant, while not the prime mover in the murder, had a valid death penalty pending against the defendant, while the defendant's copерpetrator, arguably the triggerman in the crime, did not currently have a death sentence, the defendant's sentence was not ipso facto disproportionate, in violation of U.S. Const., amend. 8, as the focus of a capital sentencing

procedure should be on the culpability of the individual defendant. *Johnson v. Kemp*, 585 F. Supp. 1496 (S.D. Ga. 1984), modified on other grounds, 759 F.2d 1503 (11th Cir. 1985).

Jurors not automatically against capital punishment cannot be systematically excluded. — A jury is improperly selected where persons who do not make it unmistakably clear that they will automatically vote against capital punishment are systematically excluded from the jury, in violation of the sixth, eighth and fourteenth amendments. *Potts v. Zant*, 575 F. Supp. 374 (N.D. Ga. 1983), aff'd, 734 F.2d 526 (11th Cir. 1984), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610, judgment vacated, 478 U.S. 1017, 106 S. Ct. 3328, 92 L. Ed. 2d 734 (1986), (remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570 (1986)), aff'd, 814 F.2d 1512 (11th Cir. 1987), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

Belief by jurors that death sentence will be carried out. — Capital defendants possess no eighth amendment right to a jury that imposes a death sentence believing that a sentence of death will result in the defendant's execution. *Ingram v. Zant*, 26 F.3d 1047 (11th Cir. 1994), cert. denied, 513 U.S. 1167, 115 S. Ct. 1137, 130 L. Ed. 2d 1097 (1995).

Each statutory aggravating circumstance under the death penalty statute must satisfy a constitutional standard derived from the principles of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), itself, for a system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman*, supra could occur. *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).

As long as one valid statutory aggravating circumstance exists in a death penalty case, a federal habeas court should not grant relief

unless the evidence or factor in question was constitutionally inappropriate. *Collins v. Francis*, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984).

Death penalty based on emotional response to evidence. — Neither U.S. Const., amend. 8 nor O.C.G.A. § 17-10-35(c)(1) forbids a death penalty based in part on an emotional response to factors in evidence that implicate valid penological justifications for the imposition of the death penalty. *Conner v. State*, 251 Ga. 113, 303 S.E.2d 266, cert. denied, 464 U.S. 865, 104 S. Ct. 203, 78 L. Ed. 2d 177 (1983).

Prosecutor's recital to jury from United States Supreme Court and Georgia Supreme Court cases during the penalty phase of a case, with the purpose of influencing the jury to impose the death penalty, violates right to a rational sentencing hearing and right to due process of law as guaranteed by the eighth and fourteenth amendments. *Potts v. Zant*, 575 F. Supp. 374 (N.D. Ga. 1983), aff'd, 734 F.2d 526 (11th Cir. 1984), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610, judgment vacated, 478 U.S. 1017, 106 S. Ct. 3328, 92 L. Ed. 2d 734 (1986), (remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570 (1986)), aff'd, 814 F.2d 1512 (11th Cir. 1987), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989), aff'd, 734 F.2d 526 (11th Cir. 1984), cert. denied, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610, cert. granted, 478 U.S. 1017, 106 S. Ct. 3328, 92 L. Ed. 2d 734 (1986), aff'd, 814 F.2d 1512 (11th Cir. 1987), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

Prosecutor's argument during sentencing phase of capital murder trial improper, but not prejudicial. — Although arguments made by the prosecutor in the sentencing phase of a capital murder trial were improper — the discussion of the prosecutor's policy of infrequently seeking the death penalty (the "prosecutorial expertise" argument) and the use of personal opinions in discussing the defendant's chance for rehabilitation, they did not have a severely prejudicial impact, given that they were mitigated in substantial measure by the more pervasive thrust of the sentencing hearing. *Tucker v. Kemp*, 762 F.2d 1480 (11th Cir. 1985), judgment vacated, 474 U.S. 1001, 106

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S. Ct. 517, 88 L. Ed. 2d 452 (1985) for further consideration in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), *aff'd*, 802 F.2d 1293 (11th Cir. 1986), *cert. denied*, 480 U.S. 911, 107 S. Ct. 1359, 94 L. Ed. 2d 529 (1987).

Fundamentally unfair to suggest impropriety of mercy. — In the sentencing phase of a capital murder prosecution, in which the state's case against the defendant was made almost completely by the codefendant, the prosecutor's extremely improper use of century-old Georgia Supreme Court cases to suggest the impropriety of mercy rendered the sentencing proceeding fundamentally unfair. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020, 106 S. Ct. 3333, 92 L. Ed. 2d 738 (1986).

Jury's function as primary sentencer in capital cases. — Although the prosecutor made statements regarding the "important responsibility" of the appellate court, which allegedly encouraged the jury to abandon its crucial function as primary sentencer, the trial court instructed the jury to disregard the prosecutor's statement and advised the jury that the statement was "highly improper" and that the case ended with the jury's decision. This admonishment was sufficient to correct any improper impression that the prosecutor may have sought to impart. *McCorquodale v. Kemp*, 829 F.2d 1035 (11th Cir.), *cert. denied*, 483 U.S. 1055, 108 S. Ct. 32, 97 L. Ed. 2d 819 (1987).

Permissible instructions concerning aggravating circumstances. — The trial judge may instruct the jury that if it finds one or more statutory aggravating circumstances it may also consider any other mitigating or aggravating circumstances in determining whether or not the death penalty should be imposed, provided that the evidence bears on the defendant's prior record, or circumstances of the defendant's offense. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), *rev'd on other grounds sub nom. McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *aff'd*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), *cert. denied*, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

Capital sentencing instructions which do not clearly guide a jury in its understanding

of mitigating circumstances and their purpose violate this and the fourteenth amendments. *Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983), *overruled on other grounds*, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Under Georgia's death sentencing scheme, the eighth and fourteenth amendments require that the trial judge clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death. Where the instruction, taken as a whole, at best was contradictory and confusing as to the jury's function if it determined that an aggravating circumstance was present, as the jury was told that upon finding an aggravating circumstance its verdict would be death, but it was possible to lift isolated phrases from the jury instruction and find in those phrases an indication that a death sentence need not have inexorably flowed from a finding of an aggravated circumstance, on the whole, the instruction fell far short of providing clear and explicit information to the jury that it had the option not to recommend a sentence of death and defendant's death sentence was therefore set aside. *Moore v. Kemp*, 809 F.2d 702 (11th Cir.), *cert. denied*, 481 U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987), *aff'd*, 972 F.2d 319 (11th Cir. 1992).

Instruction in death penalty proceeding must explain life sentence alternative. — It is error to provide a sentencing phase instruction in a death penalty case, which fails to explain that a life sentence may be recommended even in the presence of statutory aggravating circumstances. *Stynchcombe v. Floyd*, 252 Ga. 113, 311 S.E.2d 828 (1984).

Jury must be given standards to guide and limit its discretion whether to recommend life imprisonment or death. *Goodwin v. Balkcom*, 501 F. Supp. 317 (M.D. Ga. 1980), *rev'd on other grounds*, 684 F.2d 794 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983).

Because one of the aggravating circumstances used to support a death sentence was invalidated by the Georgia Supreme Court, its failure to reverse the death sentence based on that invalid aggravating circumstance deprived the defendant of the defendant's rights under the eighth and fourteenth amendments. *Potts v. Zant*, 575 F.

Supp. 374 (N.D. Ga. 1983), *aff'd*, 734 F.2d 526 (11th Cir. 1984), *cert. denied*, 475 U.S. 1068, 106 S. Ct. 1386, 89 L. Ed. 2d 610, judgment vacated, 478 U.S. 1017, 106 S. Ct. 3328, 92 L. Ed. 2d 734 (1986), (remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570 (1986)), *aff'd*, 814 F.2d 1512 (11th Cir. 1987), *cert. denied*, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989).

“Unfettered discretion” of clemency constitutional. — The presence of “unfettered discretion” in the clemency process does not render the imposition of the death penalty of the defendant arbitrary and capricious in violation of the eighth amendment. The discretion involved at the clemency stage can never cause the imposition of the death sentence; it serves only as an act of grace to relieve that sentence even when the sentence has been legally imposed. *Smith v. Snow*, 722 F.2d 630 (11th Cir. 1983).

Effect of jury finding of malice murder on court’s review of death sentence. — A jury’s decision finding the defendant guilty of malice murder foreclosed the court from considering the argument that the imposition of the death penalty was unconstitutional because the defendant aided and abetted a felony but did not kill, attempt to kill, or intend that a killing take place. *Green v. Zant*, 738 F.2d 1529 (11th Cir.), *cert. denied*, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984).

Scope of federal habeas corpus review of death sentences. — If a federal habeas court concludes that the Georgia Supreme Court’s determination following its “proportionality” review of a death sentence under O.C.G.A. § 17-10-35 “shocks the conscience,” it is required to remand the case to allow the state court to resentence the petitioner. A federal habeas court may not conduct a *de novo* proportionality review and thereby inject itself into the state sentencing procedure. Its review remains confined to whether the state sentencing procedure both on its face and as applied violates the eighth and fourteenth amendments. *Moore v. Balkom*, 716 F.2d 1511 (11th Cir.), modified on other grounds, 722 F.2d 629 (11th Cir. 1983) (on motion for rehearing), *cert. denied*, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 733 (1984).

Defendant in a capital murder trial must be allowed to proffer to the jury any evi-

dence of mitigation submitted as a basis for a sentence less than death. *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Grandparent’s testimony of not wishing to see a grandchild die is admissible in mitigation at the sentencing phase of a death penalty case. *Romine v. State*, 251 Ga. 208, 305 S.E.2d 93 (1983), *cert. denied*, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

State’s duty to fund capital defendant’s attempt to present mitigating evidence. — A capital defendant’s right to present evidence in mitigation places an affirmative duty on the state to provide the funds necessary for production of that evidence. *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986).

Court need not point out specific mitigating circumstances. — In making it clear to the jury that mitigating circumstances must be considered, there is no requirement that the trial court point out specific mitigating circumstances which may be present in a defendant’s case and it is also unnecessary to include the magic words “mitigating circumstances” in the charge. Where Georgia juries are instructed in sentencing to consider all the facts and circumstances which have appeared at both phases of the trial, this necessarily includes any mitigating circumstances which defendant has shown, or argued, or both. *Zant v. Gaddis*, 247 Ga. 717, 279 S.E.2d 219, *cert. denied*, 454 U.S. 1037, 102 S. Ct. 579, 70 L. Ed. 2d 483 (1981).

State must furnish the services of a psychologist or psychiatrist in those capital cases deemed appropriate by the state trial court. *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Appointment of psychologist properly denied. — Where request by indigent in capital murder case for appointment of psychologist or psychiatrist was not for purpose of determining the indigent’s sanity or competency to stand trial but rather to reveal the indigent’s inability due to prolonged incarceration to conform the indigent’s conduct

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so as to constitute a mitigating factor against a death penalty sentence, trial court did not abuse its discretion in denying the request. *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Death sentence properly applied where rape victim killed. — The application of O.C.G.A. § 17-10-30(b)(7) (imposition of death sentence) to a defendant who raped the victim before murdering the victim did not violate the defendant's eighth amendment rights. *Johnson v. Kemp*, 759 F.2d 1503 (11th Cir. 1985).

Death penalty in domestic murder cases. — Although lesser sentences than death are frequently imposed in domestic murder cases, it does not follow that the death penalty would not be authorized for the murder of one spouse by another under any circumstances. Some of the more vile, horrible, or inhuman homicides have been perpetrated by family members against one another. *Godfrey v. State*, 248 Ga. 616, 284 S.E.2d 422 (1981), cert. denied, 456 U.S. 919, 102 S. Ct. 1778, 72 L. Ed. 2d 180 (1982).

The death penalty does not constitute cruel and unusual punishment when imposed for a domestic homicide. *Tyler v. Kemp*, 755 F.2d 741 (11th Cir.), cert. denied, 474 U.S. 1026, 106 S. Ct. 582, 88 L. Ed. 2d 564 (1985), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986).

Resentencing from concurrent sentences including death to consecutive life sentences. — Where the state trial court originally sentenced defendant to death for a kidnapping and to life imprisonment for armed robbery, presumably to run concurrently, but the death sentence was set aside on direct appeal, and the case was remanded to the trial court for resentencing on the kidnapping count, and, upon resentencing, the trial court imposed a second life sentence for the kidnapping, specifically directing that it was to run consecutively to the original life sentence for the armed robbery, the trial court did not impose a harsher sentence after remand than that originally

imposed in violation of the eighth and fourteenth amendments, since a death sentence, even when imposed concurrently with a life sentence, is more severe than two life sentences, whether imposed concurrently or consecutively to each other. *Thomas v. Newsome*, 821 F.2d 1550 (11th Cir.), cert. denied, 484 U.S. 967, 108 S. Ct. 461, 98 L. Ed. 2d 401 (1987).

When the sentencing phase of a death penalty case is retried by a jury other than the one which determined guilt, evidence presented by the defense, as well as evidence presented by the state, may not be excluded on the ground that it would only go to the guilt or innocence of the defendant. Although a resentencing trial will have no effect on any previous convictions, the parties are entitled to offer evidence relating to circumstances of the crime. *Blankenship v. State*, 251 Ga. 621, 308 S.E.2d 369 (1983), aff'd, 258 Ga. 43, 365 S.E.2d 265, cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988).

Where a defendant is indicted and convicted on a felony murder charge, but there is sufficient evidence to support a conclusion that the defendant contemplated that life would be taken, intended to kill, and actually did kill, a death penalty is not disproportionate in relation to the defendant's participation in the crime. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), aff'd in part, rev'd in part on other grounds, 756 F.2d 1483 (11th Cir. 1985).

Black defendant's death sentence for the murder of a white person did not violate the eighth and fourteenth amendments, where, although the jurors possessed some racial prejudices, and some more so than others, defendant did not show that the jurors, either individually or as a whole, were influenced by prejudices that would make them favor the death penalty for a black person who murdered a white person. *Dobbs v. Zant*, 720 F. Supp. 1566 (N.D. Ga. 1989), aff'd, 963 F.2d 1403 (11th Cir. 1991), rev'd on other grounds, 506 U.S. 357, 113 S. Ct. 835, 122 L. Ed. 2d 103 (1993).

Racial prejudice claim did not arise from the fact that a defendant was black and the victim was white, although certain of the jurors' statements revealed racial prejudice, no juror stated that they viewed blacks as more prone to violence than whites or as

morally inferior to whites, and although the trial judge and defense lawyer referred to the defendant as “colored” and “colored boy”, because the defense counsel did not express those personal views at trial, and neither the lawyer nor the trial judge decided the defendant’s penalty. *Dobbs v. Zant*, 963 F.2d 1403 (11th Cir. 1991), rev’d on other grounds, 506 U.S. 357, 113 S. Ct. 835, 122 L. Ed. 2d 103 (1993).

Remarks minimizing jurors’ role in death sentence. — Defendant was entitled to habeas corpus relief, where the prosecutor minimized the jurors’ responsibility by telling them that the sole responsibility for the death sentence lay on defendant who “signed [the defendant’s] own death warrant” and that they were “merely a cog in the criminal process,” and the court over-

ruled defendant’s objection without explanation. *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), aff’d, 908 F.2d 695 (11th Cir. 1990).

No prohibition against executing mentally ill but competent defendant. — Defendant, who was not found by the jury to be mentally ill, was not entitled to have the death sentence vacated on mental illness grounds, as O.C.G.A. § 17-7-131 did not preclude a death sentence on mental illness grounds, and there was no constitutional prohibition under U.S. Const., amend. 8 or Ga. Const. 1983, Art. I, Sec. I, Para. XVII against a death sentence for a competent but mentally ill defendant. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, U.S. , 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

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Am. Jur. Proof of Facts. — Excessive Bail, 18 POF2d 149

Am. Jur. Trials. — Public School Liability: Constitutional Tort Claims for Excessive Punishment and Failure to Supervise Students, 48 Am. Jur. Trials 587.

ALR. — Manner of inflicting death sentence as cruel or unusual punishment, 30 ALR 1452.

Amount of bail required in criminal action, 53 ALR 399.

Constitutionality of statute providing for penalty or forfeiture as affected by failure to fix maximum amount, 53 ALR 942.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 116 ALR 209; 132 ALR 91; 139 ALR 673.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 139 ALR 673.

Court’s power and duty, pending determination of habeas corpus proceeding on merits, to admit petition to bail, 56 ALR2d 668.

Insanity of accused as affecting right to bail in criminal case, 11 ALR3d 1385.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment, 33 ALR3d 335.

Prison conditions as amounting to cruel and unusual punishment, 51 ALR3d 111.

Review for excessiveness of sentence in narcotics case, 55 ALR3d 812.

Drug addiction or related mental state as defense to criminal charge, 73 ALR3d 16.

Pretrial preventive detention by state court, 75 ALR3d 956.

Validity of a state statute imposing mandatory sentence or prohibiting granting of probation or suspension of sentence for narcotics offenses, 81 ALR3d 1192.

Modern status: Right of peace officer to use deadly force in attempting to arrest fleeing felon, 83 ALR3d 174.

Validity, construction, and effect of Uniform Alcoholism and Intoxication Treatment Act, 85 ALR3d 701.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 ALR3d 225.

Validity and construction of statute or ordinance mandating imprisonment for habitual or repeated traffic offender, 2 ALR4th 618.

Judicial power to order discontinuance of life-sustaining treatment, 48 ALR4th 67.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator’s license for “habitual,” “persistent,” or “frequent” violations of traffic regulations, 48 ALR4th 367.

Validity and construction of prison regulation of inmates’ possession of personal property, 66 ALR4th 800.

“Guilty but mentally ill” statutes: validity and construction, 71 ALR4th 702.

Validity, construction, and effect of body execution statutes allowing imprisonment based on judgment, debt, or the like — modern cases, 79 ALR4th 232.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities, 10 ALR5th 700.

Right of extraditee to bail after issuance of governor's warrant and pending final disposition of habeas corpus claim, 13 ALR5th 118.

Propriety of carrying out death sentences against mentally ill individuals, 111 ALR5th 491.

Application of constitutional rule of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that execution of mentally retarded persons constitutes "cruel and unusual punishment" in violation of Eighth Amendment, 122 ALR5th 145.

When does forfeiture of real property violate excessive fines clause of Eighth Amendment or state constitutions — State cases, 124 ALR5th 509.

Validity, construction, and application of § 504 of Labor-Management Reporting and Disclosure Act (29 USCS § 504), precluding certain convicted persons from serving in union office for specified period, 98 ALR Fed. 481.

Excessiveness or adequacy of awards of compensatory damages in civil actions for deprivation of rights under 42 USCS § 1983 — modern cases, 99 ALR Fed. 501.

When does forfeiture of currency, bank account, or cash equivalent violate excessive fines clause of Eighth Amendment, 164 ALR Fed. 591.

When does forfeiture of real property violate excessive fines clause of Eighth Amendment — post-Austin cases, 168 ALR Fed. 375.

When does forfeiture of motor vehicle pursuant to federal statute violate excessive fines clause of Eighth Amendment, 169 ALR Fed. 615.

Excessive fines clause of Eighth Amendment — Supreme Court cases, 172 ALR Fed. 389.

[AMENDMENT IX]

[Reservation of Rights of the People]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Cross references. — Provision that enumeration of rights shall not exclude other inherent rights, Ga. Const. 1983, Art. I, Sec. I, Para. XXVIII.

Law reviews. — For article discussing federalism and this amendment, see 23 Ga. B.J. 317 (1961). For article discussing utilization of this amendment in preventing abuses of liberty by federal law enforcement officials, see 1 Ga. L. Rev. 386 (1967). For article on the judicial development of the due process clause of U.S. Const., Amend. 14 and the selective incorporation of the Bill of Rights, see 22 Mercer L. Rev. 533 (1971). For article, "Privacy in the Corporate State: A Constitutional Value of Dwindling Significance," see 22 J. of Pub. L. 3 (1973). For article discussing federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and the effect credit reporting has upon the constitutional right

to privacy, see 22 J. of Pub. L. 67 (1973). For article discussing validity of "executive privilege" as defense to congressional demand for information, see 8 Ga. L. Rev. 809 (1974). For article discussing the recognition and enforcement of new rights by the courts, see 11 Ga. L. Rev. 1143 (1977). For article on abortion, poverty and the equal protection of the laws, see 13 Ga. L. Rev. 505 (1979). For article, "Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined," see 31 Emory L.J. 785 (1982). For article, "A Senate of Five: An Essay on Sexuality and Law," see 23 Ga. L. Rev. 859 (1989). For essay, "The prospects for a Revival of Conservative Activism in Constitutional Jurisprudence," see 24 Ga. L. Rev. 629 (1990). For article, "Rights: Afterthoughts," see 27 Ga. L. Rev. 473 (1993). For

article, "Our Declaratory Ninth Amendment," see Emory L.J. 967 (1993).

For note, "Substantive Due Process and Felony Treatment of Pot Smokers: The Current Conflict," see 2 Ga. L. Rev. 247 (1968). For note advocating revision of former Georgia abortion statutes, see 6 Ga. L. Rev. 168 (1971). For note, "ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979). For note discussing the constitutional origins of the substantive right to family autonomy, see 30 Mercer L. Rev. 719 (1979).

For comment on *United Pub. Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1946), upholding constitutionality of Hatch Act, 5 U.S.C. § 1501 et seq., curbing political activity of state and federal employees, see 9 Ga. B.J. 459 (1947). For comment, "The 'Right to Work': Individual or Collective Right," focusing on *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 2d 1112 (1956), see 6 J. of Pub. L. 263 (1957). For comment discussing the constitutionality of the statutory prohibition against expenditures by labor unions in connection with federal elections, 18 U.S.C.

§ 610, see 21 Ga. B.J. 575 (1959). For comment discussing constitutionality of legislation requiring employees to pay dues to railway union in order to maintain employment, in light of *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 784, 6 L. Ed. 2d 1141 (1961), see 24 Ga. B.J. 432 (1962). For comment discussing limits on the military's jurisdiction and the constitutional rights of servicemen in light of *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), see 21 Mercer L. Rev. 311 (1969). For comment discussing *Babbitz v. McCann*, 38 U.S.L.W. 2498 (E.D. Wis. Mar. 5, 1970), as to the constitutionality, under the ninth amendment right to privacy of a state law banning intentional destruction of an unquickened fetus, see 4 Ga. L. Rev. 907 (1970). For comment, "Free Press, Privacy, and Privilege: Protection of Researcher-Subject Communications," see 17 Ga. L. Rev. 1009 (1983). For comment, "The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome — AIDS," see 37 Emory L.J. 217 (1988). For comment, "An Establishment Clause Analysis of *Webster v. Reproductive Health Services*," see 24 Ga. L. Rev. 399 (1990).

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Purpose. — The specific constitutional intent of U.S. Const., amend. 9 is that the specific mention of certain rights in U.S. Const., amend. 1 through 8 not be interpreted as a denial that others are protected. *United States v. Michael*, 622 F.2d 744 (5th Cir. 1980), rev'd on other grounds, 645 F.2d 252 (5th Cir. 1981).

Right to wear one's hair as one sees fit has not been found to be within the periphery of any of our specific constitutional rights. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), aff'd, 505 F.2d 868 (5th Cir. 1975).

There is no constitutionally protected right, plainly expressed or within the penumbra, the shadow, of U.S. Const., amends. 1, 8, 10, and 14 and U.S. Const., amend. 9, to wear one's hair in a public high school in the length and style that suits the wearer. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), aff'd, 505 F.2d 868 (5th Cir. 1975).

Cited in *Reynolds v. Brosnan*, 170 Ga. 773, 154 S.E. 264 (1930); *Gernatt v. Huiet*, 192

Ga. 729, 16 S.E.2d 587 (1941); *Looper v. Georgia, S. & Fla. Ry.*, 213 Ga. 279, 99 S.E.2d 101 (1957); *Suggs v. Brotherhood of Locomotive Firemen & Enginemen*, 219 F. Supp. 770 (M.D. Ga. 1960); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1966); *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967); *Handsford v. United States*, 410 F.2d 733 (5th Cir. 1969); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970); *Cooley v. Endictor*, 340 F. Supp. 15 (N.D. Ga. 1971); *Allison v. State*, 129 Ga. App. 364, 199 S.E.2d 587 (1973); *Finish Allatoona's Interstate Right, Inc. v. Volpe*, 355 F. Supp. 933 (N.D. Ga. 1973); *Walter v. State*, 131 Ga. App. 667, 206 S.E.2d 662 (1974); *Revels v. Tift County*, 235 Ga. 333, 219 S.E.2d 445 (1975); *Garrett v. Department of Pub. Safety*, 237 Ga. 413, 228 S.E.2d 812 (1976); *Nelson v. Rosenthal*, 539 F.2d 1034 (5th Cir. 1976); *Underwood v. State*, 144 Ga. App. 684, 242 S.E.2d 339 (1978); *Beall v. Department of Revenue*, 148 Ga. App. 5, 251 S.E.2d 4 (1978); *High Ol' Times, Inc. v. Busbee*, 449 F. Supp. 364 (N.D.

Ga. 1978); *Doe v. Busbee*, 471 F. Supp. 1326 (N.D. Ga. 1979); *Doe v. Busbee*, 481 F. Supp. 46 (N.D. Ga. 1979); *Playmate Cinema, Inc. v.*

State, 154 Ga. App. 871, 269 S.E.2d 883 (1980); *Hester v. City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985).

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ALR. — Immunity of state and its agencies from federal taxation as affected by the governmental or nongovernmental character of the particular functions involved, 150 ALR 676.

Right of privacy, 14 ALR2d 750; 11 ALR3d 1296; 18 ALR3d 873; 23 ALR3d 865; 30 ALR3d 203; 33 ALR3d 154; 46 ALR3d 900; 57 ALR3d 16; 58 ALR4th 902.

Eavesdropping as violating right of privacy, 11 ALR3d 1296.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 ALR3d 225.

Judicial power to order discontinuance of life-sustaining treatment, 48 ALR4th 67.

[AMENDMENT X]

[Powers Reserved to States or People]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Law reviews. — For article, "Interposition, Nullification and the Delicate Division of Power in a Federal System," see 5 J. of Pub. L. 2 (1956). For article arguing against constitutional justification for the sending of federal troops to Little Rock, Arkansas and the federalization of Arkansas troops, see 20 Ga. B.J. 325 (1957). For article discussing federalism under the Constitution, see 24 Ga. B.J. 352 (1962). For article suggesting recent history of Supreme Court indicates judicial usurpation of constitutional authority, see 25 Ga. B.J. 279 (1963). For article discussing functional broadening of Congress' delegated powers and its effect on civil liberties, see 18 J. of Pub. L. 103 (1969). For article on the judicial development of the due process clause of U.S. Const., Amend. 14, and the selective incorporation of the Bill of Rights, see 22 Mercer L. Rev. 533 (1971). For article, "The Treaty Power and Family Law," see 7 Ga. L. Rev. 55 (1972). For article discussing validity of executive privilege as defense to congressional demand for information, see 8 Ga. L. Rev. 809 (1974). For article discussing developing principles of state sovereignty limitations on Congress' exercise of its granted powers, see 11 Ga. L. Rev. 35 (1976). For article, "In their own image: The reframing of the due process

clause by the United States Supreme Court," see 13 Ga. L. Rev. 479 (1979). For article discussing the separation of powers implications of implied rights of actions, see 34 Mercer L. Rev. 973 (1983). For article, "The New Judicial Federalism: Where We Are Now," see 19 Ga. L. Rev. 1075 (1985). For article, "Legal Positivism and Federalism: The Certification Experience," see 19 Ga. L. Rev. 999 (1985). For article, "Federalism and the Traditions of American Political Theory," see 19 Ga. L. Rev. 981 (1985). For article, "Federalism and Rights," see 19 Ga. L. Rev. 917 (1985). For article, "Supreme Court Review of State Court 'Federal' Decisions: A Study in Interactive Federalism," see 19 Ga. L. Rev. 861 (1985). For article, "The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip," see 19 Ga. L. Rev. 799 (1985). For article discussing fundamental principles of federalism, "Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles," see 19 Ga. L. Rev. 789 (1985). For article, "Georgia and the Development of Constitutional Principles: An Essay in Honor of the Bicentennial," see 24 Ga. St. B.J. 6 (1987). For article, "A Senate of Five: An Essay on Sexuality and Law," see 23 Ga. L. Rev. 859

(1989). For article, "Individual Rights and the Powers of Government," see 27 Ga. L. Rev. 343 (1993). For article, "The Structure of Rights," see 27 Ga. L. Rev. 415 (1993). For article, "Rights: Afterthoughts," see 27 Ga. L. Rev. 473 (1993). For article, "Core Societal Values Deserve Federal Aid: Schools, Tax Credits, and the Establishment Clause," see 34 Ga. L. Rev. 1 (1999). For article, "The Principled and Unprincipled Grounds of the New Federalism: A Call for Detachment in the Constitutional Adjudication of Federalism," see 53 Mercer L. Rev. 811 (2002).

For note discussing limitations on national police power, see 4 Ga. L. Rev. 359 (1970). For note, "Selecting and Certifying National Political Convention Delegates — A Party or a State Right?", see 4 Ga. L. Rev. 875 (1970). For note discussing the doctrine of federal preemption in the allocation of powers between the nation and the states, see 22 J. of Pub. L. 391 (1973). For note discussing the commerce power, U.S. Const., Art. I, Sec. 8, Cl. 3, and its relation to this amendment in light of National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), see 25 Emory L. J. 937 (1976). For note, "Interstitial Lawmaking: Uniformity or Conformity?", see 32 Mercer L. Rev. 1235 (1981). For note discussing the doctrine of state sovereignty, see 35 Mercer L. Rev. 395 (1983).

For comment on United Pub. Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1946), upholding constitutionality of Hatch Act, 5 U.S.C. § 1501 et seq., curbing political activity of state and federal employees, see 9 Ga. B.J. 459 (1947). For comment on Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 67 S. Ct. 544, 91 L.

Ed. 794 (1947), upholding constitutionality of Hatch Act, 5 U.S.C. § 1501 et seq., see 10 Ga. B.J. 118 (1947). For comment on United States v. Kahriger, 345 U.S. 22, 72 S. Ct. 510, 97 L. Ed. 54 (1953), holding unconstitutional the federal excise and occupational tax on wagering as an invasion of the state's police powers and violative of the privilege against self-incrimination, see 15 Ga. B.J. 505 (1953). For comment, "The 'Right to Work': Individual or Collective Right," focusing on Railway Employees' Dep't v. Hanson, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 2d 1112 (1956), see 6 J. of Pub. L. 263 (1957). For comment discussing the constitutionality of the statutory prohibition against expenditures by labor unions in connection with federal elections, 18 U.S.C. § 610, see 21 Ga. B.J. 575 (1959). For comment on Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), and the unconstitutionality of state composed prayer in a public school, see 14 Mercer L. Rev. 284 (1962). For comment suggesting Georgia's Sunday Work Law (former Code 1933, § 26-6905) is a valid exercise of police power, see 18 Mercer L. Rev. 288 (1966). For comment on Pope v. City of Atlanta, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979), see 31 Mercer L. Rev. 375 (1979). For comment on Fullilove v. Klutznick, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980), regarding the constitutionality of the ten percent set aside for minority contractors, etc., see 29 Emory L.J. 1127 (1980). For comment on Garcia v. San Antonio Metropolitan Transit Authority, see 37 Mercer L. Rev. 523 (1985). For comment, "Private Citizens in Foreign Affairs: A Constitutional Analysis," see 36 Emory L.J. 285 (1987).

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U.S. Const., amend. 10 states but a truism that all is retained which has not been surrendered. United States v. Darby, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

But while U.S. Const., amend. 10 has been characterized as a truism, stating merely that all is retained which has not been surrendered, it is not without significance. The amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effec-

tively in a federal system. City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977).

Federalism does not preclude cooperative action between the two sovereigns when the interests of both state and nation are thereby served. United States ex rel. Gereau v. Henderson, 526 F.2d 889 (5th Cir. 1976).

Does not limit means by which granted powers are exercised. — U.S. Const., amend. 10 has been construed as not depriving the national government of authority to resort to all means for the exercise of a

granted power which are appropriate and plainly adapted to the permitted end. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

Effect on exercise of commerce power. — U.S. Const., amend. 10 does not operate upon a valid exercise of power delegated to Congress by the commerce clause, U.S. Const., Art. I, Sec. 8, Cl. 3. *United States v. Collier*, 478 F.2d 268 (5th Cir. 1973).

Minimum wage. — The establishment by Congress of a minimum wage is a valid regulation of interstate commerce and does not violate U.S. Const., amend. 10. *Morgan v. Atlantic Coast Line R.R.*, 32 F. Supp. 617 (S.D. Ga. 1940).

While Congress cannot directly command or force a state or municipality to comply with federal wage and hour concepts, it may, pursuant to the spending clause of the Constitution, fix the terms and conditions upon which money from the United States Treasury will be allotted and disbursed to the states and their political subdivisions. *City of Macon v. Marshall*, 439 F. Supp. 1209 (M.D. Ga. 1977).

Application of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., to a county is not prevented by U.S. Const., amend. 10. *Prickett v. DeKalb County*, 92 F. Supp. 2d 1357 (N.D. Ga. 2000).

Conflict of civil rights and police powers in regulation of business. — Civil rights do not authorize the operation of a business within a municipality in violation of ordinances enacted under police power and for the welfare of the community. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Mere fact that only one party operating a business is affected by a regulation designed to localize the operation of such business in a certain district in the city does not show arbitrary and unreasonable or unjust discrimination in violation of organic rights. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

State and local zoning laws and ordinances generally. — The power and necessity for state legislatures and municipal governments to impose restrictions through zoning

laws and ordinances is no longer subject to question. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Test of constitutionality of zoning laws and ordinances. — A zoning statute or ordinance should not be declared unconstitutional unless its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. And the exercise of police power in this regard must be upheld if any state of facts either known or which could be reasonably assumed affords support for it. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Regulation of motion picture theaters under the police power. — Motion picture theaters, like filling stations and whiskey stores are not immune from regulation under the police power. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

The right to disseminate motion pictures is not absolute. It does not mean that any motion picture can be distributed at any time, at any place, and under any circumstances. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Rights under U.S. Const., amend. 1, as they attach to commercial movies, are not so fundamental as to be immune from valid regulation under the police power, particularly where the restraint upon such movies is relatively minor and the public interest to be protected is substantial. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Right to wear one's hair as one sees fit has not been found to be within the periphery of any of our specific constitutional rights. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), aff'd, 505 F.2d 868 (5th Cir. 1975).

There is no constitutionally protected

right, plainly expressed or within the penumbra, the shadow, of U.S. Const., amends. 1, 8, 9, 14 and U.S. Const., amend. 10, to wear one's hair in a public high school in the length and style that suits the wearer. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), *aff'd*, 505 F.2d 868 (5th Cir. 1975).

31 U.S.C. §§ 462, 463, providing for discharge, by payment in legal tender, of obligations for payment in gold or any particular coin or currency, or in money of the United States measured thereby, of the then standard weight and fineness, is not unconstitutional as in violation of U.S. Const., Art. I, Sec. 8, as the exercise of a power not delegated to the Congress, nor in violation of the due process clause of U.S. Const., amend. 5 or U.S. Const., amend. 10. *Smith v. Bukofzer*, 180 Ga. 585, 180 S.E. 358 (1935).

U.S. Const., amend. 10 standing alone houses no constitutional guarantees of freedom. *Metz v. McKinley*, 583 F. Supp. 683 (S.D. Ga.), *aff'd*, 747 F.2d 709 (11th Cir. 1984).

Regulation of airplane flights. — While the right to regulate and control the flight of airplanes in interstate commerce is vested in the federal government under the commerce clause of the federal Constitution, the federal government cannot invade the rights of the people of the sovereign states so as to regulate them as between themselves. This governmental function and power has not been granted to the federal government but is reserved in the states by U.S. Const., amend. 10. *Owen v. City of Atlanta*, 157 Ga. App. 354, 277 S.E.2d 338, *aff'd*, 248 Ga. 299, 282 S.E.2d 906 (1981), *cert. denied*, 456 U.S. 972, 102 S. Ct. 2235, 72 L. Ed. 2d 846 (1982).

Title 11 U.S.C. § 724, governing the priority of liens in bankruptcy cases and effecting a subordination of city, county, and state tax liens, does not violate U.S. Const., amend. 10. *Flatau v. Jackson* (In re Cropper Co.), 63 Bankr. 874 (Bankr. M.D. Ga. 1986).

Dismissal of federal antidiscriminatory statutory action against state deemed adjudication on merits. — A federal district court's dismissal of a case with prejudice, on the grounds that a federal antidiscrimination

statute cannot be applied against the states, is an adjudication on the merits, and not a jurisdictional disposition. Accordingly, the litigant is barred from relitigating the matter in state court. Similarly, a civil rights claim against the state alleging a violation of 42 U.S.C. § 1983 is barred by the doctrine of *res judicata*, because it could and should have been presented to the original federal court. *Morgan v. Department of Offender Rehabilitation*, 166 Ga. App. 611, 305 S.E.2d 130 (1983).

Federal statute prohibiting firearm possession. — Federal statute prohibiting anyone convicted of a domestic violence misdemeanor from possessing or receiving a firearm did not violate U.S. Const., amend. 10. *National Ass'n of Gov't Employees v. Barrett*, 968 F. Supp. 1564 (N.D. Ga. 1997), *aff'd sub nom. Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998).

Forfeiture of medical license under federal law. — Forfeiture of a defendant's medical license under 21 U.S.C. § 853 did not violate U.S. Const., amend. 10. *United States v. Dicter*, 198 F.3d 1284 (11th Cir. 1999), *cert. denied*, 531 U.S. 828, 121 S. Ct. 77, 148 L. Ed. 2d 40 (2000).

Cited in *Reynolds v. Brosnan*, 170 Ga. 773, 154 S.E. 264 (1930); *Town of McIntyre v. Baldwin*, 61 Ga. App. 489, 6 S.E.2d 372 (1939); *Screven County v. Brier Creek Hunting & Fishing Club, Inc.*, 202 F.2d 369 (5th Cir. 1953); *United States v. Braun*, 119 F. Supp. 646 (S.D. Ga. 1953); *United States v. Denmark*, 119 F. Supp. 647 (S.D. Ga. 1953); *Williams v. State*, 211 Ga. 763, 88 S.E.2d 376 (1955); *Looper v. Georgia, S. & Fla. Ry.*, 213 Ga. 279, 99 S.E.2d 101 (1957); *Suggs v. Brotherhood of Locomotive Firemen & Enginemen*, 219 F. Supp. 770 (M.D. Ga. 1960); *United States v. Raines*, 203 F. Supp. 147 (M.D. Ga. 1961); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1966); *Gilstrap v. United States*, 389 F.2d 6 (5th Cir. 1968); *Brown v. State Realty Co.*, 304 F. Supp. 1236 (N.D. Ga. 1969); *Bleakley v. Jekyll Island-State Park Auth.*, 536 F. Supp. 236 (S.D. Ga. 1982); *McCroan v. Bailey*, 543 F. Supp. 1201 (S.D. Ga. 1982).

OPINIONS OF THE ATTORNEY GENERAL

Power of Congress to regulate state and local elections is highly circumscribed by

U.S. Const., amend. 10. 1987 Op. Att'y Gen. No. 87-11.

RESEARCH REFERENCES

ALR. — General delegation of power to guard against spread of contagious disease, 8 ALR 836.

Validity of statutes or ordinances which impose duties upon pawnbrokers as regards identity of persons with whom they deal other means of enforcing criminal law against theft, 23 ALR 52.

Constitutionality of trading stamp legislation, 26 ALR 707; 124 ALR 345; 133 ALR 1087.

Constitutionality of statutes relating to insurance contracts made and to be performed out of state, upon property life within state, 32 ALR 636.

License tax or fee on automobiles as affected by interstate commerce clause, 52 ALR 533; 115 ALR 1105.

Power to revoke license as affected by the fact that the penalty provided by license statute or ordinance for violation its terms or conditions does not include revocation, 79 ALR 91.

Constitutionality of regulations as to milk, 101 ALR 64; 110 ALR 644; 119 ALR 243; 155 ALR 1383.

Validity of license law which requires security for payment of debts by licensee, 101 ALR 827.

Constitutionality of statute conferring on court power to suspend sentence, 101 ALR 1402.

Applicability of state statutes or municipal regulations to contracts for performance of work on land owned or leased by the federal government, 115 ALR 371; 127 ALR 827.

Constitutionality of statutes regulating business of making small loans, 125 ALR 743; 149 ALR 1424.

Constitutionality, construction, and effect of statutes in relation to foreign-owned vehicles operating within state, 138 ALR 1499.

Validity and construction of gun control laws, 28 ALR3d 845.

Relief to owner of motor vehicle subject to state forfeiture for use in violation of narcotics laws, 50 ALR3d 172.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR3d 564.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 ALR4th 931.

Federal constitutional right to bear arms, 37 ALR Fed. 696.

Construction and application of 18 USCS § 922(e), prohibiting delivery of firearms to common carrier, 125 ALR Fed. 613.

[AMENDMENT XI]

[Restriction of Judicial Power]

The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Editor's notes. — U.S. Const., amend. 11 modifies U.S. Const., art. III, sec. II, cl. 1.

Law reviews. — For article, "Georgia Versus the United States Supreme Court," see 4 J. Pub. L. 285 (1955). For article, "Sovereign Immunity in Administrative Law—A New Diagnosis," see 9 J. of Pub. L. 1 (1960). For article, "The Eleventh Amendment: Adoption and Interpretation," see 2 Ga. L. Rev. 207 (1968). For article discussing developing

principles of state sovereignty limitations on Congress' exercise of its granted powers, see 11 Ga. L. Rev. 35 (1976). For article discussing interpretation of this amendment, see 14 Ga. L. Rev. 389 (1980). For article surveying 1982 Eleventh Circuit cases involving constitutional civil law, see 34 Mercer L. Rev. 1221 (1983). For survey of 1985 Eleventh Circuit cases on employment discrimination, see 37 Mercer L. Rev. 1315 (1986). For article,

“Federal Preemption, Federal Conscription Under the New Superfund Act,” see 38 Mercer L. Rev. 643 (1987). For survey of 1986 Eleventh Circuit cases on bankruptcy, see 38 Mercer L. Rev. 1097 (1987). For survey of 1986 Eleventh Circuit cases on trial practice and procedure, see 38 Mercer L. Rev. 1371 (1987). For article, “Georgia and the Development of Constitutional Principles: An Essay in Honor of the Bicentennial,” see 24 Ga. St. B.J. 6 (1987). For article, “Eleventh Amendment Jurisprudence After *Atascadero*: The Coming Clash with Antitrust, Copyright, and Other Causes of Action over Which the Federal Courts Have Exclusive Jurisdiction,” see 37 Emory L.J. 645 (1988). For annual eleventh circuit survey of constitutional law — civil, see 42 Mercer L. Rev. 1313 (1991). For article, “Individual Rights and the Powers of Government,” see 27 Ga. L. Rev. 343 (1993). For article, “Annual Eleventh Circuit Survey January 1, 1993 — December 31, 1993: Constitutional Civil Law,” see 45 Mercer L. Rev. 1217 (1994).

For note, “Sovereign Immunity and the Fair Labor Standards Act,” see 21 J. of Pub. L. 415 (1972). For note discussing state liability for highway defects and waiver of sovereign immunity under this amendment, see 27 Emory L.J. 337 (1978). For a note analyzing sovereign immunity in this state and proposing implementation of a waiver scheme and creation of a court of claims pursuant to Ga. Const. 1976, Art. VI, Sec. V, Para. I, see 27 Emory L.J. 717 (1978). For note, state standing in police-misconduct cases: expanding the boundaries of *parens patriae*, see 16 Ga. L. Rev. 865 (1982). For note, “Express Waiver of Eleventh Amendment Immunity,” see 17 Ga. L. Rev. 513 (1983). For note, “Lapides: Striking a Balance Between State Sovereignty and Fairness to Individual Litigants?,” see 54 Mercer L. Rev. 1741 (2003). For note, “Finding Immunity: *Manders v. Lee* and the Erosion of 1983 Liability,” see 55 Mercer L. Rev. 1505 (2004).

For comment criticizing *Gainer v. School Bd.*, 135 F. Supp. 559 (M.D. Ala. 1955), refusing to enforce injunction against school board for discriminatory salary practices on grounds of this amendment, see 7 Mercer L. Rev. 387 (1956). For comment on *Knowles v. Housing Auth.*, 212 Ga. 729, 95 S.E.2d 659 (1957), holding that the act giving the housing authority unqualified power to sue and be sued under § 49-2-6 waived any immunity the authority otherwise might have claimed under the state’s privilege of governmental immunity, see 20 Ga. B.J. 258 (1957). For comment discussing *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973) and *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), as to restrictions under this amendment on federal jurisdiction over suits seeking to force state officials to make retroactive payment of withheld state-federal welfare payments, see 7 Ga. L. Rev. 366 (1973). For comment discussing executive immunity under this amendment, in light of *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972), *rev’d sub nom. Scheuer v. Rhodes*, 42 U.S.L.W. 4543 (1974), see 10 Ga. St. B.J. 669 (1974). For comment on *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979) and this amendment, see 14 Ga. L. Rev. 135 (1979). For comment on *Owen v. City of Independence*, 444 U.S. 822, 100 S. Ct. 1398, 64 L. Ed. 2d 850 (1980), discussing state and municipal immunity from suit, see 14 Ga. L. Rev. 605 (1980). For comment on the role of the Eleventh Amendment in shipwreck litigation, see 42 Emory L.J. 1099 (1993). For comment, “Roving Federalism: Waiver Doctrine After *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,” see 49 Emory L.J. 859 (2000). For comment, “*Verizon Maryland, Inc. v. Public Service Commission of Maryland*: Reaffirming *Ex parte Young* and the Necessity of Finding Regulatory Hand-Back Schemes to a Gift or Gratuity,” see 52 Emory L.J. 1519 (2003).

JUDICIAL DECISIONS

Purpose. — The very object and purpose of U.S. Const., amend. 11 is to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. *Ramsey v. Hamilton*, 181 Ga. 365, 182 S.E. 392 (1935).

U.S. Const., amend. 11 grants a state immunity from suits by an individual. *Turner v. Ledbetter*, 906 F.2d 606 (11th Cir. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991).

How amendment to be construed. — In

order to secure the manifest purpose of the constitutional exemption guaranteed by U.S. Const., amend. 11, it should be interpreted not literally and too narrowly, but with the breadth and largeness necessary to enable it to accomplish its purpose; and must be held to cover not only suits brought against a state by name, but those against its officers, agents, and representatives, where the state, though not named, is the real party against which the relief is asked and the judgment will operate. *Ramsey v. Hamilton*, 181 Ga. 365, 182 S.E. 392 (1935).

Georgia Attorney General lacks statutory authority to waive the state's eleventh amendment immunity from suit; only the legislature can authorize a waiver of sovereign immunity. *Ramey v. Georgia Dep't of Cors.*, 153 F. Supp. 2d 1382 (M.D. Ga. 2001).

Standing of county in federal court. — A political subdivision of this state, such as the DeKalb County School District and its Board of Education, does not have standing to maintain a suit against the state in federal court for a breach of Title VI of the Civil Rights Act of 1964. *DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680 (11th Cir. 1997), cert. denied, 522 U.S. 1015, 118 S. Ct. 601, 139 L. Ed. 2d 489 (1997).

Partial dismissal permitted. — Federal courts may dismiss claims which run afoul of U.S. Const., amend. 11 without dismissing other claims involved in the case. *Brown v. Composite State Bd. of Medical Exmrs.*, 960 F. Supp. 301 (M.D. Ga. 1997).

Federal court had jurisdiction over state agency. — The Georgia Department of Transportation was subject to jurisdiction of the federal court in an action by citizens seeking a preliminary injunction against a federally-funded road widening project that involved removal of a historically significant oak tree. *Hatmaker v. Georgia DOT ex rel. Shackelford*, 973 F. Supp. 1047 (M.D. Ga. 1995).

Determination of dischargeability of student loan. — An adversary proceeding to determine the dischargeability of a student loan which, if successful, would restrain the defendant state from collecting the student loan debt at issue constitutes a suit for eleventh amendment purposes. *Wilson v. South Carolina State Educ. Assistant Auth.*, 258 Bankr. 303 (Bankr. S.D. 2001).

Immunity applies to awards payable from state treasury. — The doctrine of sovereign

immunity prohibits a monetary award when the amount of that award would be paid from the state treasury. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518 (11th Cir. 1983).

U.S. Const., amend. 11 is, in effect, the prohibition of an award of damages which must be paid out of the state treasury. *Davis v. Griffin-Spalding County Bd. of Educ.*, 445 F. Supp. 1048 (N.D. Ga. 1975).

Retroactive monetary relief against a state. — U.S. Const., amend. 11 restricts the power of the federal courts to order retroactive monetary relief against a state. *Davis v. Griffin-Spalding County Bd. of Educ.*, 445 F. Supp. 1048 (N.D. Ga. 1975).

Because an award of costs does not compensate the plaintiff for the injury that first brought the plaintiff into court, such an award does not violate U.S. Const., amend. 11's proscription against awards of "retroactive" relief against the state. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 794 (11th Cir. 1988).

For the purposes of U.S. Const., amend. 11, there is no reason for distinguishing between actual costs and interest on those costs that result from a lengthy appellate process. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 794 (11th Cir. 1988).

Suits against administrative agencies of the state may be instituted, without making the state a party and without its consent, where they are seeking to enforce an unconstitutional statute or a valid law in an unconstitutional manner. *Davis v. Cook*, 55 F. Supp. 1004 (N.D. Ga. 1944), later appeal, 80 F. Supp. 443 (N.D. Ga. 1948), rev'd on other grounds, 178 F.2d 595 (5th Cir. 1949), cert. denied, 340 U.S. 811, 71 S. Ct. 38, 95 L. Ed. 596 (1950).

Suit against agency and officials. — Eleventh amendment barred lawsuit by Medicaid recipients seeking a portion of a tobacco settlement against state agency; however, the more difficult issue of whether the eleventh amendment barred the lawsuit insofar as the state officials were concerned was not addressed since the issue lacked merit anyway. *McClendon v. Georgia Dep't of Community Health*, 261 F.3d 1252 (11th Cir. 2001).

Suits against state officers. — A suit against individuals for the purpose of preventing them as officers of state from enforc-

ing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of U.S. Const., amend. 11. *Davis v. Cook*, 55 F. Supp. 1004 (N.D. Ga. 1944), later appeal, 80 F. Supp. 443 (N.D. Ga. 1948), rev'd on other grounds, 178 F.2d 595 (5th Cir. 1949), cert. denied, 340 U.S. 811, 71 S. Ct. 38, 95 L. Ed. 596 (1950).

A suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952).

Suit to redress unconstitutional action by state officials will lie in federal courts. *Peacock v. Riggsbee*, 309 F. Supp. 542 (N.D. Ga. 1970).

Individual officers of a state may be sued when they act unconstitutionally under color of state law. *Neal v. Georgia*, 469 F.2d 446 (5th Cir. 1972).

Suits against state officials to enjoin them from invading constitutional rights are not forbidden by U.S. Const., amend. 11. *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), rev'd on other grounds, 503 F.2d 1319 (5th Cir. 1974), cert. denied, 422 U.S. 1057, 95 S. Ct. 2680, 45 L. Ed. 2d 709 (1975).

State officials may be sued in federal court on the basis that the state statutes under which they are acting are unconstitutional. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

A district attorney and assistant district attorney were acting as state officials, rather than county officials, and were entitled to immunity under U.S. Const., amend. 11. *McClendon v. May*, 37 F. Supp. 2d 1371 (S.D. Ga. 1999), aff'd without op., 212 F.3d 599 (11th Cir. Ga. 2000).

Suit against state officers acting in individual capacities. — Negligence suit was against state employees in both their official and individual capacities where the complaint referred to the DOT and its agents, listing the officials individually by name, nothing in the pleadings or pretrial order said the officials were sued in their "official capacity" only, and neither party took any step during the litigation that was inconsistent with the employees being sued in their individual capacities. *Hobbs v. Roberts*, 999 F.2d 1526 (11th Cir. 1993).

Actions brought under 42 U.S.C. § 1983.

— The fourteenth amendment does not supersede the eleventh amendment in actions alleging violations of 42 U.S.C. § 1983. Section five of the fourteenth amendment authorizes Congress to override eleventh amendment immunity to the extent necessary to enforce legislation designed to implement the substantive provisions of the fourteenth amendment, but it is well settled that § 1983 does not constitute an exercise of that authority. *Thomas v. Devries*, 834 F. Supp. 398 (M.D. Ga. 1993).

Public corporations and political subdivisions. — Neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty. *Davis v. Cook*, 55 F. Supp. 1004 (N.D. Ga. 1944), later appeal, 80 F. Supp. 443 (N.D. Ga. 1948), rev'd on other grounds, 178 F.2d 595 (5th Cir. 1949), cert. denied, 340 U.S. 811, 71 S. Ct. 38, 95 L. Ed. 596 (1950).

Suit by a public utility against a public service commission where it is charged that the commission in fixing a rate, issuing an order, or assessing a penalty, has acted illegally or abused its authority, or violated the constitutional rights of the public utility to its injury and damage, is not such an action against the state as is prohibited by U.S. Const., amend. 11. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Immunity for Department of Transportation. — State Department of Transportation employees are immune from a suit for negligence in federal court under the eleventh amendment. *Thorne v. Littlefield Constr. Co.*, (M.D. Ga. 1992).

The Georgia Department of Transportation (DOT) is an arm of the state and thus may have immunity under the eleventh amendment because any recovery would have been paid out of state funds; Georgia DOT's source of revenue is from the motor fuel tax specified in the Georgia Constitution. The fact that Georgia DOT can allocate its funds in its own discretion and without intervention by the state legislature does not change the fact that these funds are state funds. *Robinson v. Georgia DOT*, 966 F.2d 637 (11th Cir.), cert. denied, 506 U.S. 1022, 113 S. Ct. 660, 121 L. Ed. 2d 586 (1992).

The Georgia Department of Transporta-

tion, which may receive immunity under the eleventh amendment, did not waive its federal immunity where plaintiffs sought relief for inverse condemnation of property that was an ancestral cemetery because it had consented to suit in state court; the Georgia Constitution expressly reserves the state's immunity in federal court, and a waiver in state court does not constitute a waiver in federal court. *Robinson v. Georgia DOT*, 966 F.2d 637 (11th Cir.), cert. denied, 506 U.S. 1022, 113 S. Ct. 660, 121 L. Ed. 2d 586 (1992).

Pursuant to O.C.G.A. § 32-2-2(a)(8), the legislature has delegated to the Department of Transportation the authority to exercise the right and power of eminent domain for public road and transportation purposes. It follows that DOT is an "arm of the State" for eminent domain purposes, and that the trial court correctly held that an action brought against DOT under 42 U.S.C. § 1983 could not be maintained for losses occasioned by pre-condemnation publicity. *Thompson v. DOT*, 209 Ga. App. 353, 433 S.E.2d 623 (1993).

Department of Human Resources and agents or employees of county department of family and children services were immune from suit against them in their official capacities. *Powell v. Department of Human Resources*, 918 F. Supp. 1575 (S.D. Ga. 1996), aff'd, 114 F.3d 1074 (11th Cir. 1997).

Because sovereign immunity in Georgia may be waived only by statute, and because the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., specifically disavows any intent to waive the state's eleventh amendment immunity, the eleventh amendment barred the plaintiff's claim against the Department of Human Resources for injuries sustained by plaintiff's son while in foster care. *McCall v. Dep't of Human Res.*, 176 F. Supp. 2d 1355 (M.D. Ga. 2001).

Georgia Ports Authority. — Longshoreman's personal injury suit against the Georgia Ports Authority was controlled by admiralty law, which preempted the authority's state-conferred immunity under the Georgia Constitution, as well as any state-imposed procedural requirements, and, under the eleventh amendment, the authority was not immune as an "arm of the state" because it was self-sufficient and was not intertwined with the state's treasury, and state law and

state control of the authority, while mixed, indicated the authority was not immune under the eleventh amendment. *Hines v. Ga. Ports Auth.*, 278 Ga. 631, 604 S.E.2d 189 (2004).

Georgia Department of Revenue. — The Georgia Department of Revenue is a state entity, entitled to eleventh amendment immunity from suit in federal court. *Miles v. Georgia Dep't of Revenue*, 797 F. Supp. 987 (S.D. Ga. 1992).

Bankruptcy debtors' adversary proceeding against the Georgia Department of Revenue was barred by U.S. Const., amend. 11. *In re Taylor*, 249 Bankr. 571 (N.D. Ga. 2000).

Suits against state bar. — Since the Georgia Supreme Court is an arm of the State of Georgia and the State Bar is an arm of the Georgia Supreme Court, where a complaint alleged that actions in disbaring an attorney taken by the individual defendants were in their official capacities as members of the judiciary and of the State Bar, the claims for compensatory damages against all defendants were claims against the state and barred by the eleventh amendment. *Cohran v. State Bar*, 790 F. Supp. 1568 (N.D. Ga. 1992).

Enforcement of federal regulatory statutes. — The defense of sovereign immunity must be denied when the United States seeks to enforce a federal regulatory statute. *Intracoastal Transp., Inc. v. Decatur County*, 482 F.2d 361 (5th Cir. 1973).

State waives its sovereign immunity defense when it enters a field which is regulated by federal statute, whereby Congress has specifically created a remedy in private parties for the violation of the statute and has expressly provided that the private remedy is applicable to the states. *Intracoastal Transp., Inc. v. Decatur County*, 482 F.2d 361 (5th Cir. 1973).

State employees not immune in federal suit. — Because a state's liability insurance trust fund voluntarily established to protect its employees against personal liability for damages does not make the state the real party in interest for purposes of eleventh amendment immunity, individuals employed by a state agency are not entitled to eleventh amendment immunity from suit in federal court when they are sued in their individual capacity but are nevertheless eligible for insurance protection from the

state's voluntarily established liability insurance trust fund, through which the state will pay the verdict. *Jackson v. Georgia DOT*, 16 F.3d 1573 (11th Cir.), cert. denied, 513 U.S. 929, 115 S. Ct. 320, 130 L. Ed. 2d 281 (1994).

Award of retroactive benefits under public aid program. — U.S. Const., amend. 11 bars a federal district court from awarding retroactive benefits under a federal-state public aid program that are ultimately payable from state's general revenues. *Adams v. Harden*, 493 F.2d 21 (5th Cir. 1974).

Injunction prohibiting the state from recouping funds which persons received in violation of current Aid to Families with Dependent Children (AFDC) program requirements but which they were entitled to receive under previous law was not barred by the eleventh amendment, because the recipients were not seeking damages but rather were seeking to prevent the state from essentially accomplishing a legal termination of AFDC benefits without providing adequate notice under federal law. *Turner v. Ledbetter*, 906 F.2d 606 (11th Cir. 1990), cert. denied, 500 U.S. 928, 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991).

Creation of insurance fund to indemnify state. — Without an explicit provision that the creation of the insurance fund to indemnify the state waived both state sovereign and eleventh amendment immunity, federal district court could not conclude that the state, by creating such a fund, had waived its constitutional immunity from being sued in federal court. *Hobbs v. Georgia DOT*, 785 F. Supp. 980 (N.D. Ga. 1991), aff'd in part and vacated in part on other grounds, 999 F.2d 1526 (11th Cir. 1993).

Payment of awards by school boards. — Even though a majority of funds controlled by a school board emanates from the state, the board has sufficient sources of income to satisfy a judgment, or the ability to raise it, as well as the authority to pay an award of back salary without transgressing state law. *Davis v. Griffin-Spalding County Bd. of Educ.*, 445 F. Supp. 1048 (N.D. Ga. 1975).

U.S. Const., amend. 11 proscribes suits by citizens against their own state. *Ezzell v. Board of Regents*, 838 F.2d 1569 (11th Cir. 1988).

The Supreme Court has consistently held that an unconsenting state is immune from suits brought in federal courts by the state's

own citizens as well as by citizens of another state. *Miles v. Georgia Dep't of Revenue*, 143 F.R.D. 302 (S.D. Ga. 1992).

Suits seeking damages against administrative agencies. — Claim for damages and prospective injunctive relief against the State Board of Pharmacy for refusal to reinstate license was barred as a suit against the State. *Hicks v. Georgia State Bd. of Pharmacy*, 553 F. Supp. 314 (N.D. Ga. 1982).

Suits seeking damages against state officers. — Claim for damages from State Board of Pharmacy members for actions in their official capacities is a suit against the state and is barred. *Hicks v. Georgia State Bd. of Pharmacy*, 553 F. Supp. 314 (N.D. Ga. 1982).

A medical doctor's civil rights action against members of the state board of medical examiners alleging that the board's summary suspension of his licenses to practice medicine and to prescribe controlled substances was, in effect, a suit against the state and, insofar as damages were sought from the members in their official capacities, the action was barred by the eleventh amendment. *Howard v. Miller*, 870 F. Supp. 340 (N.D. Ga. 1994).

Damages against parole board officers unavailable. — Defendant's monetary claims asserted against members of the Georgia Board of Pardons and Paroles were barred by U.S. Const., amend. 11, as defendants were immune in their official capacity as agents of the real and substantial party in interest, the state. *Lemley v. Bowers*, 813 F. Supp. 814 (N.D. Ga. 1992).

State educational institute and administrators immune from damages action. — The Valdosta Technical Institute, as an educational agency of the State of Georgia providing technical and vocational instruction, and members of its administration, acting as state officials, were immune from a damages action brought in the course of a discrimination claim for non-renewal of a teaching contract. *Durrani v. Valdosta Tech. Inst.*, 810 F. Supp. 301 (M.D. Ga. 1992), aff'd, 3 F.3d 443 (11th Cir. 1993).

Board of pharmacy and members immune from damage actions. — Because of the control the state exercises over the State Board of Pharmacy, and because the board appears to be an entity of the state as defined by Georgia law, the board, and the board members in their official capacities, are im-

immune from damage actions by virtue of eleventh amendment immunity. *Shepard v. Byrd*, 581 F. Supp. 1374 (N.D. Ga. 1984).

But members subject to suit for unlawful acts. — By conditioning the reinstatement of a pharmacist's license to practice pharmacy on the release from civil liability of any person connected with the pharmacist's investigation and arrest, the State Board of Pharmacy engaged in a practice that was against public policy and thus unlawful. The board members therefore were not absolutely immune from suit in their individual capacities, however, the members of the board were immune from damages based on their qualified immunity. *Shepard v. Byrd*, 581 F. Supp. 1374 (N.D. Ga. 1984).

Drug and narcotics agency officers immune from suit for damages. — Neither a federal civil rights action for damages nor a pendent claim of malicious prosecution may proceed against agents of the Georgia Drug and Narcotics Agency in their official capacities by virtue of the eleventh amendment. *Shepard v. Byrd*, 581 F. Supp. 1374 (N.D. Ga. 1984).

Community college professors' suit against members of the board of regents of the university system was not barred by the eleventh amendment, where the board's authority to ignore the professors' tenure, when exercised, was alleged to be repugnant to the constitution, where the members had exercised and were continuing to exercise that authority to the professors' detriment, and the relief sought would end such conduct. *Ezzell v. Board of Regents*, 838 F.2d 1569 (11th Cir. 1988).

College and regents immune. — Where the state had not consented or waived immunity, and since Georgia College and the Regents of the University System are state entities to which *Stevens v. Gay*, 864 F.2d 113, 114 (11th Cir. 1989) applies, a § 1983 action against these defendants could not be entertained in federal court. *Thomas v. Devries*, 834 F. Supp. 398 (M.D. Ga. 1993).

The bankruptcy court lacked jurisdiction over the board of regents of the university system in an action by a trustee based on a breach of contract by the board; thus, a judgment previously entered against the board was void. *Ellenberg v. Board of Regents* (In re Midland Mechanical Contractors), 200 Bankr. 453 (Bankr. N.D. Ga. 1996).

College professor, dean, individually immune. — Official capacities aside, college dean and college professor were immune in their individual capacities in a civil rights action brought by a discharged professor, as they were cloaked in eleventh amendment immunity. *Thomas v. Devries*, 834 F. Supp. 398 (M.D. Ga. 1993).

Eleventh amendment bars a federal civil rights claim against a state park authority, which, although a public corporation, is closely controlled by the state; a suit against the authority is effectively a suit against the state. *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518 (11th Cir. 1983).

Power of the board of regents of the university system to sue and be sued waives eleventh amendment immunity in both state and federal courts. *McCroan v. Bailey*, 543 F. Supp. 1201 (S.D. Ga. 1982).

Waiver of suit in state courts is not construed automatically to include federal litigation as well. *Hodges v. Tomberlin*, 510 F. Supp. 1280 (S.D. Ga. 1980).

Consent to suit in state court does not necessarily waive eleventh amendment immunity. *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518 (11th Cir. 1983).

State may be subject to monetary as well as injunctive relief where it has waived immunity under U.S. Const., amend. 11. *Hodges v. Tomberlin*, 510 F. Supp. 1280 (S.D. Ga. 1980).

State officials not immune from suit for injunctive relief. — U.S. Const., amend. 11 does not insulate state officials acting in their official capacities from suit for prospective injunctive relief to remedy violations of federal constitutional law. *Stevens v. Gay*, 864 F.2d 113 (11th Cir. 1989).

An action by a railroad corporation seeking prospective declaratory and injunctive relief against individual members of the Public Service Commission in their official capacities was not barred by the eleventh amendment. *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573 (N.D. Ga. 1996).

Injunctive relief suit based on past actions. — Although the eleventh amendment does not act as a bar to suits against state officials to the extent injunctive relief is sought for ongoing violations of federal law, where plaintiff complained of violations over a period of time in the past, plaintiff was

barred from seeking injunctive relief against state officers for past violations. *Coney v. Department of Human Resources*, 787 F. Supp. 1434 (M.D. Ga. 1992).

Prisoner's action for injunctive relief barred. — U.S. Const., amend. 11 barred a prison inmate's action against the Georgia Department of Corrections and board of corrections seeking injunctive relief from the prison mail policy, where the state itself could not be liable on the merits, and the inmate had failed to amend his complaint to add the state officials acting in their official capacities. *Stevens v. Gay*, 864 F.2d 113 (11th Cir. 1989).

No money damages in actions under 42 U.S.C. § 1983. — The United States Supreme Court recognizes a significant limitation on actions under § 1983 of the Civil Rights Act of 1867, 42 U.S.C. § 1983, against a state agency by specifically holding that, consistent with U.S. Const., amend. 11, relief generally must be limited to prospective injunctive relief, not money damages. *Hodges v. Tomberlin*, 510 F. Supp. 1280 (S.D. Ga. 1980).

Waiver of immunity in bankruptcy proceeding. — Even though the state has not waived its immunity from suit in federal court for violations of the automatic stay, it could waive this immunity by filing a proof of claim against the debtor's estate, thus submitting itself to the bankruptcy court's equitable jurisdiction. *Headrick v. Georgia ex rel. Dep't of Revenue*, 200 Bankr. 963 (Bankr. S.D. Ga. 1996).

Immunity abrogated by provision of Bankruptcy Code. — Sovereign immunity of the state was abrogated by 11 U.S.C. § 106, subjecting it to damage awards for violations of the automatic stay, and this abrogation was enacted by a valid exercise of power under the fourteenth amendment. *Headrick v. Georgia ex rel. Dep't of Revenue*, 200 Bankr. 963 (Bankr. S.D. Ga. 1996).

The fourteenth amendment to the United States Constitution granted Congress authority to abrogate the state's eleventh amendment immunity from suit by individuals for the state's violation of the Bankruptcy Code's discharge injunction. *Burke v. Georgia ex rel. Dep't of Revenue*, 203 Bankr. 493 (Bankr. S.D. Ga. 1996).

The fourteenth amendment to the United States Constitution granted to Congress the

authority to abrogate the state's sovereign immunity against individual suits in federal court for damages arising from the state's violation of the automatic stay provisions of the Bankruptcy Code. *Headrick v. Georgia*, 203 Bankr. 805 (Bankr. S.D. Ga. 1996).

State has waived immunity under U.S. Const., amend. 11 in establishing the Georgia Ports Authority. *Hodges v. Tomberlin*, 510 F. Supp. 1280 (S.D. Ga. 1980).

Although Georgia entered a federally related sphere by operating a research vessel in the navigable waters of the United States, this act did not constitute a waiver of sovereign immunity from suits in federal court under the Jones Act and the general maritime law. *Sullivan v. Georgia Dep't of Natural Resources*, 724 F.2d 1478 (11th Cir.), cert. denied, 469 U.S. 872, 105 S. Ct. 222, 83 L. Ed. 2d 152 (1984).

Provisions of O.C.G.A. § 48-2-35 do not constitute a waiver of immunity under the eleventh amendment to the United States Constitution and were not enough to confer jurisdiction on the federal courts in Georgia to hear plaintiff's claims against the state for damages or prospective relief regarding automobile "title transfer fee" statute. *Johnsen v. Collins*, 875 F. Supp. 1571 (S.D. Ga. 1994).

In determining whether entity is arm of the state sharing the state's immunity under U.S. Const., amend. 11, courts look to the entity's function and characteristics as determined by state law. *East Cent. Health Dist. v. Brown*, 752 F.2d 615 (11th Cir. 1985).

Civil rights action seeking to compel provision of indigent defense services. — U.S. Const., amend. 11 did not bar a civil rights action brought on behalf of indigent defendants seeking to compel the governor and other state officials to provide indigent defense services that met minimum constitutional standards. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), cert. denied, 495 U.S. 957, 110 S. Ct. 2562, 109 L. Ed. 2d 744 (1990).

Private divers who salvaged artifacts from a sunken ship located on state property at the bottom of a river were not entitled to a salvage award from the state. *Chance v. Certain Artifacts Found & Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), aff'd, 775 F.2d 302 (11th Cir. 1985).

Suits against counties. — Suit against the sheriff in the sheriff's official capacity

amounts to a suit against the county employing the sheriff, and a suit against a county is generally not precluded under the eleventh amendment. *Thompson v. Spikes*, 663 F. Supp. 627 (S.D. Ga. 1987).

U.S. Const., amend. 11 does not protect a county from being subjected to a Fair Labor Standards Act, 29 U.S.C. § 201 et seq., suit in federal court without its consent. *Prickett v. DeKalb County*, 92 F. Supp. 2d 1357 (N.D. Ga. 2000).

Suits against county departments. — County departments, including the county department of family and children services, were state rather than county entities for the purposes of eleventh amendment immunity. *Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D. Ga. 1989), aff'd in part and rev'd in part, 909 F.2d 463 (11th Cir. 1990), cert. denied, 500 U.S. 932, 111 S. Ct. 2053, 114 L. Ed. 2d 459 (1991).

The eleventh amendment barred claims against employees of a county department of family and children services for injuries sustained by the plaintiff's son while in foster

care because the county department was a state agency for purposes of the eleventh amendment. *McCall v. Dep't of Human Res.*, 176 F. Supp. 2d 1355 (M.D. Ga. 2001).

Hospital authority was local, not state, instrumentality, and was not entitled to immunity under the eleventh amendment in a federal civil rights suit brought by a paramedic against the authority. *Baxter v. Fulton-DeKalb Hosp. Auth.*, 764 F. Supp. 1510 (N.D. Ga. 1991).

Cited in *Cook v. Davis*, 178 F.2d 595 (5th Cir. 1949); *Epstein v. Maddox*, 277 F. Supp. 613 (N.D. Ga. 1967); *Georgia Ass'n of Educators v. Harris*, 403 F. Supp. 961 (N.D. Ga. 1975); *Briarcliff Haven, Inc. v. Department of Human Resources*, 403 F. Supp. 1355 (N.D. Ga. 1975); *Ray v. Edwards*, 557 F. Supp. 664 (N.D. Ga. 1982); *Stevens v. Gay*, 792 F.2d 1000 (11th Cir. 1986); *Kemp v. Ervin*, 651 F. Supp. 495 (N.D. Ga. 1986); *Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307 (11th Cir. 1988); *Brown v. Georgia Dep't of Revenue*, 881 F.2d 1018 (11th Cir. 1989).

OPINIONS OF THE ATTORNEY GENERAL

Immunity of Savannah Port Authority members. — Members of the Savannah Port Authority, who sued in their individual or personal capacities, are entitled to the same qualified immunities from tort liability as are accorded by principles of federal and state law to other public officers in the executive branch of state government. 1986 Op. Att'y Gen. No. U86-7.

Participation by Georgia in the Coastal Zone Management Act would not constitute consent to waiver of its eleventh amendment immunity or consent for other states to assert regulatory jurisdiction within Georgia. 1997 Op. Att'y Gen. No. 97-2.

RESEARCH REFERENCES

ALR. — What actions arise under Constitution, laws, and treaties of United States; general principles, 12 ALR2d 5.

State's immunity from tort liability as dependent on governmental or proprietary nature of function, 40 ALR2d 927.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state, 81 ALR3d 1239.

Immunity of state from civil suits under Eleventh Amendment — Supreme Court cases, 187 ALR Fed. 175.

[AMENDMENT XII]

[Election of President and Vice-President]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots

the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Cross references. — Selection and duties of presidential electors, §§ 21-2-10 through 21-2-12.

Editor's notes. — U.S. Const., amend. 12 supersedes U.S. Const., art. II, sec. I, cl. 3. The sentence in U.S. Const., amend. 12 providing that the Vice-President shall act as President when the House of Representatives does not choose a President or in case

of death or disability of the President has, in turn, been superseded by U.S. Const., amend. 20 and 25.

Law reviews. — For comment criticizing *Ray v. Blair*, 343 U.S. 154, 72 S. Ct. 654, 69 L. Ed. 551 (1952), upholding constitutionality of state party requirement that candidates for presidential electors pledge allegiance to the party, see 4 Mercer L. Rev. 210 (1952).

JUDICIAL DECISIONS

Applicability to state electoral college. — Inclusion of the electoral college in the Constitution validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an

analogous system by a state in a statewide election. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

Cited in *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946).

RESEARCH REFERENCES

ALR. — Presidential and vice-presidential electors, 153 ALR 1066.

[AMENDMENT XIII]

Section 1.

[Abolition of Slavery]

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

[Power to Enforce this Article]

Congress shall have power to enforce this article by appropriate legislation.

Cross references. — Proscription of slavery and involuntary servitude, Ga. Const. 1983, Art. I, Sec. I, Para. XXII.

Editor's notes. — U.S. Const., amend. 13 establishes a rule for private, as well as state and federal, action, see *Clyatt v. United States*, 197 U.S. 207, 27 S. Ct. 429, 49 L. Ed. 726 (1905). It renders obsolete the following constitutional provisions: the clause "three-fifths of all other persons" in U.S. Const., art. I, sec. II, cl. 3, U.S. Const., art. I, sec. IX, and U.S. Const., art. IV, sec. II, cl. 3.

Law reviews. — For article discussing constitutionality of restrictive covenants, see 12 Ga. B.J. 277 (1950). For article, "The Law of the Land," focusing on the role of the Supreme Court, see 6 J. of Pub. L. 444 (1957). For article discussing functional broadening of Congress' delegated powers and its effect on civil liberties, see 18 J. of Pub. L. 103 (1969). For article, "State Action and Civil Rights," see 23 Mercer L. Rev. 519 (1972). For article discussing the history and effect of this amendment, see 13 Ga. L. Rev. 1447 (1979). For article discussing the con-

cept of a mandatory public service obligation for lawyers, see 29 Emory L.J. 997 (1980). For article, "Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930," see 35 Emory L.J. 59 (1986). For article, "Rights: Afterthoughts," see 27 Ga. L. Rev. 473 (1993). For article, "Slavery and Race: New Ideas and Enduring Shibboleths in the Interpretation of the American Constitutional System," see 44 Mercer L. Rev. 637 (1993).

For note discussing Georgia legislation governing the indenture of children and the practice of child indenture within the state, see 15 J. of Pub. L. 349 (1966). For note, "ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

For comment, "The 'Right to Work': Individual or Collective Right," focusing on *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956), see 6 J. of Pub. L. 263 (1957). For comment on *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971), see 5 Ga. L. Rev. 603 (1971).

JUDICIAL DECISIONS

Purpose. — The aim of U.S. Const., amend. 13 is to provide protection for racial groups which have historically been oppressed or those chafing under the hands of

involuntary servitude. *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975).

U.S. Const., amend. 13 was adopted with reference to conditions existing since the

foundation of the government, and the term “involuntary servitude” was intended to cover those forms of compulsory labor akin to African slavery, which, in practical operation, would tend to produce like undesirable results. It introduced no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties that individuals owe to the state, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *United States v. Ryals*, 56 F. Supp. 772 (N.D. Ga. 1944).

U.S. Const., amend. 13 is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Badges and incidents of slavery. — Under U.S. Const., amend. 13, Congress has the power to determine what constitutes the badges and incidents of slavery and to translate that determination into effective legislation, such as 42 U.S.C. § 1982. Whatever else they may have encompassed, the badges and incidents of slavery include restraints upon the right to purchase, lease, sell, and convey property. *Roberson v. Great Am. Ins. Cos.*, 48 F.R.D. 404 (N.D. Ga. 1969).

Power to enforce amendment through legislation. — The power vested in Congress to enforce U.S. Const., amend. 13 by appropriate legislation, includes the power to enact direct and primary laws, operating upon the acts of individuals, whether sanctioned by state legislation or not. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Congressional power to abolish slavery. — Section 2 of U.S. Const., amend. 13 clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

U.S. Const., amend. 13 empowers Congress to determine what the badges and incidents of slavery are and to create a statutory cause of action for those deprived of the basic rights that the law secures to all free persons. *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975).

Legislation against discriminatory housing practices. — A statute that makes unlawful economic exploitation of racial bias and panic selling is one regulating conduct, and any inhibiting effect it may have upon speech is justified by the government’s interest in protecting its citizens from discriminatory housing practices and is not violative of U.S. Const., amend. 1. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Congress has power under U.S. Const., amend. 13 to eradicate conditions that prevent blacks from buying and renting property because of their race or color, and no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Congressional power to legislate in furtherance of the elimination of racial discrimination is derived from U.S. Const., amend. 13, the power over interstate commerce, the power under U.S. Const., amend. 14, and the power under U.S. Const., amend. 15. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 49 (1973).

Congressional power as to racial barriers to property acquisition. — The authority of Congress to enforce U.S. Const., amend. 13 by appropriate legislation includes the power to eliminate all racial barriers to the acquisition of real and personal property. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Discriminatory purpose not found. — African-American residents of a city failed to establish that, by retaining an at-large election system for city officials, the city acted

with a discriminatory purpose in violation of the federal constitution. *Cofield v. City of LaGrange*, 969 F. Supp. 749 (N.D. Ga. 1997).

Package bond issue submitted to voters. — In requesting the county board of commissioners to submit a package bond issue to the voters instead of three separate bond issues, the county board of education did not time and structure the school bond referendum with the intent of diluting minority voting strength and manipulating the minority vote in violation of the first, thirteenth, fourteenth, and fifteenth amendments to the Constitution of the United States. *Lucas v. Townsend*, 783 F. Supp. 605 (M.D. Ga.), *aff'd*, 967 F.2d 549 (11th Cir. 1992).

Statute aimed at the commercial activities of those who would profiteer off the ills of society, conduct that U.S. Const., amend. 13 empowers Congress to regulate, regulates commercial activity, not speech. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

When commercial speech may be prohibited. — The federal government may in some circumstances prohibit purely commercial speech made in connection with conduct which Congress can permissibly regulate or prohibit. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Title 42 U.S.C. § 1982 bars all discrimination in the sale and rental of property, and given this reading, § 1982 is constitutional under U.S. Const., amend. 13. *Roberson v. Great Am. Ins. Cos.*, 48 F.R.D. 404 (N.D. Ga. 1969).

Employment discrimination. — U.S. Const., amend. 13 does not create a cause of action for employment discrimination. *Mitchell v. Carrier Corp.*, 954 F. Supp. 1568 (M.D. Ga. 1995), *aff'd*, 108 F.3d 343 (11th Cir. 1997).

Inapplicable to call to service to meet public need. — U.S. Const., amend. 13 has no application to a call for service made by one's government according to law to meet a public need, just as a call for money in such a case is taxation and not confiscation of property. *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944).

U.S. Const., amend. 13 abolished slavery and involuntary servitude, except as a pun-

ishment for crime, but was never intended to limit the war powers of government or its right to exact by law public service from all to meet the public need. *Heflin v. Sanford*, 142 F.2d 798 (5th Cir. 1944).

Work and labor on the part of prisoners is not in itself unconstitutional or unlawful. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga.), *aff'd*, 393 U.S. 266, 89 S. Ct. 477, 21 L. Ed. 2d 425 (1968).

Hard labor as a penalty for crime is expressly permitted by U.S. Const., amend. 13 and not prohibited by U.S. Const., amend. 8. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga.), *aff'd*, 393 U.S. 266, 89 S. Ct. 477, 21 L. Ed. 2d 425 (1968).

That one who has received an advance on a contract for services that the person is unable to repay is bound by the threat of penal sanction to remain at the person's employment until the debt has been discharged is coerced labor. *Taylor v. Georgia*, 315 U.S. 25, 62 S. Ct. 415, 86 L. Ed. 615 (1942).

Former Code 1933, § 26-2812 (see O.C.G.A. § 16-8-15) making criminal the receiving of money to improve real property with intent to defraud using the funds otherwise than for the payment of labor and material cost, if there are any outstanding, and providing that the failure to pay such labor and material cost is *prima facie* evidence of intent to defraud is not violative of U.S. Const., amend. 13, abolishing involuntary servitude. *Johnson v. State*, 203 Ga. 147, 45 S.E.2d 616 (1947).

Hospital authority may restrict a staff member's privileges by reasonable and non-discriminatory rules and regulations. *Yeargin v. Hamilton Mem. Hosp.*, 229 Ga. 870, 195 S.E.2d 8 (1972).

Issuance of injunction against discriminatory housing practices. — Because of the subtle, pervasive, and essentially irremediable nature of racial discrimination, proof of the existence of discriminatory housing practices is sufficient to permit a court to presume irreparable injury for purposes of issuing a preliminary injunction. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417 (11th Cir.), *cert. denied*, 469 U.S. 882, 105 S. Ct. 249, 83 L. Ed. 2d 187 (1984).

Involuntary servitude not criminal defense. — Involuntary servitude is a constitutional violation, as well as a criminal offense,

but it is not a criminal defense; therefore, the trial court did not err in failing to give the defendant's requested charges on involuntary servitude in a prosecution for selling and trafficking in cocaine in which the defendant alleged to have been illegally procured as an agent to work for the state involuntarily in connection with drug transactions. *Satterfield v. State*, 248 Ga. App. 479, 546 S.E.2d 859 (2001).

Cited in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); *Willis v. Pickrick Restaurant*, 231 F. Supp. 396 (N.D. Ga.

1964); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1966); *Sellers v. Georgia*, 374 F.2d 84 (5th Cir. 1967); *Brown v. State Realty Co.*, 304 F. Supp. 1236 (N.D. Ga. 1969); *Glover v. Daniel*, 434 F.2d 617 (5th Cir. 1970); *United States v. Bob Lawrence Realty, Inc.*, 313 F. Supp. 870 (N.D. Ga. 1970); *Copeland v. Mead Corp.*, 51 F.R.D. 266 (N.D. Ga. 1970); *Smith v. State*, 229 Ga. 727, 194 S.E.2d 82 (1972); *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977); *United States v. King*, 587 F.2d 209 (5th Cir. 1979); *Cross v. Baxter*, 639 F.2d 1383 (5th Cir. 1981); *Bailey v. Vining*, 514 F. Supp. 452 (M.D. Ga. 1981).

RESEARCH REFERENCES

ALR. — Injunction against strike as violating constitutional provision against involuntary servitude, 46 ALR 1541.

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

[Apportionment of Representatives in Congress]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

[Persons Disqualified from Holding Office]

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

[What Public Debts are Valid]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

[Power to Enforce This Article]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Cross references. — Due process rights, U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. I. Privileges and immunities for all citizens, Ga. Const. 1983, Art. I, Sec. I, Para. VII, and §§ 1-2-9, 1-2-10. Penalty for hiring applicant with criminal record, § 31-7-353.

Editor's notes. — Section II of this Amendment supersedes the first sentence of U.S. Const., art. I, sec. II, para. III. Section III of this Amendment modifies U.S. Const., art. I, secs. II and III, U.S. Const., art. II, sec. I, and U.S. Const., art. VI, by disqualifying from office those who fail to honor an oath of office. Section IV of this Amendment modifies U.S. Const., art. I, sec. VIII, para. I, by forbidding the assumption and payment of certain debts incurred by national or state governments.

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155, 5 S.E.2d 425 (1939); *Hogg v. Housing Auth.*, 189 Ga. 164, 5 S.E.2d 431 (1939), see 2 Ga. B.J. 65 (1940). For comment on *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940), holding unconstitutional school regulation mandating flag salute, see 2 Ga. B.J. 66 (1940). For comment on *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1129 (1940), holding power of public official to determine what is a religious cause is unconstitutional infringement upon religious liberty, see 2 Ga. B.J. 68 (1940). For comment concerning indirect use of illegally seized evidence, in light of *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939), see 2 Ga. B.J. 70 (1940). For comment on *Minersville School Dist. v. Gobitis*, 108 F.2d 683 (3rd Cir. 1939), holding unconstitutional compulsory flag-salute regulation in school, see 2 Ga. B.J. 74 (1940). For comment on *Schneider v. New Jersey*, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939), holding unconstitutional municipal ordinances prohibiting distribution of handbills in public places, see 2 Ga. B.J. 76 (1940). For comment criticizing *McIntyre v. State*, 190 Ga. 872, 11 S.E.2d 5 (1940), permitting admission of illegally seized evidence, see 3 Ga. B.J. 53 (1941). For comment on *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941), holding free speech and press guarantees extend to publication concerning judicial proceedings pending in court, see 4 Ga. B.J. 63 (1942). For comment discussing right to counsel for indigent defendants, in light of *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), see 5 Ga. B.J. 51 (1942). For comment regarding denial of due process through statute involving administration of estate of absentee minor, in light of *Payne v. Home Sav. Bank*, 193 Ga. 406, 18 S.E.2d 770 (1942), see 5 Ga. B.J. 62 (1943). For comment as to constitutional permissibility of state and municipal ordinances requiring permit to distribute religious literature, in light of *Jamison v. Texas*, 318 U.S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (1943), see 5 Ga. B.J. 70 (1943). For comment on *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), holding unconstitutional state law requiring flag salute by students, see 6 Ga. B.J. 249 (1944). For comment on *Taylor v. Missis-*

sippi, 319 U.S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943), holding statute criminalizing indoctrination of creed, theory, or principles creating refusal to salute United States flag denies liberty guaranteed by this amendment, see 6 Ga. B.J. 250 (1944). For comment on *United States v. White*, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944), holding privilege against self-incrimination cannot be claimed for refusal to produce union records specifically designated in subpoena, see 7 Ga. B.J. 247 (1944). For comment regarding due process right to counsel for indigent defendant charged with felony, in light of *Williams v. Kaiser*, 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed. 398 (1945), see 7 Ga. B.J. 484 (1945). For comment discussing taxation of property beyond state jurisdiction by means of ad valorem tax on accounts receivable of foreign corporation from sales in Georgia, in light of *Parke, Davis & Co. v. Atlanta*, 200 Ga. 296, 36 S.E.2d 773 (1946), see 8 Ga. B.J. 425 (1946). For comment on *Turman v. Duckworth*, 68 F. Supp. 744 (N.D. Ga.), appeal dismissed, 329 U.S. 675, 67 S. Ct. 21, 91 L. Ed. 596, rehearing denied, 329 U.S. 829, 67 S. Ct. 296, 91 L. Ed. 704 (1946), see 9 Ga. B.J. 335 (1947). For comment on *United Pub. Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1946), upholding constitutionality of Hatch Act curbing political activity of state and federal employees, see 9 Ga. B.J. 459 (1947). For comment on *Everson v. Board of Educ.*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), upholding constitutionality of public transportation to children attending parochial schools, see 9 Ga. B.J. 461 (1947). For comment on *Harris v. United States*, 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 399 (1947), upholding constitutionality of evidence seized during search incident to arrest, see 10 Ga. B.J. 120 (1947). For comment on *Fay v. New York*, 329 U.S. 697, 67 S. Ct. 92, 91 L. Ed. 609 (1947), upholding constitutionality of New York "blue ribbon" jury, see 10 Ga. B.J. 386 (1948). For comment on *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948), holding when the right of privacy must yield to right of search is a matter for judicial officer, not policeman, see 10 Ga. B.J. 498 (1948). For comment on *McCollum v. Board of Educ.*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), holding constitutionally impermissible religious education

classes held during school hours, see 10 Ga. B.J. 499 (1948). For comment on *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), holding state court enforcement of restrictive covenants based on race is state action, see 11 Ga. B.J. 89 (1948). For comment on *Local 309, United Furn. Workers v. Gates*, 75 F. Supp. 620 (1948), holding presence of state police officers at union meeting denies workers' freedoms of speech and assembly, see 11 Ga. B.J. 233 (1948). For comment on *McDonald v. United States*, 166 F.2d 957 (D.C. Cir. 1948), holding act of looking through transom without search warrant and observing that which is not hidden is not a search, see 11 Ga. B.J. 241 (1948). For comment on *Gholson v. Commonwealth*, 308 Ky. App. 82, 212 S.W.2d 537 (1948), holding judge must determine whether indigent intelligently and voluntarily waives right to counsel, see 11 Ga. B.J. 251 (1948). For comment on *Uveges v. Pennsylvania*, 335 U.S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948), holding due process requires court to offer provision of counsel before permitting accused to plead guilty, see 11 Ga. B.J. 364 (1948). For comment discussing permissible scope of statutes defining unlawful speech, in light of *Terminiello v. City of Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949), see 1 Mercer L. Rev. 114 (1949). For comment on *Jones v. Kentucky*, 97 F.2d 335 (6th Cir. 1938), holding due process requires state to afford corrective process where falsity of perjured testimony upon which conviction is obtained is discovered after the conviction, see 11 Ga. B.J. 44 (1949). For comment on *Frazier v. United States*, 335 U.S. 497, 69 S. Ct. 201, 93 L. Ed. 187 (1948), holding defendant's choice to eliminate nongovernment employees from jury panel cannot be repudiated as petitioner was given fair and lawfully selected panel, see 11 Ga. B.J. 366 (1949). For comment discussing right to distribute religious material in apartment house, in light of *Hall v. Commonwealth*, 188 Va. 72, 49 S.E.2d 369 (1948), see 11 Ga. B.J. 369 (1949). For comment discussing right of parents to teach and instruct children, in light of *Rice v. Commonwealth*, 188 Va. 224, 49 S.E.2d 342 (1948), see 11 Ga. B.J. 376 (1949). For comment discussing discrimination against Negro voters manifested in voter registration requirements, in light of *Davis v. Schnell*, 81

F. Supp. 872 (S.D. Ala.), aff'd without opinion, 336 U.S. 933, 69 S. Ct. 749, 93 L. Ed. 1093 (1949), see 12 Ga. B.J. 94 (1949). For comment on *Burke v. State*, 205 Ga. 656, 54 S.E.2d 350 (1949), see 12 Ga. B.J. 212 (1949). For comment on *Crumb v. State*, 205 Ga. 547, 54 S.E.2d 639 (1949), see 12 Ga. B.J. 215 (1949). For comment on *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949), holding rights of privacy and free association permitted script writers to refuse answers to H.U.A.C. questions on Communist party affiliations, see 12 Ga. B.J. 222 (1949). For comment discussing appeal by state after acquittal, in light of *State v. Evjue*, 254 Wis. 581, 37 N.W.2d 50 (1949), see 1 Mercer L. Rev. 306 (1950). For comment as to state authority to regulate election ballots, in light of *Morrison v. Lamarre*, 75 R.I. 176, 65 A.2d 217 (1949), see 1 Mercer L. Rev. 311 (1950). For comment discussing racial segregation in graduate schools, in light of *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), and *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149 (1950), see 2 Mercer L. Rev. 272 (1950). For comment criticizing *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950) denying federal jurisdiction in apportionment case under the county unit system (Ga. L. 1917, p. 183), see 2 Mercer L. Rev. 274 (1950). For comment on *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950) denying federal jurisdiction in case involving apportionment, see 2 Mercer L. Rev. 275 (1950). For comment discussing cruel and unusual punishment and scope of review of proceedings through writ of habeas corpus of convict escaped from chain gang, in light of *Dye v. Johnson*, 338 U.S. 864, 70 S. Ct. 146, 94 L. Ed. 530 (1949), see 12 Ga. B.J. 356 (1950). For comment discussing damages for breach of restrictive covenants when such covenants not specifically enforceable, in light of *Weiss v. Leon*, 225 S.W.2d 127 (Mo. 1949), see 12 Ga. B.J. 498 (1950). For comment on *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149 (1950), holding unconstitutional racial discrimination in state-supported graduate school, see 13 Ga. B.J. 88 (1950). For comment discussing constitutionality of local motion picture censorship laws, in light of *RD-DR Corp. & Film Classics, Inc. v. Smith*,

183 F.2d 562 (5th Cir. 1950), see 13 Ga. B.J. 248 (1950). For comment on *Traveler's Health Ass'n v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L. Ed. 1154 (1950), holding due process is satisfied by Virginia provisions subjecting foreign mail-order insurance business to service of process, see 13 Ga. B.J. 255 (1950). For comment on *Azar v. Thomas*, 206 Ga. 588, 57 S.E.2d 821 (1950), holding foreign decree of divorce may be collaterally attacked on grounds of fraud in its procurement and lack of jurisdiction, see 13 Ga. B.J. 334 (1951). For comment discussing constitutionality of segregation in state-supported law school, in light of *Epps v. Carmichael*, 93 F. Supp. 327 (M.D.N.C. 1950), see 13 Ga. B.J. 357 (1951). For comment on *Doremus v. Board of Educ.*, 5 N.J. 435, 75 A.2d 880 (1950), holding constitutional statutes requiring Bible reading without comment in public school classrooms, see 13 Ga. B.J. 360 (1951). For comment discussing clear and present danger test, in light of *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), see 13 Ga. B.J. 361 (1951). For comment on *Blau v. United States*, 340 U.S. 159, 71 S. Ct. 223, 95 L. Ed. 170 (1950), holding fifth amendment privilege against self-incrimination extends to refusal to answer grand jury questions regarding Communist party, see 13 Ga. B.J. 483 (1951). For comment discussing state regulation of interstate natural gas pipelines, in light of *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 71 S. Ct. 215, 95 L. Ed. 190 (1950), see 13 Ga. B.J. 488 (1951). For comment on *Mairs v. Peters*, 52 So. 2d 793 (Fla. 1951), holding party loyalty oath is reasonable regulation based on legislative power to set standards for candidates, see 14 Ga. B.J. 234 (1951). For comment concerning discriminatory selection of grand jury members, in light of *Shepherd v. Florida*, 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740 (1951), see 14 Ga. B.J. 256 (1951). For comment on *Breard v. City of Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), upholding constitutionality of "Green River" ordinances, see 14 Ga. B.J. 258 (1951). For comment discussing the constitutional issues involved in releasing students from public schools for periodic religious training, in light of *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E.2d 463 (1951), aff'd, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), see 1 J. of Pub. L. 212

(1952). For comment discussing the constitutional conflicts involved where outside events, especially press coverage, tend to influence a defendant's opportunity for a fair trial, in light of *Shepherd v. Florida*, 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 40 (1951), see 1 J. of Pub. L. 217 (1952). For comment, "State Regulation of the Hatemonger," focusing on *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952), see 1 J. of Pub. L. 519 (1952). For comment on *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 343 (1952), holding state-imposed pay-for-voting system constitutional, see 4 Mercer L. Rev. 209 (1952). For comment on *United States v. Carignan*, 342 U.S. 36, 72 S. Ct. 97, 96 L. Ed. 48 (1951), see 14 Ga. B.J. 486 (1952). For comment on *Phillips v. Naff*, 332 Mich. 389, 52 N.W.2d 158 (1952), see 15 Ga. B.J. 71 (1952). For comment on *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), see 15 Ga. B.J. 86 (1952). For comment on *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952), holding a Florida statute which required the isolation of persons having tuberculosis to be a proper exercise of police power and not violative of due process, see 15 Ga. B.J. 215 (1952). For comment, "Dual Nationals' Duties of Allegiance," discussing the legal effect of dual nationality, see 15 Ga. B.J. 239 (1952). For comment on *Barrows v. Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), holding damage award by state court for breach of restrictive covenant against sale of realty to nonwhites an equal protection violation, see 5 Mercer L. Rev. 206 (1953). For comment on discriminatory jury selection, in light of *Avery v. State of Georgia*, 345 U.S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953), see 5 Mercer L. Rev. 207 (1953). For comment on *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), see 15 Ga. B.J. 363 (1953). For comment on *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952), see 15 Ga. B.J. 366 (1953). For comment on *Fowler v. Rhode Island*, 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953), see 16 Ga. B.J. 95 (1953). For comment on *Barrows v. Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), holding that damages for breach of racially restrictive covenant cannot be maintained as such action by the court is state action within the meaning of this amend-

ment, see 16 Ga. B.J. 229 (1953). For comment on *Kansas City v. Williams*, 205 F.2d 47 (8th Cir. 1953), holding the exclusion of blacks from the use of a deluxe swimming pool located in a public park constitutes unequal protection and is violative of this amendment, see 16 Ga. B.J. 230 (1953). For comment on racially restrictive covenants, in light of *Rice v. Sioux City Mem. Park Cem.*, 245 Iowa 147, 60 N.W.2d 110 (1953), see 3 J. of Pub. L. 272 (1954). For comment discussing motion picture censorship, in light of *Commercial Pictures Corp. v. Regents of Univ. of State of N.Y.*, 346 U.S. 587, 74 S. Ct. 286, 98 L. Ed. 329 (1954), see 5 Mercer L. Rev. 325 (1954). For comment on *Barrows v. Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), denying damages for breach of racially restrictive covenant, see 16 Ga. B.J. 355 (1954). For comment on *United States v. Nesmith*, 121 F. Supp. 758 (D.D.C. 1954), regarding admissibility of chemical tests of body fluids where U.S. Const., Amends. 4 and 5 and this amendment objections are made, see 4 J. of Pub. L. 202 (1955). For comment on *Grandville-Smith v. Grandville-Smith*, 349 U.S. 1, 75 S. Ct. 553, 99 L. Ed. 773 (1955), analyzing due process aspects of divorce jurisdiction statutes and full faith and credit problems with divorce decrees, see 4 J. of Pub. L. 206 (1955). For comment on *Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954), regarding extension of due process to include right to employ counsel in trial under habitual criminal statute, see 4 J. of Pub. L. 212 (1955). For comment on *Dawson v. Mayor of Baltimore*, 23 U.S.L. Week 2057 (4th Cir. March 14, 1955) abolishing "Separate but Equal" doctrine as applied to racial segregation in public beach and bath house facilities, see 6 Mercer L. Rev. 343 (1955). For comment on *Williams v. Hirsch*, 211 Ga. 534, 87 S.E.2d 70 (1955), holding unfair Cigarette Sales Act of 1949 (Ga. L. 1949, p. 695) unconstitutional, see 6 Mercer L. Rev. 352 (1955). For comment on *Beard v. United States*, 222 F.2d 84 (4th Cir. 1955), wherein the refusal of defendant to produce public records was held to raise an inference of criminality and such inference did not violate privilege against self-incrimination, see 7 Mercer L. Rev. 233 (1955). For comment on *Massey v. Moore*, 348 U.S. 105, 75 S. Ct. 145, 99 L. Ed. 135 (1954), holding that conviction of an insane

man without benefit of counsel and unable to defend himself is violative of due process, see 17 Ga. B.J. 525 (1955). For comment on *Watson v. Employer's Liab. Assurance Corp.*, 348 U.S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1954), holding that a statute allowing a direct action by the policy holder against the insurer contrary to the terms of the contract and requiring the consent of the insurer to such action as a prerequisite of doing business in the state was not violative of the Constitution, see 17 Ga. B.J. 529 (1955). For comment on *Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 (1954), reversing conviction as a habitual criminal of petitioner who was denied aid of counsel, see 17 Ga. B.J. 401 (1955). For comment, "Doing Business for Purposes of State Taxation of Foreign Corporations," focusing on *Minnesota v. Northwestern States Portland Cement Co.*, CCH State Tax Reports 16-001 (Hennepin County Dist. Court, October, 1955), see 5 J. of Pub. L. 263 (1956). For comment criticizing *Gainer v. School Bd.*, 135 F. Supp. 559 (M.D. Ala. 1955), refusing to enforce injunction against school board for discriminatory salary practices on U.S. Const., Amend. 11 grounds, see 7 Mercer L. Rev. 387 (1956). For comment on *Fleming v. South Carolina Elec. & Gas Co.*, 224 F.2d 752 (4th Cir. 1955), holding that defendant corporation in requiring plaintiff to change bus seats under color of state law denied plaintiff her constitutional rights as the separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) can no longer be regarded as a correct statement of law, see 18 Ga. B.J. 356 (1956). For comment on *International Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957) as to the constitutionality of enjoining picketing, see 6 J. of Pub. L. 534 (1957). For comment on *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957), upholding the enjoining under a New York statute of distribution of certain obscene books, see 6 J. of Pub. L. 548 (1957). For comment on *First Unitarian Church v. County of Los Angeles*, 48 C.2d 419, 311 P.2d 508 (1957), upholding requirement of loyalty oath as prerequisite to tax exemption, see 6 J. of Pub. L. 555 (1957). For comment on *Fikes v. Alabama*, 25 U.S.L. Week (1957), as to effect of psychological weakness of

prisoner on voluntariness of confession, see 8 Mercer L. Rev. 367 (1957). For comment discussing reasonableness in search and seizure of narcotics from accused's body, in light of *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), see 9 Mercer L. Rev. 220 (1957). For comment on *Dyer v. Abe*, 138 F. Supp. 220 (D. Hawaii 1956), holding that the failure of the state Legislature to reapportion in accordance with statutory or constitutional requirements is a denial of equal protection and due process, see 19 Ga. B.J. 368 (1957). For comment on *Hill v. Balkcom*, 213 Ga. 58, 96 S.E.2d 589 (1957), holding that where court appointed counsel in a criminal case is a member of the bar in good standing, which is prima facie evidence of his competency as an attorney, and serves his client in good faith and with loyalty, the requirements of due process are met, see 19 Ga. B.J. 519 (1957). For comment discussing the effect of the decision in *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 ALR2d 1180 (1954), on the separate but equal doctrine in areas other than public education, see 19 Ga. B.J. 540 (1957). For comment on *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957), holding that this amendment does not extend the protection of the U.S. Const., Amendments 4 and 5 to criminal prosecutions in state cases, see 20 Ga. B.J. 126 (1957). For comment on *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957) extending personal jurisdiction to nonresident life insurance company through expansion of "minimum contacts" doctrine, see 9 Mercer L. Rev. 362 (1958). For comment on *Pennsylvania v. Board of Dirs.*, 353 U.S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792 (1957), holding that the Philadelphia Board of Directors of City Trusts was an agency of the state and their denial to nonwhite applicants of admission to a college pursuant to the trust creating the institution constitutes discrimination by the state and is violative of this amendment, see 20 Ga. B.J. 397 (1958). For comment on *Ludley v. Board of Supervisors*, 150 F. Supp. 900 (E.D. La. 1957), declaring that a statute requiring applicants to publicly financed institutions of higher learning obtain a certificate of eligibility and good moral character signed by their local superintendent of education and a statute forbidding teachers

from performing acts to bring about integration in public schools or institutions of higher learning, together violated the equal protection clause of this amendment, and the obvious intent of the statute requiring the certificate of eligibility to discriminate against Negroes rendered it unconstitutional where standing alone as well, see 20 Ga. B.J. 400 (1958). For comment on *Schwartz v. Board of Bar Exmrs.*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), holding that the petitioner was denied due process by the state's refusal to allow him to qualify for the bar indicating that because of prior arrests and past membership in the Communist Party he had not shown "good moral character," see 20 Ga. B.J. 406 (1958). For comment on *Fikes v. Alabama*, 352 U.S. 191, 77 S. Ct. 281, 1 L. Ed. 2d 246 (1957), holding that a confession rendered under pressure while in solitary confinement at a state penitentiary prior to arraignment was involuntary and its admission into evidence constituted a violation of due process under this amendment, see 20 Ga. B.J. 408 (1958). For comment on *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957), reversing a contempt conviction where appellant refused to testify on grounds of U.S. Const., Amend. 1, see 20 Ga. B.J. 411 (1958). For comment on *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), holding that for a state to assert jurisdiction over a foreign insurance company it is sufficient for due process purposes if the contract on which the case is based has a substantial connection with that state, see 21 Ga. B.J. 113 (1958). For comment on *Payne v. Arkansas*, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958), overturning a conviction for murder gained on the basis of a coerced confession, see 21 Ga. B.J. 116 (1958). For comment on *Complete Auto Transit Co. v. Floyd*, 249 F.2d 396 (5th Cir. 1957), holding that a statute which, if applied, would subject the defendant to double recovery of medical and funeral expenses was unconstitutional as against that defendant because it deprives the defendant of its property without due process of law, see 21 Ga. B.J. 244 (1958). For comment on the right to belong to a labor union, in light of *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 262 F.2d 359 (6th Cir. 1958), cert. denied, 359

U.S. 935, 79 S. Ct. 648, 3 L. Ed. 2d 636 (1959), see 8 J. of Pub. L. 580 (1959). For comment discussing right to counsel of indigent indicted for noncapital felony, in light of *Cash v. Culver*, 358 U.S. 633, 79 S. Ct. 432, 3 L. Ed. 2d 557 (1959), see 22 Ga. B.J. 111 (1959). For comment on *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958), holding suspension of retirement pay for pleading U.S. Const., Amend. 5 to be violation of due process, see 22 Ga. B.J. 114 (1959). For comment on *Martinez v. State*, 167 Tex. 97, 318 S.W.2d 66 (1958), holding suspension of attorney from state bar rendered him unqualified to afford representation envisioned by guarantees of U.S. Const., Amend. 6, see 22 Ga. B.J. 239 (1959). For comment on *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957), holding Criminal Registration Act violates due process, see 22 Ga. B.J. 272 (1959). For comment regarding right of witness in congressional contempt proceeding to refuse to testify under the U.S. Const., Amends. 1 and 5, in light of *Barrenblatt v. United States*, 360 U.S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959), see 22 Ga. B.J. 404 (1960). For comment on *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), holding knowing use of false testimony by state official to obtain conviction is denial of due process, see 22 Ga. B.J. 406 (1960). For comment on *Frank v. Maryland*, 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959), holding housing inspection without warrant to be reasonable search, see 22 Ga. B.J. 410 (1960). For comment on *Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), holding exposure of jurors to newspaper articles regarding prior convictions when court refused to permit prosecutor to present such evidence was denial of due process, see 22 Ga. B.J. 413 (1960). For comment discussing reasonableness of warrantless search of automobile, in light of *Patenotte v. United States*, 266 F.2d 647 (5th Cir. 1959), see 22 Ga. B.J. 549 (1960). For comment discussing constitutionality of prior restraint of distribution of anonymous handbills, in light of *California v. Talley*, 172 Cal. App. 2d 797, 332 P.2d 447 (1958), see 23 Ga. B.J. 123 (1960). For comment on *Hudson v. North Carolina*, 363 U.S. 697, 80 S. Ct. 1314, 4 L. Ed. 2d 1500 (1960), holding unconstitutional denial of counsel to peti-

tioner where guilty plea of codefendant placed him in prejudicial position, see 23 Ga. B.J. 265 (1960). For comment on *Nelson v. County of Los Angeles*, 362 U.S. 1, 80 S. Ct. 527, 4 L. Ed. 2d 494 (1959), holding due process not denied employees summarily dismissed for invocation of U.S. Const., Amends. 1 and 5, before congressional subcommittee, see 23 Ga. B.J. 267 (1960). For comment on *Mapp v. Ohio*, 365 U.S. 514, 81 S. Ct. 1684, 5 L. Ed. 2d 714 (1961), and the incorporation of the prohibition of unreasonable searches and seizures of U.S. Const., Amend. 4 into this amendment, see 13 Mercer L. Rev. 275 (1961). For comment on *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960), holding evidence illegally obtained by state officers is inadmissible in federal as well as state courts, see 23 Ga. B.J. 383 (1961). For comment discussing admissibility of evidence obtained by search and seizure under administrative warrant, in light of *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960), see 23 Ga. B.J. 400 (1961). For comment on *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E.2d 421 (1960), see 23 Ga. B.J. 406 (1961). For comment discussing Supreme Court treatment of political questions, in light of *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960), see 23 Ga. B.J. 545 (1961). For comment on *Times Film Corp. v. Chicago*, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (1961), holding censorship standards set by state to prevent public display of obscenity do not constitute prior restraint, see 23 Ga. B.J. 554 (1961). For comment discussing constitutionality of state loyalty oaths, in light of *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960), see 23 Ga. B.J. 556 (1961). For comment discussing exclusionary rule in state courts, in light of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), see 24 Ga. B.J. 129 (1961). For comment discussing standing to object to unlawful search and seizure, in light of *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), see 24 Ga. B.J. 131 (1961). For comment on *Silverman v. United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961), holding police use of "spike mike" violated prohibition against unlawful search and seizure, see 24 Ga. B.J. 135 (1961). For comment on

Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) and the unconstitutionality of state composed prayer in a public school, see 14 Mercer L. Rev. 284 (1962). For comment discussing constitutionality of legislation requiring employees to pay dues to railway union in order to maintain employment, in light of *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 784, 6 L. Ed. 2d 1141 (1961), see 24 Ga. B.J. 432 (1962). For comment discussing application of exclusionary rule to state, in light of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), see 24 Ga. B.J. 445 (1962). For comment on *Pierce v. La Vallee*, 293 F.2d 233 (2d Cir. 1961), holding black muslimism is religion within meaning of U.S. Const., Amend. 1, see 24 Ga. B.J. 519 (1962). For comment on *Cohen v. Hurley*, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961), upholding constitutionality of disbarment by state court of attorney who refused to answer questions in judicial investigation pertaining to professional misconduct, see 24 Ga. B.J. 522 (1962). For comment on *National Linen Serv. Corp. v. Thompson*, 103 Ga. App. 786, 120 S.E.2d 779 (1961), see 24 Ga. B.J. 541 (1962). For comment on *Wright v. State*, 217 Ga. 453, 122 S.E.2d 738 (1961), see 25 Ga. B.J. 99 (1962). For comment on *Heard v. Bolton*, 107 Ga. 863, 131 S.E.2d 835 (1963), as to reasonable exercise of municipality's police power, see 15 Mercer L. Rev. 297 (1963). For comment on *Hempton v. Jacksonville*, 304 F.2d 320 (5th Cir. 1962), holding conveyance of public facilities to private individuals with inclusion of reversionary clause restricting use of facilities to white patrons makes purchasers thereof agents of state, and is state action, see 25 Ga. B.J. 333 (1963). For comment on *Gallegos v. Colorado*, 370 U.S. 49, 82 S. Ct. 1209, 81 L. Ed. 2d 325 (1962), holding coerced confession denies accused of due process, see 25 Ga. B.J. 415 (1963). For comment on *Anderson v. Martin*, 206 F. Supp. 700 (D. La. 1962), holding designation of race of candidates on ballot does not violate constitutional rights, see 25 Ga. B.J. 416 (1963). For comment discussing judicial establishment of standards for reapportioning state senate districts, in light of *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962), see 25 Ga. B.J. 431 (1963). For comment on *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.

Ed. 2d 799, 93 ALR2d 733 (1963), holding accused has right to counsel in all felony cases regardless of indigency, see 26 Ga. B.J. 96 (1963). For comment on *Wright v. State*, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963), see 26 Ga. B.J. 99 (1963). For comment on *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 ALR2d 733 (1963), holding right to counsel is extended to noncapital felonies in the state courts, see 26 Ga. B.J. 186 (1963). For comment on *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 81 (1964), congressional districting, see 15 Mercer L. Rev. 504 (1964). For comment criticizing *Lovett v. State*, 108 Ga. App. 478, 133 S.E.2d 595 (1963), as to right of accused to assistance of counsel in making an unsworn statement, see 15 Mercer L. Rev. 512 (1964). For comment on right of refugees to homestead exemption, in light of *Juarrero v. McNayr*, 157 So. 2d 79 (Fla. 1963), see 15 Mercer L. Rev. 525 (1964). For comment discussing admissibility of voluntary statements made after indictment and release on bail in absence of retained counsel, in light of *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), see 16 Mercer L. Rev. 343 (1964). For comment on *Balkcom v. Shores*, 219 Ga. 429, 134 S.E.2d 3 (1963), see 16 Mercer L. Rev. 359 (1964). For comment on *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), holding county unit system per se unconstitutional under "one man, one vote" doctrine, see 26 Ga. B.J. 339 (1964). For comment on *Draper v. Washington*, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963), upholding indigent's right to transcript, see 26 Ga. B.J. 346 (1964). For comment discussing motion picture as protected as speech, in light of *Atlanta v. Twentieth Century-Fox Film Corp.*, 219 Ga. 271, 133 S.E.2d 12 (1963), see 26 Ga. B.J. 442 (1964). For comment on *Harris v. United States*, 321 F.2d 739 (6th Cir. 1963), holding invalid search incident to arrest where primary purpose is to search for evidence and not make a valid arrest, see 26 Ga. B.J. 446 (1964). For comment on *Atlanta v. Twentieth Century-Fox Film Corp.*, 219 Ga. 271, 133 S.E.2d 12 (1963), see 26 Ga. B.J. 475 (1964). For comment discussing "one man, one vote" doctrine in light of *Wilkins v. Davis*, 205 Va. 803, 139 S.E.2d 849 (1965), see 16 Mercer L. Rev. 446 (1965). For com-

ment discussing *Dukes v. State*, 109 Ga. App. 825, 137 S.E.2d 532 (1964), as to an accused's constitutional right to be questioned by his counsel in making an unsworn statement to the court pursuant to § 24-9-20, prior to the elimination of the unsworn statement provision, see 1 Ga. St. B.J. 350 (1965). For comment on *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 653 (1964), see 1 Ga. St. B.J. 358 (1965). For comment on *Allen v. State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964), see 1 Ga. St. B.J. 371 (1965). For comment on *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), see 1 Ga. St. B.J. 550 (1965). For comment on *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964), see 2 Ga. St. B.J. 123 (1965). For comment on *Bond v. Floyd*, 251 F. Supp. 333 (N.D. Ga. 1966), appearing below, see 17 Mercer L. Rev. 467 (1966). For comment on *Evans v. Newton*, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), appearing below, see 17 Mercer L. Rev. 474 (1966). For comment on procedural due process rights in quasi-judicial administrative proceedings into which extra-record information is introduced, in light of *Dayco Corp. v. F.T.C.*, 362 F.2d 180 (6th Cir. 1966), see 18 Mercer L. Rev. 284 (1966). For comment on *McLennan v. Undercofler*, 222 Ga. 306, 149 S.E.2d 705 (1966), see 18 Mercer L. Rev. 290 (1966). For comment on *Evans v. Newton*, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), see 2 Ga. St. B.J. 487 (1966). For comment on *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965), see 2 Ga. St. B.J. 504 (1966). For comment, "Due Process and the Dismissal of Students at State-Supported Colleges and Universities," see 3 Ga. St. B.J. 101 (1966). For comment discussing equal voting rights and the equal protection clause in light of *Fortson v. Morris*, 385 U.S. 231, 87 S. Ct. 446, 17 L. Ed. 2d 330 (1966), see 16 J. of Pub. L. 417 (1967). For comment on *Reed v. Gardner*, 261 F. Supp. 87 (C.D. Cal. 1966) as to constitutionality of inquiry into Medicare applicant's political affiliation, see 18 Mercer L. Rev. 495 (1967). For comment criticizing *Klopfert v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967) in its application of the U.S. Const., Amend. 6, speedy trial guarantee to the states as an encroachment upon states rights, see 18 Mercer L. Rev. 497 (1967). For comment on *State Hwy. Dep't v. Branch*, 222 Ga. 770, 152

S.E.2d 372 (1966), discussing regulation of outdoor advertising and billboards as a constitutional "Taking," see 18 Mercer L. Rev. 499 (1967). For comment on extension of exclusionary rule to civil cases in light of *Williams v. Williams*, 8 Ohio Misc. 156, 221 N.E.2d 622 (1966), see 18 Mercer L. Rev. 501 (1967). For comment criticizing *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967), as to discrimination by a subdivision development who has not received government monetary aid, see 17 J. of Pub. L. 175 (1968). For comment discussing standard of malice in cases involving reckless disregard to truth, in light of *St. Amant v. Thompson*, 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968), see 17 J. of Pub. L. 426 (1968). For comment criticizing use of detainer by state to effectively thwart the right to speedy trial of federal defendants in state court, in light of *State v. Evans*, 432 P.2d 175 (Ore. 1967), cert. denied, 390 U.S. 971, 88 S. Ct. 1093, 19 L. Ed. 2d 1182 (1968), see 17 J. of Pub. L. 431 (1968). For comment on *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), overturning the mere privilege doctrine by applying due process requirement to liquor licensing, see 19 Mercer L. Rev. 250 (1968). For comment on *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967) as to constitutionality of public schools regulation of student appearance, see 19 Mercer L. Rev. 252 (1968). For comment on *Loving v. Commonwealth*, 206 Va. 924, 147 S.E.2d 78 (1966), rev'd, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), banning anti-miscegenation statutes, see 19 Mercer L. Rev. 255 (1968). For comment on *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967), as to constitutionality of imposing state use taxes on out of state mail order form, see 19 Mercer L. Rev. 257 (1968). For comment on *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), applying U.S. Const., Amend. 4 guarantees to unreasonable searches by administrative agencies, see 19 Mercer L. Rev. 259 (1968). For comment on *Francois v. State*, 197 So. 2d 492 (Fla. App. 1967), discussing the admissibility of juveniles' confessions in criminal court, see 19 Mercer L. Rev. 261 (1968). For comment on *Nelson v. State*, 151 N.W.2d 694 (Wis. 1967), as to constitutionality of appointment of general practitioner as an expert witness on

issue of defendant's sanity, see 19 Mercer L. Rev. 263 (1968). For comment on *White v. Blackwell*, 277 F. Supp. 211 (N.D. Ga. 1967), analyzing constitutional implications of prison rules forbidding prisoners from assisting one another in legal matters, see 19 Mercer L. Rev. 438 (1968). For comment on *State v. Borst*, 278 Minn. 388, 154 N.W.2d 888 (1967), as to an indigent misdemeanor's right to counsel, see 19 Mercer L. Rev. 440 (1968). For comment on *Hughes v. Reynolds*, 223 Ga. 727, 157 S.E.2d 746 (1967), holding the Sunday Business Activities Act of 1967 (chapter 96-8) unconstitutional, see 19 Mercer L. Rev. 479 (1968). For comment on *Talbert v. State*, 224 Ga. 291, 161 S.E.2d 279 (1968), see 5 Ga. St. B.J. 256 (1968). For comment on *Baker v. City of St. Petersburg*, 400 F.2d 294 (5th Cir. 1968), as to unconstitutionality of police department practice of assigning black officers solely on the basis of race, see 18 J. of Pub. L. 189 (1969). For comment on *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968), as to illegitimate child's right to recover for wrongful death of mother, see 18 J. of Pub. L. 198 (1969). For comment discussing probable cause for search warrant in obscenity case, in light of *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S. Ct. 2103, 20 L. Ed. 2d 1313 (1968) (per curiam), see 18 J. of Pub. L. 205 (1969). For comment on *Jenness v. Little*, Civil No. 12762 (N.D. Ga. 1969), holding bar against placement of candidate's name on ballot due to inability to pay qualifying fee is denial of equal protection, see 18 J. of Pub. L. 483 (1969). For comment on *State v. Rand*, 20 Ohio Misc. 98, 247 N.E.2d 342 (Com. Pleas 1969), holding criminal defendant competent to stand trial under properly administered tranquilizing drugs, see 18 J. of Pub. L. 503 (1969). For comment on *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968), cert. denied, 393 U.S. 1105, 89 S. Ct. 908, 21 L. Ed. 2d 799 (1969), mandating in camera examination of evidence withheld by prosecution, see 18 J. of Pub. L. 510 (1969). For comment discussing *Williams v. Dandridge*, 297 F. Supp. 450 (D. Md. 1969), as to the validity under this amendment of a state "maximum grant" welfare provision, see 4 Ga. L. Rev. 203 (1969). For comment discussing *Esteban v. Central Mo. State College*, 415 F.2d 1077 (8th Cir. 1969), as to the applicability of due

process "specificity" requirements to college regulations governing mass gatherings and demonstrations, see 4 Ga. L. Rev. 221 (1969). For comment on *Avery v. Midland County*, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968), as to application of the one man, one vote principal to local government elections, see 20 Mercer L. Rev. 454 (1969). For comment on *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), discussing limits on regulation of students' symbolic speech, see 20 Mercer L. Rev. 505 (1969). For comment on *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), as to when a soldier should be tried in military or civilian court, see 21 Mercer L. Rev. 311 (1969). For comment discussing limits on the military's jurisdiction and the constitutional rights of servicemen in light of *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), see 21 Mercer L. Rev. 311 (1969). For comment on *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969), as to the constitutionality of the State Bar Act (ch. 9-7), see 21 Mercer L. Rev. 355 (1969). For comment on *Jenness v. Little*, 306 F. Supp. 925 (N.D. Ga. 1969), on motion for stay on appeal and injunctive relief sub nom. *Matthews v. Little*, 396 U.S. 1223, 90 S. Ct. 17, 24 L. Ed. 2d 45 (1969), as to the constitutionality of requiring a filing fee as prerequisite to candidacy in municipal elections, see 21 Mercer L. Rev. 369 (1969). For comment concerning free speech aspects of F.C.C. fairness doctrine, in light of *Red Lion Broadcasting Co. v. F.C.C.*, 381 F.2d 908 (D.C. Cir. 1967), see 19 J. of Pub. L. 129 (1970). For comment on *Kirk v. Board of Regents of Univ. of Cal.*, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), upholding durational residency classification for state university tuition rates, see 19 J. of Pub. L. 139 (1970). For comment on *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), appearing below, see 4 Ga. L. Rev. 417 (1970). For comment on *Palmer v. Thompson*, 419 F.2d 1222 (5th Cir. 1969) (en banc), as to the constitutionality of closing state recreational facilities, see 21 Mercer L. Rev. 507 (1970). For comment on *Parham v. State*, 120 Ga. App. 723, 171 S.E.2d 911 (1969) and the rejection of charge that defendant must prove alibi to the satisfaction of the jury, see 21 Mercer L.

Rev. 511 (1970). For comment on *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 225 Ga. 259, 167 S.E.2d 658 (1969), cert. denied, 396 U.S. 1041, 90 S. Ct. 680, 24 L. Ed. 2d 685 (1970), see 6 Ga. St. B.J. 438 (1970). For comment on *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D. N.Y. 1970), as to implied power of the executive to sue, see 20 J. of Pub. L. 337 (1971). For comment on *United States v. Barash*, 428 F.2d 328 (2d Cir. 1970), as to the constitutionality under the principle of double jeopardy, of increasing severity of punishment on retrial following successful appeal, see 5 Ga. L. Rev. 194 (1971). For comment on the right to vote as affected by state residency requirements, in light of *Blumstein v. Ellington*, 337 F. Supp. 323 (M.D. Tenn. 1970), see 5 Ga. L. Rev. 389 (1971). For comment on *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971), see 5 Ga. L. Rev. 603 (1971). For comment on *Mary Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), as to unconstitutionality of statutory limitation on reasons for abortion, see 22 Mercer L. Rev. 461 (1971). For comment on *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) regarding constitutionality under U.S. Const., Amend. 6, confrontation clause of expulsion of defendant from the courtroom for misconduct, see 22 Mercer L. Rev. 467 (1971). For comment on *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595, cert. denied, 397 U.S. 149, 90 S. Ct. 999, 25 L. Ed. 2d 183 (1970), as to the constitutionality under U.S. Const., Amend. 1, and this amendment of prohibiting succession by an incumbent Governor until after the expiration of a four-year period, see 22 Mercer L. Rev. 473 (1971). For comment on *Freeman v. Wilcox*, 119 Ga. App. 325, 167 S.E.2d 163 (1969) and a juvenile's right to counsel at preadjudicatory stages of juvenile proceedings, see 22 Mercer L. Rev. 597 (1971). For comment on *State Hwy. Dep't v. Owens*, 120 Ga. App. 647, 171 S.E.2d 770 (1969), and the right to inquire as to property owner's knowledge of condemnation prior to making improvements, see 22 Mercer L. Rev. 616 (1971). For comment on *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) and Georgia's coconspirator exception to the hearsay rule, see 22 Mercer L. Rev. 791 (1971). For

comment on *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), discussing the revocation of a motorist's license pursuant to the state's financial responsibility laws, without hearing to determine fault prior to the enactment of the present Georgia Motor Vehicle Safety Responsibility Act, see 8 Ga. St. B.J. 252 (1971). For comment on *In re Kras*, 331 F. Supp. 1207 (E.D.N.Y. 1971), holding the required prepayment of a filing fee by an indigent in a bankruptcy proceeding violative of equal protection and due process, see 21 J. of Pub. L. 239 (1972). For comment on *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d (1971), as to unconstitutionality of imprisonment of indigent for nonpayment of traffic fines, see 23 Mercer L. Rev. 361 (1972). For comment on *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971), see 23 Mercer L. Rev. 369 (1972). For comment suggesting replacement of former Motor Vehicle Safety Responsibility Act with a Compulsory Liability Insurance System, in light of *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), see 23 Mercer L. Rev. 383 (1972). For comment criticizing *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 776 (1971), as to constitutionality of § 51-2-3 prior to 1976 Amendment, see 23 Mercer L. Rev. 681 (1972). For comment discussing *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), rehearing and rehearing en banc denied February 1, 1972, see 23 Mercer L. Rev. 977 (1972). For comment on *Palmer v. Thompson*, 403 U.S. 217, 91 S. Ct. 1940, 29 L. Ed. 2d 438 (1971), upholding city's refusal to operate an integrated pool in the face of equal protection attack, see 8 Ga. St. B.J. 382 (1972). For comment on *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971), holding parental liability statute which formerly provided for unlimited liability of parents for willful torts of minor children on the basis of parent-child relationship violative of due process, see 9 Ga. St. B.J. 129 (1972). For comment on *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), holding the seizure of property in replevin without notice and hearing or waiver as violative of due process, see 22 J. of Pub. L. 169 (1973). For comment on *Stoner v. Fortson*, Civil No. 16271 (N.D. Ga. May 11, 1972), holding fee requirement for placement on primary ballot unconstitutional, see

22 J. of Pub. L. 243 (1973). For comment on *Moose Lodge v. Irvis*, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972), holding the granting of a liquor license to a discriminatory private club insufficient to constitute state action prohibited by this amendment, see 22 J. of Pub. L. 281 (1973). For comment discussing constitutionality of conviction upon less-than-unanimous jury vote, see 7 Ga. L. Rev. 339 (1973). For comment on *South Gwinnett Venture v. Pruitt*, 482 F.2d 389 (5th Cir. 1973), appearing below, see 8 Ga. L. Rev. 254 (1973). For comment on *Ruff v. Lee*, 230 Ga. 426, 197 S.E.2d 376 (1973), appearing below, see 8 Ga. L. Rev. 264 (1973). For comment discussing the death penalty in light of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment discussing aspects of Georgia's bail trover proceeding as violative of due process, in light of *Hall v. Stone*, 229 Ga. 96, 189 S.E.2d 403 (1972), see 9 Ga. St. B.J. 336 (1973). For comment on *Bassett v. Smith*, 464 F.2d 347 (5th Cir. 1972), refusing to apply decision holding Georgia's alibi instruction unconstitutional retroactively, see 9 Ga. St. B.J. 500 (1973). For comment on *Salzer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973), discussing the application of the equal protection reasonableness test to voter qualification and vote weighting, see 10 Ga. St. B.J. 144 (1973). For comment on *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), and *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), see 10 Ga. St. B.J. 153 (1973). For comment on *Coe & Payne Co. v. Wood-Mosaic Corp.*, 230 Ga. 58, 195 S.E.2d 399 (1973), see 10 Ga. St. B.J. 164 (1973). For comment as to constitutionality of financing public schools by means of local property taxes, in light of *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), see 23 Emory L.J. 211 (1974). For comment on *de facto* school segregation, in light of *Keyes v. School Dist. No. 1*, 413 U.S. 189, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973), see 23 Emory L.J. 293 (1974). For comment criticizing *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), calling for application of contemporary community standards to determine obscenity, see 23

Emory L.J. 551 (1974). For comment on *Scarpa v. United States Bd. of Parole*, 477 F.2d 278 (5th Cir.), vacated and remanded, 414 U.S. 809, 94 S. Ct. 79, 38 L. Ed. 2d 44, vacated as moot, 501 F.2d 992 (5th Cir. 1973), declining to accord parole release hearings, judicial review and procedural due process rights, see 23 Emory L.J. 597 (1974). For comment on *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), as to probationer's rights at probation revocation, see 23 Emory L.J. 617 (1974). For comment discussing due process and equal protection rights of illegitimate child denied social security benefits due to birth after father's disability in light of *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), see 23 Emory L.J. 861 (1974). For comment criticizing *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), permitting imposition increased sentence by jury after retrial, see 23 Emory L.J. 879 (1974). For comment on *Simmons v. Jones*, 478 F.2d 321 (5th Cir. 1973), appearing below, see 8 Ga. L. Rev. 510 (1974). For comment discussing *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973), as to validity of waiver of constitutional objection to the racial composition of a grand jury, see 8 Ga. L. Rev. 984 (1974). For comment on *Construction Indus. Assoc. v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), as to the authority of local governments to restrict population growth by means other than by the operation of demographic and market demands in light of the right to travel, see 9 Ga. L. Rev. 260 (1974). For comment on *James v. State*, 230 Ga. 29, 195 S.E.2d 448 (1973), see 25 Mercer L. Rev. 935 (1974). For comment on *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974), holding Louisiana *ex parte* procedure for sequestration of encumbered property did not violate due process, see 26 Mercer L. Rev. 325 (1974). For comment criticizing inadequate standards and nebulous measurements for review under Georgia death penalty statute, in light of *Colby v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974), see 26 Mercer L. Rev. 331 (1974). For comment criticizing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), holding petitioner's right to confrontation was preeminent to state policy protecting anonymity of juvenile offenders, see 26 Mercer L. Rev.

343 (1974). For comment discussing elements of due process required for nonprobationary employee discharged without prior evidentiary hearing where administrative appeal is available, in light of *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974), see 26 *Mercer L. Rev.* 1429 (1974). For comment on *Ware v. State*, 128 Ga. App. 407, 196 S.E.2d 896 (1973), discussing the right of an accused to retract guilty plea prior to judgment, see 10 Ga. St. B.J. 469 (1974). For comment discussing the right to present evidence for the purposes of rebutting presumption, in light of *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974). For comment on *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973), discussing the labeling of sex as a suspect classification for equal protection purposes, see 10 Ga. St. B.J. 493 (1974). For comment suggesting equal protection considerations of tax exemption for widows, in light of *Kahn v. Shevin*, 416 U.S. 351, 94 S. Ct. 1734, 40 L. Ed. 2d 189 (1974), see 24 *Emory L.J.* 169 (1975). For comment criticizing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974), holding state right-of-reply statute intrudes upon the freedom of the press, see 24 *Emory L.J.* 217 (1975). For comment criticizing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974), as to termination by privately owned utility of electric service, see 24 *Emory L.J.* 511 (1975). For comment criticizing *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975), holding abortion advertisement protected by commercial speech doctrine, see 24 *Emory L.J.* 1165 (1975). For comment on *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), holding a state may not impose sanctions on accurate publication of name of rape victim obtained from official court records, see 24 *Emory L.J.* 1205 (1975). For comment on *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), see 9 Ga. L. Rev. 963 (1975). For comment discussing defamatory falsehoods and first amendment protection in light of *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), see 25 *Emory L.J.* 705 (1976). For comment

on *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), see 27 *Mercer L. Rev.* 1189 (1976). For comment on *Johnson v. Wright*, 509 F.2d 828 (5th Cir. 1975), see 27 *Mercer L. Rev.* 1207 (1976). For comment on *United States v. Whitesel*, 543 F.2d 1176 (6th Cir. 1976), holding denial of defendant's request to be represented at trial by a nonattorney not violative of U.S. Const., Amend. 6, see 26 *Emory L.J.* 457 (1977). For comment on *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), as to failure to rezone for multifamily housing without discriminatory intent, see 26 *Emory L.J.* 681 (1977). For comment criticizing *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977), as to corporal punishment in public schools, see 26 *Emory L.J.* 885 (1977). For comment on *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977), as to free speech violation by local ordinance banning "for sale" and "sold" signs on residential property, see 26 *Emory L.J.* 913 (1977). For comment on *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), recognizing a liberty interest in state employees against whom damaging charges were published in the course of their discharge by state officials without due process, see 11 Ga. L. Rev. 437 (1977). For comment discussing constitutionality of regulating location of "Adult Theaters" on basis of film content in light of *Young v. American Mini Theaters*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), see 28 *Mercer L. Rev.* 587 (1977). For comment on *Brown v. Liberty Loan Corp.*, 539 F.2d 1355 (5th Cir. 1976), as to constitutionality of Florida post judgment garnishment statutes failing to provide notice or hearing on entitlement to statutory wage exemption prior to wage attachment, see 28 *Mercer L. Rev.* 997 (1977). For comment on *Coleman v. Bradford*, 238 Ga. 505, 233 S.E.2d 764 (1977), see 29 *Mercer L. Rev.* 335 (1977). For comment discussing extension of the minimum contacts concept to personal jurisdiction in divorce litigation in light of *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976), see 29 *Mercer L. Rev.* 341 (1977). For comment on *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977), upholding certain prison regula-

tions relating to prisoners "union," see 27 Emory L.J. 137 (1978). For comment discussing doctrine of substituted judgment and constitutional underpinnings of a qualified right to refuse medical treatment asserted for an incompetent, in light of Superintendent of Belcherton State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977), see 27 Emory L.J. 425 (1978). For comment on *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977), as to media's nonprotection under U.S. Const., Amend. 1, and this amendment from suit by performer whose "right of publicity" has been infringed, see 29 Mercer L. Rev. 861 (1978). For comment as to placement of the burden of proving an affirmative defense on defendant, as developed in *Patterson v. State*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), see 29 Mercer L. Rev. 875 (1978). For comment criticizing *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978), see 29 Mercer L. Rev. 1137 (1978). For comment on *United States v. Grayson*, 438 U.S. 41, 98 S. Ct. 2610, 57 L. Ed. 2d 582 (1978), regarding consideration by sentencing judge of his belief that defendant falsely testified during trial, see 28 Emory L.J. 159 (1979). For comment discussing impact of U.S. Const., Amend. 1 upon state statute prohibiting corporate spending to influence voters on referendum not materially affecting corporation's business in light of *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978), see 28 Emory L.J. 183 (1979). For comment on a nuisance-abatement statute applied to authorize prior restraint on exhibition of unnamed films, in the future as violative of the federal Constitution in *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978), probable jurisdiction noted, 442 U.S. 928, 99 S. Ct. 2857, 61 L. Ed. 2d 295 (1979), aff'd, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980), see 13 Ga. L. Rev. 1076 (1979). For comment on *Colautti v. Franklin*, 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979), in light of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), see 30 Mercer L. Rev. 761 (1979). For comment on *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 99 S. Ct.

693, 58 L. Ed. 2d 619 (1979), see 30 Mercer L. Rev. 1079 (1979). For comment on *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979), see 31 Mercer L. Rev. 341 (1979). For comment on *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979). For comment, "Bivens and the Creation of a Cause of Action for Money Damages Arising Directly From the Due Process Clauses," see 29 Emory L.J. 231 (1980). For comment on *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), regarding the equal protection clause and school desegregation, see 29 Emory L.J. 481 (1980). For comment, "The Secularization of the Law and Sex Discrimination," see 31 Mercer L. Rev. 581 (1980). For comment on *Hoback v. Alabama*, 607 F.2d 680 (5th Cir. 1979), discussing an indigent defendant's rights to expert witnesses, see 31 Mercer L. Rev. 1103 (1980). For comment on *Statutes Requiring Consent of Mother, But Not of Father, As Prerequisite to Adoption of Illegitimate Child, Violating the Fourteenth Amendment Equal Protection Clause*, see 29 Emory L.J. 833 (1980). For comment on *Shakman v. Democratic Organization*, 481 F. Supp. 1315 (N.D. Ill. 1979), regarding constitutionality of patronage hiring practices based on political affiliation, see 29 Emory L.J. 1217 (1980). For comment on *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980), regarding the constitutionality of the ten percent set aside for minority contractors, etc., see 29 Emory L.J. 1127 (1980). For comment on *Rogers v. Medical Ass'n*, 244 Ga. 151, 259 S.E.2d 85 (1979), invalidating Georgia statute requiring Governor's appointments to Composite State Board of Medical Examiners be made solely from nominees submitted by state medical society as an unconstitutional delegation of legislative authority to a private organization, see Emory L.J. 1183 (1980). For comment discussing the forcible medication of involuntarily committed mental patients with antipsychotic drugs in light of *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), see 15 Ga. L. Rev. 739 (1981). For comment, "Jurisdiction over Nonresidents in Georgia: *Crowder v. Ginn*," see 17 Ga. L. Rev. 201 (1982). For comment, "The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The

Fourteenth Amendment and Title IX of the Education Amendments of 1972," see 32 Emory L.J. 1111 (1983). For comment, "Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation," see 32 Emory L.J. 1199 (1983). For comment, "Free Press, Privacy, and Privilege: Protection of Researcher-Subject Communications," see 17 Ga. L. Rev. 1009 (1983). For comment discussing the unconstitutional use of deadly force against nonviolent fleeing felons, see 18 Ga. L. Rev. 137 (1983). For comment, "The Right to Adequate Treatment Versus the Right to Refuse Antipsychotic Drug Treatment: A Solution to the Dilemma of the Involuntarily Committed Psychiatric Patient," see 33 Emory L.J. 441 (1984). For comment, "Permissible State Aid to Parochial Schools: A Plea for Neutrality," see 33 Emory L.J. 487 (1984). For comment, "Proposal: Bilingual Education Guidelines for the Courts and the Schools," see 33 Emory L.J. 577 (1984). For comment, "Ohio v. Johnson: Prohibiting the Offensive Use of Guilty Pleas to Invoke Double Jeopardy Protection," see 19 Ga. L. Rev. 159 (1984). For comment, "The Expanding Scope of Appellate Review in Libel Cases — The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice," see 36 Mercer L. Rev. 711 (1985). For comment, "Can Georgia's Rape Shield Statute Withstand a Constitutional Challenge?," see 36 Mercer L. Rev. 991 (1985). For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985). For comment, "The Effect of Firefighters Local Union 174 v. Stotts on the Negotiated Settlement of Title VII Suits," see 34 Emory L.J. 827 (1985). For comment, "The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated," see 34 Emory L.J. 855 (1985). For case comment discussing *Miranda v. Arizona* ambiguous requests for counsel, see 20 Ga. L. Rev. 221 (1985). For comment, "Legislative Limitations on Medical Malpractice Damages: The Chances of Survival," see 37 Mercer L. Rev. 1583 (1986). For comment, "Just Compensation for Temporary Regulatory Takings: A Discussion of Factors Influencing Damage Awards," see 35 Emory L.J. 729 (1986). For comment, "Use and Abuse of Urinalysis

Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening," see 35 Emory L.J. 1011 (1986). For comment, "Private Prisons," see 36 Emory L.J. 253 (1987). For comment, "Enforcing the Right to a Public Education for Children Afflicted with AIDS," see 36 Emory L.J. 603 (1987). For comment, "The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome — AIDS," see 37 Emory L.J. 217 (1988). For comment, "Davis v. Bandemer: Remedial Difficulties in Political Gerrymandering," see 37 Emory L.J. 443 (1988). For comment, "Surrogate Mother Contracts: Analysis of a Remedial Quagmire," see 37 Emory L.J. 721 (1988). For comment, "Batson v. Kentucky: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges," see 37 Emory L.J. 755 (1988). For case comment, "Booth v. Maryland: Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials," see 21 Ga. L. Rev. 1191 (1987). For comment, "Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System," see 37 Emory L.J. 995 (1988). For comment, "Teacher Competency Testing: 'Decertification' and the Federal Constitution and Title VII," see 37 Emory L.J. 1077 (1988). For case comment, "Taylor v. Ledbetter: Vindicating the Constitutional Rights of Foster Children to Adequate Care and Protection," see 22 Ga. L. Rev. 1187 (1988). For case comment, "In re Baby Girl Eason: Balancing Three Competing Interests in Third Party Adoptions," see 22 Ga. L. Rev. 1217 (1988). For comment, "Shapiro v. Kentucky Bar Ass'n: First Amendment Protection for 'Targeted' Advertisements by Attorneys," see 23 Ga. L. Rev. 545 (1989). For comment, "New York State Club Ass'n v. City of New York: A Statutory Presumption Against Privacy," see 23 Ga. L. Rev. 569 (1989). For comment, "An Establishment Clause Analysis of Webster v. Reproductive Health Services," see 24 Ga. L. Rev. 399 (1990). For comment, "Capital Punishment: New Weapons in the Sentencing Process," see 24 Ga. L. Rev. 423 (1990). For comment, "Metro Broadcasting, Inc. v. FCC: The Constitutionality of the FCC's Use of Racial Classifications," see 25 Ga. L. Rev. 535 (1991). For comment,

“Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court,” see 43 Emory L.J. 1519 (1994). For comment, “Is Georgia’s Stalking Law Unconstitutionally Vague?,” see 45 Mercer L. Rev. 853 (1994). For comment on the right to counsel in post-conviction proceedings, see 47 Emory L.J. 1079 (1998). For comment, “Taking Steps to Protect Private Property and Endangered Species: Constitutional Implications of Habitat Conservation Planning After *Dolan v. Tigard*,” see 47 Emory L.J. 311 (1998). For comment, “A

Back Door Solution: *Steinberg v. Carhart* and the Answer to the *Casey/Salerno* Dilemma for Facial Challenges to Abortion Statutes,” see 50 Emory L. Rev. 873 (2001). For comment, “*Apprendi v. New Jersey*: Should Any Factual Determination Authorizing an Increase in a Criminal Defendant’s Sentence be Proven to a Jury Beyond a Reasonable Doubt?,” see 52 Mercer L. Rev. 1531 (2001). For comment, “A Deep Breath Before the Plunge: Undoing *Miranda*’s Failure Before It’s Too Late,” see 55 Mercer L. Rev. 1375 (2004).

JUDICIAL DECISIONS

ANALYSIS

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STATE ACTION

POLICE POWER

PRIVILEGES AND IMMUNITIES

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- 3. STATUTORY NOTICE OF PROSCRIBED CONDUCT
- 4. BUSINESS
- 5. TAKING PROPERTY FOR PUBLIC USE
- 6. TAXATION
- 7. ZONING
- 8. PRETRIAL CRIMINAL PROCEEDINGS
- 9. RIGHT TO COUNSEL
- 10. CRIMINAL TRIALS
- 11. SENTENCING
- 12. APPEALS AND HABEAS CORPUS
- 13. PROBATION AND PAROLE
- 14. PRISONERS
- 15. ELECTION AND VOTING RIGHTS
- 16. PROPERTY RIGHTS
- 17. JURISDICTION
- 18. ENTRAPMENT
- 19. CIVIL PROCEEDINGS

EQUAL PROTECTION

- 1. IN GENERAL
- 2. STATUTORY CLASSIFICATIONS
- 3. RACE DISCRIMINATION
- 4. ELECTION AND VOTING RIGHTS
- 5. SELECTION OF JURIES
- 6. CRIMINAL PROCEDURE

General Consideration

Protection of life, liberty, and property from state interference. — Fourteenth amendment protects life, liberty, and property interests from undue state interference.

Williams v. Housing Auth., 158 Ga. App. 734, 282 S.E.2d 141 (1981).

All persons — children and adults — are protected by prohibitions of U.S. Const., amend. 14. *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), rev’d on other grounds,

General Consideration (Cont'd)

442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

Established principle of civilized government. — While U.S. Const., amend. 14 of the Constitution of the United States is a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly all state Constitutions. By U.S. Const., amend. 5, it was introduced into the Constitution of the United States as a limitation upon the powers of the national Government, and by U.S. Const., amend. 14, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states. *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), rev'd on other grounds, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

Sovereign immunity constitutional. — The statutory bar of sovereign immunity to suit in tort is not a deprivation of property without just compensation, nor a denial of either equal protection or due process under the federal or state Constitutions. *Robinson v. City of Decatur*, 253 Ga. 779, 325 S.E.2d 752 (1985), overruled on other grounds, *Martin v. Georgia Dep't of Pub. Safety*, 257 Ga. 300, 357 S.E.2d 569 (1987).

Must establish violation of clear constitutional right. — Plaintiff failed to demonstrate that the defendants violated clearly established constitutional rights of which a reasonable person would have known; therefore, defendants are shielded by qualified immunity. *Powell v. Georgia Dep't of Human Resources*, 114 F.3d 1074 (11th Cir. 1997).

The Court found that the plaintiff, who was attacked after being released from police custody, was not deprived of the plaintiff's constitutional rights under U.S. Const., amend. 14 when police officers released the plaintiff from custody in an impaired state, since there was no violation of a clearly established constitutional right, the individual police officers were entitled to qualified immunity. *Bogle v. City of Warner Robins*, 953 F. Supp. 1563 (M.D. Ga. 1997).

Private discriminatory acts come within the purview of sec. 5 of U.S. Const., amend. 14 should Congress believe that a preclusion of such acts is helpful in insuring the effectuation of sec. 1. *Westberry v. Gilman Paper*

Co., 507 F.2d 206 (5th Cir. 1975).

Requirements of U.S. Const., amend. 14 are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government. *Chatterton v. Dutton*, 223 Ga. 243, 154 S.E.2d 213, cert. denied, 389 U.S. 914, 88 S. Ct. 247, 19 L. Ed. 2d 266 (1967).

Compelling state interest required for regulation of fundamental rights. — When fundamental right is affected, regulations may be justified only if necessary to accomplish compelling state interest. *Chatham v. Jackson*, 613 F.2d 73 (5th Cir. 1980).

Establishment clause, as applied to states through fourteenth amendment, is limited to governmental action. — Establishment clause only speaks to acts of the United States Congress, and, as applied to the states under the due process clause of the fourteenth amendment it still is limited only to governmental action respecting an establishment of religion. *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), aff'd, 678 F.2d 1379 (11th Cir.), modified, 698 F.2d 1098 (11th Cir. 1983).

Relationship of presumptions to due process. See *Williamson v. State*, 248 Ga. 47, 281 S.E.2d 512 (1981).

Constitutional restraints limit state power to terminate entitlement whether the entitlement is denominated a "right" or a "privilege." *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

Protection of freedom of speech. — Freedom of speech among fundamental personal rights and liberties protected by U.S. Const., amend. 14 from invasion by state action. *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958).

First amendment, in conjunction with fourteenth, prohibits governments from abridging freedom of speech or of press; or right of people peaceably to assemble and to petition the government for a redress of grievances. These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to functioning of government. *CNN, Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981).

“Fighting words” constitute one of those narrow speech areas not constitutionally protected. *State v. Klinakis*, 206 Ga. App. 318, 425 S.E.2d 665 (1992).

The press may not be exposed to liability for truthfully publishing information released to the public in official court records. *Munoz v. American Lawyer Media*, 236 Ga. App. 462, 512 S.E.2d 347 (1999).

Protection of familial relationship. — Appointment of a guardian ad litem for the limited purpose of making a best interest determination regarding the need for a 16-year-old to receive a blood transfusion did not constitute a substantive due process violation with respect to the government’s intrusion into the familial relationship of the child and the child’s mother who, as Jehovah’s Witnesses, did not want the transfusion. *Novak v. Cobb County-Kennestone Hosp. Auth.*, 849 F. Supp. 1559 (N.D. Ga. 1994), *aff’d*, 74 F.3d 1173 (11th Cir. 1996).

Constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of the federal union. *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).

Constitutional right to privacy. — A person’s complaint stating that city police officers violated the person’s right to privacy by viewing a videotape which depicted the person and another person engaging in sexual activity alleged a violation of a clearly established constitutional right. *James v. City of Douglas*, 941 F.2d 1539 (11th Cir. 1991).

Defendant had a legitimate expectation of privacy in the apartment of the defendant’s friend’s sibling because the defendant was a frequent welcome social visitor, the defendant left possessions there, and the defendant had spent the night as a social guest. *State v. Brown*, 212 Ga. App. 800, 442 S.E.2d 818 (1994).

Citizen’s right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), vacated on other grounds, 379 U.S. 621, 85 S. Ct. 598, 13 L. Ed. 2d 527 (1965).

Residency requirement for candidate upheld. — Requiring appellee candidate to

reside in the district for 12 months prior to the general election did not deny the candidate equal protection under the United States Constitution or the Georgia Constitution as the residency requirement for election to the Georgia Public Service Commission was rationally related to the state’s legitimate interests in fostering informed voters and promoting knowledgeable and responsive candidates with ties to the community, and did not place an unreasonable burden on the right of voters to choose a candidate or the right of the candidate to run for public office. *Cox v. Barber*, 275 Ga. 415, 568 S.E.2d 478 (2002), *cert. denied*, 537 U.S. 1109, 123 S. Ct. 851, 154 L. Ed. 2d 780 (2003).

Legislation conflicting with court order based on amendment. — Legislation conflicting with court order drawing its authority from U.S. Const., amend. 14 is unconstitutional. *Stell v. Board of Pub. Educ.*, 334 F. Supp. 909 (S.D. Ga. 1971).

Plaintiff’s burden in dispute about discharge. — When a dispute arises concerning whether a discharge was effected pursuant to a permissible or an impermissible reason, the plaintiff has the burden to show (1) that his conduct was constitutionally protected; and (2) that his conduct was a “substantial” or “motivating” factor in the termination decision. *Smith v. Price*, 616 F.2d 1371 (5th Cir. 1980).

State regulation of intoxicating beverages. — States do not escape operation of U.S. Const., amend. 14 in dealing with intoxicating beverages by reason of U.S. Const., amend. 21. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

When use of language can be restricted. — Former Code 1933, § 26-2610 (see now O.C.G.A. § 16-11-39.1), which made use of “fighting words,” obscene and vulgar or profane language or harassing phone calls a misdemeanor, was not unconstitutional as a violation of U.S. Const., amends. 1 and 14. *Grantham v. State*, 151 Ga. App. 707, 261 S.E.2d 445, *aff’d*, 244 Ga. 775, 262 S.E.2d 777 (1979).

Municipality may not discriminate in regulation of expression on basis of content. — A municipality may not under U.S. Const., amends. 1 and 14 discriminate in the regulation of expression on the basis of the content of that expression. *Hudgens v.*

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NLRB, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

Large self-contained shopping center is not functional equivalent of municipality. — *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

Exclusiveness of remedy in workers' compensation system. — Concept of exclusiveness of remedy is rational mechanism for making the workers' compensation system work in accord with the purpose of the Workers' Compensation Act. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Workers' Compensation Act applicable to personal property damage action. — Although the Georgia Workers' Compensation Act does not provide a remedy for damage to personal property, the Act does not bar an action for damages to personal property, such as an employee's clothing. To hold otherwise would deny an employee the constitutional right to due process and equal protection of the law. *Superb Carpet Mills, Inc. v. Thomason*, 183 Ga. App. 554, 359 S.E.2d 370 (1987).

Regulation of distribution of obscenity. — States have legitimate interest in controlling commercial distribution and exploitation of obscenity. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Charter and ordinance forbidding showing picture without prior approval not unconstitutional on its face. — A charter and ordinance which forbids the showing of any picture without its prior approval by a censor does not on its face offend the United States Constitution. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962).

Provision making distributing obscene materials misdemeanor not unconstitutional. — Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80) is not violative of the U.S. Const., amends. 1, 4, 5, 9 and 14 on the ground that the constitutional right to mere possession of obscene material necessarily implies the right to purchase such material and, hence, the right of others to distribute it. *Gornto v. State*, 227 Ga. 46, 178 S.E.2d 894 (1970), cert. denied, 402 U.S. 933, 91 S. Ct. 1525, 28 L. Ed. 2d 868 (1971).

Conviction on obscenity charge not permitted unless work substantially exceeds lim-

its of community standards. — U.S. Const., amend. 14 does not permit a conviction on obscenity charges unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980).

Interim injunctive relief not warranted in challenge to statute restricting distribution of publications to minors. — Plaintiffs, consisting of booksellers, publishers, distributors, stores, retailers, as well as an author, challenging the constitutionality of O.C.G.A. § 16-12-103 (distribution of sexually explicit materials to minors) on the ground that it would prevent even parents from providing proscribed materials to their children, in violation of the parents' federal constitutional rights to direct their children's upbringing and education, did not establish that any significant portion of their business would consist in selling parents materials covered by the challenged law and, thus, did not show that their injury would be sufficiently great to justify interim injunctive relief to protect the plaintiffs during the federal court's period of abstention while the plaintiffs sought a ruling from the state court on state and federal constitutional grounds. *American Booksellers Ass'n v. Webb*, 590 F. Supp. 677 (N.D. Ga. 1984).

Statute regulating profane words on bumper stickers unconstitutionally restricts freedom of expression as guaranteed by the first and fourteenth amendments of the United States Constitution and by the Georgia Constitution. *Cunningham v. State*, 260 Ga. 827, 400 S.E.2d 916 (1991).

Loitering ordinances. — Local ordinance providing that "No person shall remain or loiter upon any premises to which the public has access, including but not limited to such places as business and shopping area parking lots, where the person's presence upon such premises is unrelated to the normal activity, use or business for which such premises are made available to the public" violates U.S. Const., amends. 1 and 14. *Bullock v. City of Dallas*, 248 Ga. 164, 281 S.E.2d 613 (1981).

Right to wear one's hair as one sees fit not within specific constitutional right. — Even where the wearing of long hair is assumed to

be symbolic expression, it falls within that type of expression which is manifested through conduct and is therefore subject to reasonable state regulation in furtherance of a legitimate state interest. *Stevenson v. Wheeler County Bd. of Educ.*, 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957, 91 S. Ct. 355, 27 L. Ed. 2d 265 (1970).

The right to wear one's hair as one sees fit has not been found to be within the periphery of any of our specific constitutional rights. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), *aff'd*, 505 F.2d 868 (5th Cir. 1975).

There is no constitutionally protected right — plainly expressed or within the penumbra, the shadow, of the U.S. Const., amends. 1, 8, 9, 10 and 14 — to wear one's hair in a public high school in the length and style that suits the wearer. *Ashley v. City of Macon*, 377 F. Supp. 540 (M.D. Ga. 1974), *aff'd*, 505 F.2d 868 (5th Cir. 1975).

School regulations concerning hairstyles and dress part of necessary disciplining. — Public school regulations concerning hairstyles and regulations which deal generally with dress and the like are a part of the disciplinary process which is necessary in maintaining a balance between the rights of individual students and the rights of the whole in the functioning of schools. The touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process. *Stevenson v. Board of Educ.*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957, 91 S. Ct. 355, 27 L. Ed. 2d 265 (1970).

School officials should possess considerable leeway in promulgating regulations for conduct. — Public school officials cannot make rules for the sake of making them but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools. *Stevenson v. Wheeler County Bd. of Educ.*, 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957, 91 S. Ct. 355, 27 L. Ed. 2d 265 (1970).

State subdivision can constitutionally restrict facial hair of police officers because of

its strong interest in having law enforcement personnel present a uniform appearance to the public. *Nalley v. Douglas County*, 498 F. Supp. 1228 (N.D. Ga. 1980).

Anti-nepotism ordinance constitutional. — Municipal anti-nepotism ordinance restricting the rights of law enforcement personnel to intermarry placed only an indirect burden on plaintiff's right to marry while advancing several legitimate governmental purposes in a rational manner. *Parks v. City of Warner Robins*, 841 F. Supp. 1205 (M.D. Ga. 1994), *aff'd*, 43 F.3d 609 (11th Cir. 1995).

No citizen with personal right as to location of public schools. — No property right which could be accorded protection under this section exists in the maintenance of a certain school in a certain location. The location of public schools is a matter in which no citizen has a personal right any more than he would in the location of any other public facility. *Wallis v. Blue*, 263 F. Supp. 965 (N.D. Ga. 1967).

Law or regulation requiring or furthering racial discrimination in schools unconstitutional. — Any law or regulation of a state, county, or municipality requiring or furthering racial discrimination in the public schools violates the federal Constitution. *Stell v. Board of Pub. Educ.*, 334 F. Supp. 909 (S.D. Ga. 1971).

Every school need not reflect racial composition of system in desegregation. — In the exercise of broad remedial powers, focus must be on dismantling dual school systems rather than on achieving perfect racial balance: the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. *United States v. Board of Educ.*, 331 F. Supp. 466 (N.D. Ga. 1971); *Drummond v. Acree*, 409 U.S. 1228, 93 S. Ct. 18, 34 L. Ed. 2d 33 (1972).

School ethics standard not void for vagueness. — Good and sufficient cause standard in Interim Ethics Rules 505-2-.03(1)(o), Ga. Comp. R. & Regs. r. 505-2-.03(1)(o), was not void for vagueness as it gave a school superintendent notice that the superintendent's decision to bypass the sheriff's department and take the law into the superintendent's own hands by brandishing a firearm and threatening a suspect of criminal activity on

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a public highway, during school hours, could constitute "good and sufficient cause" for the suspension of the superintendent's educator certificate. *Prof'l Stds. Comm'n v. Alberson*, 273 Ga. App. 1, 614 S.E.2d 132 (2005).

Busing is an available tool for use by district courts in achieving school desegregation. *Acree v. County Bd. of Educ.*, 458 F.2d 486 (5th Cir.), cert. denied, 409 U.S. 1006, 93 S. Ct. 431, 34 L. Ed. 2d 299 (1972).

When freedom of choice plans permissible. — Freedom of choice plans for school desegregation are permissible only where they offer real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system. *Stell v. Board of Pub. Educ.*, 334 F. Supp. 909 (S.D. Ga. 1971).

Board of education discretion in dealing with teachers not unbounded. — It is the board of education and not a court which is empowered by law to manage a county school system, and it is their duty to hire and fire teachers as necessary. To this end, the law grants the board and its superintendent's broad discretion. The orderly operation of the schools depends upon their expertise and not upon whatever skills a judge may possess in the area of school administration. The board's discretion, though, is not unbounded. Standards which they use in the evaluation of prospective teachers must be reasonably related to teaching competency and effectiveness. Their standards must be applied in a uniform fashion so that no group of prospective teachers is singled out for greater scrutiny than other prospective teachers and employment cannot be conditioned upon factors which infringe upon the free exercise of constitutionally protected rights. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

Grandparent visitation statute unconstitutional. — The grandparent visitation statute, O.C.G.A. § 19-7-3, is unconstitutional because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized. *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769 (1995).

Juvenile court jurisdiction statute does not violate the separation of powers doctrine of

the state constitution, nor is it violative of the due process and equal protection provisions of the federal and state constitutions. *Bishop v. State*, 265 Ga. 821, 462 S.E.2d 716 (1995); *Murphy v. State*, 267 Ga. 100, 475 S.E.2d 590 (1996).

When controls and requirements concerning abortions within legislative discretion. — Controls and requirements concerning the performance of abortions are properly within the sphere of legislative discretion so long as they do not restrict the reasons for the initial decisions and do not violate the due process and equal protection clauses of U.S. Const., amend. 14. *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), modified and affirmed, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

Legislature's compliance with duty to furnish party charged with crime due process of law. — Where the legislature of this state has enacted laws for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary protection of life, liberty, and property, it has complied with its duty to furnish to a party charged with a crime due process of law. *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932).

Constructive knowledge provision in statute concerning distribution of obscene materials not unconstitutional. — Constitutional attack upon former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80) that the constructive knowledge as found therein is a violation of the constitutional requirements as to scienter was not meritorious. *Showcase Cinemas, Inc. v. State*, 156 Ga. App. 225, 274 S.E.2d 578 (1980), cert. dismissed, 451 U.S. 934, 101 S. Ct. 2037, 68 L. Ed. 2d 343 (1981).

Standing to raise question of constitutionality. — One cannot raise the question of constitutionality of a statute, or of the action of an administrative agency acting under statutory power, as violative of constitutional rights, unless the interest or rights of such complaining party are affected by the statute or the action of the agency. *West v. Housing Auth.*, 211 Ga. 133, 84 S.E.2d 30 (1954).

Constitutional questions must be raised in trial court in order to be heard on appeal. — Constitutional questions cannot be considered by the Court of Appeals or the Supreme Court where it does not appear from the

record that they were raised in the trial court. *Cantrell v. Abernathy*, 120 Ga. App. 318, 170 S.E.2d 319 (1969).

Abrogation of state's eleventh amendment immunity. — U.S. Const., amend. 14 granted Congress authority to abrogate the state's eleventh amendment immunity from suit by individuals for the state's violation of the Bankruptcy Code's discharge injunction. *Burke v. Georgia ex rel. Dep't of Revenue*, 203 Bankr. 493 (Bankr. S.D. Ga. 1996).

U.S. Const., amend. 14 granted to Congress the authority to abrogate the state's sovereign immunity against individual suits in federal court for damages arising from the state's violation of the automatic stay provisions of the Bankruptcy Code. *Headrick v. Georgia*, 203 Bankr. 805 (Bankr. S.D. Ga. 1996).

Actions alleging violation of 42 U.S.C. § 1983. — The fourteenth amendment does not supersede the eleventh amendment in actions alleging violations of 42 U.S.C. § 1983. Section five of the fourteenth amendment authorizes Congress to override eleventh amendment immunity to the extent necessary to enforce legislation designed to implement the substantive provisions of the fourteenth amendment, but it is well settled that § 1983 does not constitute an exercise of that authority. *Thomas v. Davies*, 834 F. Supp. 398 (M.D. Ga. 1993).

Liability under federal civil rights statute. — Recognizing that 42 U.S.C. § 1983 clearly requires a showing of something more than common law tort elements, the court analyzed a deputy sheriff's tort claims for malicious prosecution, abuse of process, false arrest and false imprisonment, in the context of the fourth and fourteenth amendments, and found that claims thereunder were validly inferrable for alleged conspiracy by fellow officers to force the deputy to give false testimony against the county sheriff. *Mastroianni v. Deering*, 835 F. Supp. 1577 (S.D. Ga. 1993).

Where plaintiff alleges federal statutory and constitutional predicates, federal court must assume jurisdiction. — Where a plaintiff alleges 28 U.S.C. § 1343(3), in conjunction with 42 U.S.C. § 1983, as the jurisdictional predicate, and alleges federal constitutional predicates, such as fourteenth amendment property rights, first amendment rights to free speech and association,

and fifth amendment just compensation or "taking" clause, a federal court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief, as well as to determine issues of fact arising in the controversy. *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D. Ga. 1983), *aff'd*, 746 F.2d 761 (11th Cir. 1984).

Failure to voice objection. — The refusal to grant a mistrial, on the grounds that the state's cross-examination of a witness was improper, is not an abuse of discretion where the defendant failed to voice an objection during the questioning. *Kirk v. State*, 168 Ga. App. 226, 308 S.E.2d 592 (1983), *aff'd*, 252 Ga. 133, 311 S.E.2d 821 (1984).

Emergency medical care and services. — County which received an emergency telephone call from a mental health institute in another county had no constitutional duty to provide emergency medical care and services to an institute patient who died before receiving treatment. *Cleveland v. Fulton County*, 196 Ga. App. 168, 396 S.E.2d 2 (1990).

Transfer of excess reserves in guaranteed student loan program. — The 1987 amendments to the federal Higher Education Act of 1965 which required the transfer of excess reserves held by guarantors participating in the guaranteed student loan program to the United States Department of Education did not abrogate a state-created guaranty agency's contract in an attempt to lessen the public debt and, therefore, did not violate § 4 of U.S. Const., amend. 14. *Georgia Student Fin. Comm'n v. Cavazos*, 741 F. Supp. 899 (N.D. Ga. 1990).

Determination of dischargeability of student loan. — Congress had and exercised its authority under the fourteenth amendment to waive the eleventh amendment immunity of a state from an action by an individual to determine the dischargeability in bankruptcy of a student loan. *Wilson v. South Carolina State Educ. Assistant Auth.*, 258 Bankr. 303 (Bankr. S.D. 2001).

Cited in *Morgan v. Lowry*, 168 Ga. 723, 149 S.E. 37 (1929); *Atlanta Term. Co. v. Georgia Pub. Serv. Comm'n*, 168 Ga. 772, 149 S.E. 189 (1929); *Southern Ry. v. Reed*, 40 Ga. App. 332, 149 S.E. 582 (1929); *Toombs v. Citizens' Bank*, 169 Ga. 115, 149 S.E. 645 (1929); *Wilkins v. American Sec. Co.*, 40 Ga.

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App. 378, 149 S.E. 810 (1929); *Toombs v. Citizens Bank*, 281 U.S. 643 (1930); *Butler v. Mobley*, 170 Ga. 265, 152 S.E. 229 (1930); *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930); *Georgia Pub. Serv. Comm'n v. Saye & Davis Transf. Co.*, 170 Ga. 873, 154 S.E. 439 (1930); *Mobley v. Brundage*, 170 Ga. 829, 154 S.E. 452 (1930); *Davidson v. Citizens' Bank*, 171 Ga. 81, 154 S.E. 775 (1930); *Southern Ry. v. Perdue*, 171 Ga. 134, 154 S.E. 793 (1930); *City of Macon v. Georgia Power Co.*, 171 Ga. 40, 155 S.E. 34 (1930); *Curtis v. Town of Helen*, 171 Ga. 256, 155 S.E. 202 (1930); *Southern Transf. Co. v. Harrison*, 171 Ga. 358, 155 S.E. 338 (1930); *Brooks v. Harrison*, 171 Ga. 488, 156 S.E. 35 (1930); *Sanders v. Hinton*, 171 Ga. 702, 156 S.E. 812 (1931); *Georgia Fertilizer Co. v. Walker*, 171 Ga. 734, 156 S.E. 820 (1931); *Gregory v. Quarles*, 172 Ga. 45, 157 S.E. 306 (1931); *Slicer v. State*, 172 Ga. 445, 157 S.E. 664 (1931); *Sharpe v. Seaboard Air Line Ry.*, 43 Ga. App. 51, 157 S.E. 875 (1931); *American Serv. Co. v. Cohen*, 172 Ga. 744, 158 S.E. 599 (1931); *Georgia Power Co. v. City of Decatur*, 173 Ga. 219, 159 S.E. 862 (1931); *Threatt v. American Mut. Liab. Ins. Co.*, 173 Ga. 350, 160 S.E. 379 (1931); *Bank of Jonesboro v. Wilson*, 43 Ga. App. 839, 160 S.E. 653 (1931); *Citizens' & S. Nat'l Bank v. City of Atlanta*, 46 F.2d 88 (N.D. Ga. 1931); *Citizens' & S. Nat'l Bank v. City of Atlanta*, 53 F.2d 557 (5th Cir. 1931); *Thomas v. State*, 174 Ga. 654, 163 S.E. 734 (1932); *Walden v. Sellers*, 174 Ga. 774, 163 S.E. 897 (1932); *Buie v. Buie*, 175 Ga. 27, 165 S.E. 15 (1932); *Western & A.R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932); *Woodall v. Georgia Power Co.*, 45 Ga. App. 526, 165 S.E. 311 (1932); *Perkins v. Mayor of Madison*, 175 Ga. 714, 165 S.E. 811 (1932); *Board of Comm'rs v. Massachusetts Bonding Ins. Co.*, 175 Ga. 584, 165 S.E. 828 (1932); *Montgomery & Atlanta Freight Lines v. Georgia Pub. Serv. Comm'n*, 175 Ga. 826, 166 S.E. 200 (1932); *West v. Standard Accident Ins. Co.*, 176 Ga. 54, 166 S.E. 761 (1932); *State Bd. of Barber Exmrs. v. Blocker*, 176 Ga. 125, 167 S.E. 298 (1932); *Saunders v. Lowry*, 58 F.2d 158 (5th Cir. 1932); *Downer v. Dunaway*, 1 F. Supp. 1001 (M.D. Ga. 1932); *Western & A.R.R. v. Leslie*, 176 Ga. 385, 168 S.E. 15 (1933); *Wilder v. Federal Land Bank*, 176 Ga. 813,

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Inc. (In re WWG Indus., Inc.), 44 Bankr. 287 (N.D. Ga. 1984); *Smith v. Georgia*, 749 F.2d 683 (11th Cir. 1985); *Risdon Enters., Inc. v. Colemill Enters., Inc.*, 172 Ga. App. 902, 324 S.E.2d 738 (1984); *Doby v. State*, 173 Ga. App. 348, 326 S.E.2d 506 (1985); *Spencer v. McCarley Moving & Storage Co.*, 174 Ga. App. 525, 330 S.E.2d 753 (1985); *Arras v. Herrin*, 255 Ga. 11, 334 S.E.2d 677 (1985); *Reeves v. Wilkes*, 754 F.2d 965 (11th Cir. 1985); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985); *Jordan v. Lippman*, 763 F.2d 1265 (11th Cir. 1985); *Amadeo v. Kemp*, 773 F.2d 1141 (11th Cir. 1985); *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528 (11th Cir. 1985); *Madden v. Cleland*, 105 F.R.D. 520 (N.D. Ga. 1985); *Fernandez-Roque v. Smith*, 622 F. Supp. 887 (N.D. Ga. 1985); *American Fed'n of Gov't Employees v. United States*, 622 F. Supp. 1109 (N.D. Ga. 1984); *Moore v. State*, 176 Ga. App. 882, 339 S.E.2d 271 (1985); *Johnson v. Jones*, 178 Ga. App. 346, 343 S.E.2d 403 (1986); *Watson v. State*, 178 Ga. App. 778, 344 S.E.2d 667 (1986); *Wise v. State*, 179 Ga. App. 115, 346 S.E.2d 393 (1986); *Johnson v. State*, 179 Ga. App. 467, 346 S.E.2d 903 (1986); *Brown v. Bowden*, 179 Ga. App. 626, 347 S.E.2d 356 (1986); *Robinson v. State*, 180 Ga. App. 248, 348 S.E.2d 761 (1986); *Hamilton v. State*, 180 Ga. App. 284, 349 S.E.2d 230 (1986); *Ford v. State*, 256 Ga. 375, 349 S.E.2d 361 (1986); *Parker v. State*, 256 Ga. 363, 349 S.E.2d 379 (1986); *Sparks v. State*, 180 Ga. App. 467, 349 S.E.2d 504 (1986); *Thomas v. State*, 180 Ga. App. 685, 350 S.E.2d 253 (1986); *Jones v. Kemp*, 794 F.2d 1536 (11th Cir. 1986); *Shelton v. City of Atlanta*, 796 F.2d 1391 (11th Cir. 1986); *United States v. Alexander*, 805 F.2d 1458 (11th Cir. 1986); *Davis v. Pringle*, 642 F. Supp. 171 (N.D. Ga. 1986); *Wansley v. State*, 256 Ga. 624, 352 S.E.2d 368 (1987); *Hubbard v. State*, 256 Ga. 637, 352 S.E.2d 383 (1987); *Penland v. State*, 256 Ga. 641, 352 S.E.2d 385 (1987); *Marbury v. Marbury*, 256 Ga. 651, 352 S.E.2d 564 (1987); *Proffitt v. State*, 181 Ga. App. 564, 353 S.E.2d 61 (1987); *Lindsey v. State*, 182 Ga. App. 10, 354 S.E.2d 650 (1987); *Ring v. Crisp County Hosp. Auth.*, 652 F. Supp. 477 (M.D. Ga. 1987); *Thompson v. Lancaster*, 652 F. Supp. 703 (M.D. Ga. 1987); *Howell v. Roberts*, 656 F. Supp. 1150 (N.D. Ga. 1987); *Ivey v. DeKalb County Dep't of Pub. Safety*,

668 F. Supp. 1579 (N.D. Ga. 1987); *Grant v. State*, 258 Ga. 299, 368 S.E.2d 737 (1988); *Walker v. State*, 258 Ga. 443, 370 S.E.2d 149 (1988); *United States v. Sims*, 845 F.2d 1564 (11th Cir. 1988); *O'Neal v. DeKalb County*, 850 F.2d 653 (11th Cir. 1988); *Ortiz v. State*, 188 Ga. App. 532, 374 S.E.2d 92 (1988); *Jones v. Automobile Ins. Co.*, 698 F. Supp. 226 (N.D. Ga. 1988); *Frost v. State*, 200 Ga. App. 267, 407 S.E.2d 765 (1991); *United States v. Williams*, 954 F.2d 668 (11th Cir. 1992); *Brown v. Crawford County*, 960 F.2d 1002 (11th Cir. 1992); *United States v. Myers*, 972 F.2d 1566 (11th Cir. 1992), cert. denied, 507 U.S. 1017, 113 S. Ct. 1813, 123 L. Ed. 2d 445 (1993); *Van Dyck v. Van Dyck*, 262 Ga. 720, 425 S.E.2d 853 (1993); *Quiller v. Bowman*, 262 Ga. 769, 425 S.E.2d 641 (1993); *Fiscus v. City of Roswell*, 832 F. Supp. 1558 (N.D. Ga. 1993); *Clark v. City of Zebulon*, 156 F.R.D. 684 (N.D. Ga. 1993); *Strickland v. Alderman*, 74 F.3d 260 (11th Cir. 1996); *Braden v. Bell*, 222 Ga. App. 144, 473 S.E.2d 523 (1996); *DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680 (11th Cir. 1997), cert. denied, 522 U.S. 1015, 118 S. Ct. 601, 139 L. Ed. 2d 489 (1997); *Anderson v. State*, 231 Ga. App. 807, 499 S.E.2d 717 (1998); *Dollar v. Dalton Pub. Schs.*, 233 Ga. App. 827, 505 S.E.2d 789 (1998); *Fulton County Tax Comm'r v. GMC*, 234 Ga. App. 459, 507 S.E.2d 772 (1998); *Veasey v. State*, 234 Ga. App. 795, 507 S.E.2d 799 (1998).

State Action

U.S. Const., amend. 14 applies only where there is state action. *Graves v. Walton County Bd. of Educ.*, 300 F. Supp. 188 (M.D. Ga. 1968), aff'd, 410 F.2d 1152 (5th Cir. 1969), 1153 *Jewell v. City of Covington*, 425 F.2d 459 (5th Cir.), cert. denied, 400 U.S. 929, 91 S. Ct. 195, 27 L. Ed. 2d 189 (1970); *Metz v. McKinley*, 583 F. Supp. 683 (S.D. Ga.), aff'd, 747 F.2d 709 (11th Cir. 1984).

Before the due process clause of the fourteenth amendment comes into play, governmental deprivation of a person's liberty or property must be shown. *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir.), cert. denied, 459 U.S. 1043, 103 S. Ct. 462, 74 L. Ed. 2d 612 (1982).

The due process protection of U.S. Const., amend. 14 protects the citizens against state action rather than against citizen action.

State Action (Cont'd)

Duck v. State, 250 Ga. 592, 300 S.E.2d 121 (1983).

Only egregious abuse of governmental power constitutionally tortious. — Neither the federal Civil Rights Act (42 U.S.C. § 1983) nor U.S. Const., amend. 14 is a font of tort law. An act must constitute a sufficiently egregious abuse of governmental power to be constitutionally tortious. *Stone Mt. Game Ranch, Inc. v. Hunt*, 570 F. Supp. 238 (N.D. Ga. 1983), *aff'd*, 746 F.2d 761 (11th Cir. 1984).

Although the right to life is undisputedly of constitutional dimension, because 42 U.S.C. § 1983 is not a general tort statute, the plaintiff must show that the injury inflicted arose to the level of a constitutional tort, being sufficiently egregious to exceed the boundaries of wrongful injuries redressable under tort law and depriving the victim of a fourteenth amendment "liberty" interest without due process of law. *McQuirter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

County ordinance not unconstitutionally vague. — Cherokee County, Ga., Code of Ordinances § 46-61(d) was not unconstitutionally vague where "litter" and "rubbish" were defined in the county code such that individuals were given sufficient warning that they could avoid doing that which was forbidden; it could also readily be ascertained whether a person was "accumulating" rubbish or litter on the person's property. *Franklin v. State*, 279 Ga. 150, 611 S.E.2d 21 (2005).

Amendment not applicable to private action. — U.S. Const., amend. 14 protects individual against state action, not against wrongs done by individuals. *United States v. Sutherland*, 37 F. Supp. 344 (N.D. Ga. 1940); *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966).

No shield against merely private conduct. — The action inhibited by the first section of U.S. Const., amend. 14 is only such action as may fairly be said to be that of the states. U.S. Const., amend. 14 erects no shield against merely private conduct, however discriminatory or wrongful. *Barnes v. Atlanta Transit Sys.*, 144 F. Supp. 156 (N.D. Ga. 1956).

State has no duty to protect citizens from "private violence" and, thus, there was no

violation of substantive due process rights where, at the time the state allegedly failed to act to protect an infant, it did not have custody and control of the infant. *Powell v. Department of Human Resources*, 918 F. Supp. 1575 (S.D. Ga. 1996), *aff'd*, 114 F.3d 1074 (11th Cir. 1997).

State action defined. — Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law. *Shelton v. GECC*, 359 F. Supp. 1079 (M.D. Ga. 1973).

In order for wrong to be subject to redress under U.S. Const., amend. 14 it must result from state action or, at the very least, the state must have some way of knowing of its occurrence. *Johnson v. Smith*, 295 F. Supp. 835 (N.D. Ga. 1968), *aff'd*, 414 F.2d 645 (5th Cir. 1969), cert. denied, 397 U.S. 951, 90 S. Ct. 975, 25 L. Ed. 2d 133 (1970).

No constitutional deprivation where no state created right or privilege. — There can be no deprivation of due process and equal protection of the laws in civil actions for deprivation of these rights where there is no exercise of a right or privilege created by the state and the party charged with such deprivation is not a "state actor." *Poss v. Moreland*, 253 Ga. 730, 324 S.E.2d 456, cert. dismissed, 474 U.S. 807, 106 S. Ct. 182, 88 L. Ed. 2d 151 (1985).

No duty of care owed to sexually harassed student. — A state owes a duty of care to the individual only where the state has acted to render the person incapable, or significantly less capable of caring for or protecting oneself, or where the state places an individual in a dangerous situation or makes the individual more vulnerable to harm. Therefore, a student who was repeatedly sexually harassed by a fifth-grade student classmate did not state a constitutional deprivation because, despite a mandatory attendance policy and the loco parentis authority of the school over the children, students are not in state custody during school hours. *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363 (M.D. Ga. 1994), *aff'd*, 120 F.3d 1390 (11th Cir. 1997).

Due process of law is denied when an arm of the state acts directly against an individual's property and deprives the individual of it without notice or an opportunity to be

heard. Thus, the requirements of "state" action can rarely be satisfied when the action is taken by one not a state official. *Reinertsen v. Porter*, 242 Ga. 624, 250 S.E.2d 475 (1978).

State statutes denying equal protection and due process rendered unconstitutional. — U.S. Const., amend. 14 renders state statutes unconstitutional that deny equal protection of the law, due process of the law, etc. *Screws v. United States*, 140 F.2d 662 (5th Cir. 1944), rev'd on other grounds, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).

State need not be directly involved for finding of discrimination. — It is not necessary that state be overtly or directly involved in order to find state-caused discrimination. *Ingram v. Dunn*, 383 F. Supp. 1043 (N.D. Ga. 1974), aff'd, 514 F.2d 1070 (5th Cir. 1975).

State action where one in public position acts in name and for state. — Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the Constitution; and as the official acts in the name and for the state, and is clothed with the state's power, the official's act is that of the state. *United States v. Sutherland*, 37 F. Supp. 344 (N.D. Ga. 1940).

Municipal police officer's arrival with a motor vehicle repossession might have given the repossession a cachet of legality and had the effect of intimidating the vehicles' possessor into not exercising his right to resist, thus facilitating the repossession. Even if unintended, such an effect could have constituted "intervention and aid" sufficient to establish state action. Thus, the city would not be insulated from liability if its actual practice, as opposed to its stated policy, facilitated repossession. *Booker v. City of Atlanta*, 776 F.2d 272 (11th Cir. 1985).

Official acted contrary to express command of state law. — Acts done by virtue of public position under a state government, and in the name and for the state, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. If a state official, acting under color of state authority, invades in the course of the official's duties, a private

right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded the official's authority but disregarded special commands of the state law. *United States v. Sutherland*, 37 F. Supp. 344 (N.D. Ga. 1940).

Every state official bound by Constitution. — Every state official, high and low, is bound by U.S. Const., amends. 14 and 15. *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

Actions of officials held state action. — Action of duly qualified officer, acting within scope of the officer's authority, constitutes state action, even though the particular acts complained of may not be authorized. *United States v. Sutherland*, 37 F. Supp. 344 (N.D. Ga. 1940).

Action of prosecuting officers on behalf of the state, like that of administrative officers in execution of its laws, may constitute state action within the purview of U.S. Const., amend. 14. U.S. Const., amend. 14 governs any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers. This is true where the officer acts without specific authority to do the particular acts alleged and also where such acts are expressly forbidden by state law. *United States v. Sutherland*, 37 F. Supp. 344 (N.D. Ga. 1940).

As alleged threats, assaults and torture inflicted by police officer while exercising authority of the officer's office in an effort to extort from petitioner a confession of guilt of theft, constituted state action and were in violation of U.S. Const., amend. 14. *United States v. Sutherland*, 37 F. Supp. 344 (N.D. Ga. 1940).

Action of administrative officers of State Board of Education is state action within U.S. Const., amend. 14. They are acting for the state under authority of its laws. If in doing this they deny any person the equal protection of the law they may be stopped by virtue of U.S. Const., amend. 14 as officers. *Cook v. Davis*, 178 F.2d 595 (5th Cir. 1949), cert. denied, 340 U.S. 811, 71 S. Ct. 38, 95 L. Ed. 596 (1950).

Business tort not civil rights case merely because state agency is party. — A tort count arising out of a business relationship does not become a federal civil rights case because of the mere fortuity that one of the parties is a state agency. *Stone Mt. Game*

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Ranch, Inc. v. Hunt, 570 F. Supp. 238 (N.D. Ga. 1983), aff'd, 746 F.2d 761 (11th Cir. 1984).

Amendment made constitutional guarantees applicable to states and gave Congress enforcement powers. — U.S. Const., amend. 14 made the guarantees of the Constitution of the United States applicable to each of the states and gave Congress “the power to enforce provisions” thereof against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it. *Palmer v. Hall*, 380 F. Supp. 120 (M.D. Ga. 1974), modified, 517 F.2d 705 (5th Cir. 1975).

Inquiry concerning whether state authorized misuse of power irrelevant. — Amendment presupposes possibility of abuse by state officer or representative of powers possessed, and deals with such a contingency. It provides, therefore, for the case in which one who is in possession of state power uses that power to do wrongs which the amendment forbids, although the consummation of the wrong may be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the amendment is that where an officer or other representative of a state, in the exercise of the authority with which the officer is clothed misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of the officer's exertion of power. *Davis v. Cook*, 55 F. Supp. 1004 (N.D. Ga. 1944), later appeal, 80 F. Supp. 443 (N.D. Ga. 1948), rev'd on other grounds, 178 F.2d 595 (5th Cir. 1949), cert. denied, 340 U.S. 811, 71 S. Ct. 38, 95 L. Ed. 596 (1950); *Refoule v. Ellis*, 74 F. Supp. 336 (N.D. Ga. 1947).

Freedom of speech and freedom of press protected from invasion by state action. — Freedom of speech and freedom of the press, which are protected by the U.S. Const., amend. 1 from infringement by Congress, are among the fundamental personal

rights and liberties which are protected by U.S. Const., amend. 14 from invasion by state action. *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938); *Walter v. State*, 131 Ga. App. 667, 206 S.E.2d 662, appeal dismissed, 233 Ga. 10, 209 S.E.2d 605 (1974).

Voting rights protected. — Among the basic civic and political rights that have been found to be protected and preserved from discriminatory action on the part of states is the right of suffrage — the right or privilege of casting a vote at public elections. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977).

Concern of preserving civic and political rights from discriminatory state action based on race or color. — The primary concern of the framers of U.S. Const., amend. 14 was the establishment of equality in the enjoyment of basic civic and political rights and the preservation of those rights from discriminatory action on the part of the states based on considerations of race or color. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977).

Amendment protects rather than creates individual rights. — The right to the enjoyment of life and liberty is a fundamental or natural right, and is not derived from or created by the federal Constitution; nevertheless, U.S. Const., amend. 14 was designed to safeguard and protect the individual against the deprivation without due process of law of those rights by the state rather than to create new rights in the individual. *Screws v. United States*, 140 F.2d 662 (5th Cir. 1944), rev'd on other grounds, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).

States with wide discretion in deciding whether law should operate statewide or in certain counties. — There is nothing in U.S. Const., amend. 14 that prohibits a state from creating different kinds of political subdivisions and providing a different process for selecting and removing officials in those subdivisions. The states have wide discretion in deciding whether a law should operate statewide or only in certain counties. *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975).

Licensing agency regulations causing discrimination. — Licensing agency is not legal cause of discrimination unless agency regulation requires or fosters discrimination. *Ingram v. Dunn*, 383 F. Supp. 1043 (N.D. Ga.

1974), *aff'd*, 514 F.2d 1070 (5th Cir. 1975).

Municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment. *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938); *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958).

Statutory declaration of noninterference with innkeepers' liens. — Where the sole action attributable to the state is the General Assembly's enactment of statutes announcing the circumstances under which the courts of this state will not interfere with the private enforcement of innkeepers' liens, there is no violation of hotel lodgers' due process rights. *Evans v. Harley Hotels, Inc.*, 253 Ga. 53, 315 S.E.2d 896, appeal dismissed, 469 U.S. 803, 105 S. Ct. 58, 83 L. Ed. 2d 9 (1984).

Action of political party in conducting primary election constitutes state action. — The conduct of a primary election in Georgia is such an essential part in the total election process, its conduct and management is so closely supervised by state law and the effect to be given it is so clearly determined by statute that the action of the party in the conduct of its primary constitutes state action within the contemplation of U.S. Const., amend. 14. *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga. 1962), vacated on other grounds, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

In private litigation state merely furnishes forum. — If the plaintiffs have been parties to state court litigations with results considered by them to be unsatisfactory, it cannot be seriously contended that the lawyers who participated in the trial of these matters, or the judges who presided over the proceedings in the state court, are state functionaries acting under color of state law within the meaning of U.S. Const., amend. 14. This was private litigation and the state merely furnished the forum and had no interest one way or another in the outcome. *Swift v. Fourth Nat'l Bank*, 205 F. Supp. 563 (M.D. Ga. 1962).

Nonrecognition of cause of action not state action. — Where appellants contended that a doctor's negligence interfered with the woman's right to make a choice whether to continue her pregnancy, the State of Georgia was not involved; Georgia's nonrec-

ognition of a cause of action was not state action that brought the doctor's conduct within the purview of the fourteenth amendment. *Campbell v. United States*, 962 F.2d 1579 (11th Cir. 1992), cert. denied, 507 U.S. 909, 113 S. Ct. 1254, 122 L. Ed. 2d 653 (1993).

Whether state sufficiently interjected itself into challenged conduct requires factual determination. — Whether the state has sufficiently interjected itself into the challenged conduct must be determined by weighing the facts and circumstances of each particular case. *Global Indus., Inc. v. Harris*, 376 F. Supp. 1379 (N.D. Ga. 1974).

Determining whether private bodies required to provide due process. — In determining whether due process mandates are applicable to private bodies, initial question is whether the state or the federal government has become so involved in the conduct of these otherwise private bodies that their activities are also governmental activities and performed under governmental aegis without the private body necessarily becoming either a governmental instrumentality or agent in a strict sense. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), *rev'd* on other grounds, 556 F.2d 356 (5th Cir. 1977).

Determining line between private and governmental action. — Line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority. When governmental action is alleged there must be cautious analysis of the quality and degree of government relationship to the particular acts in question. *Shelton v. GECC*, 359 F. Supp. 1079 (M.D. Ga. 1973).

No infallible test for determining whether state significantly involved in private discrimination. — The United States Supreme Court has never attempted the impossible task of formulating an infallible test for determining whether the state in any of its manifestations has become significantly involved in private discrimination. *Shelton v. GECC*, 359 F. Supp. 1079 (M.D. Ga. 1973).

State involvement with invidious discrimination. — Where impetus for discrimination is private, state must have significantly involved itself with invidious discriminations, in order for the discriminatory action to fall

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within the ambit of the constitutional prohibition. *Shelton v. GECC*, 359 F. Supp. 1079 (M.D. Ga. 1973).

Private individuals clothed with state authority. — State courts that aid private parties to perform public function on segregated basis implicate the state in conduct proscribed by U.S. Const., amend. 14. *Evans v. Newton*, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966).

When private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations. *Evans v. Newton*, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966).

To determine whether private individuals were clothed with state authority one must look to the degree of involvement, for only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance. *Shelton v. GECC*, 359 F. Supp. 1079 (M.D. Ga. 1973).

When private citizen's conduct attributable to state. — The private citizen's conduct may be attributable to the state where the government affirmatively facilitates, encourages, or authorizes the objectionable practice. *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919 (11th Cir.), cert. denied, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

The relevant inquiry is whether there is a sufficiently close nexus between the state and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the state itself. *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919 (11th Cir.), cert. denied, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

"Special relationship" protection from violence from non-government actors. — Plaintiff did not fit within the "special relationship" exception to the general rule that due process does not entitle a citizen to be protected from violence at the hands of non governmental actors. *Lovins v. Lee*, 53 F.3d 1208 (11th Cir. 1995).

Action of private hospital not state action. — Private, operated for profit hospital's decision to change bylaws so as to allow only

doctors eligible for membership in the American Medical and Dental Associations (AMA and ADA) to obtain medical staff privileges and thus denying defendants continued staff privileges because they were doctors of podiatric medicine ineligible for membership in the AMA or ADA was neither state nor federal action subject to scrutiny under the due process or equal protection clauses of the federal Constitution; nor did it constitute a restraint of trade in violation of O.C.G.A. § 16-10-22 merely because the hospital derived 55 percent of its income from federal medicaid and medicare funds, was licensed by the state and was regulated as a certified provider under the medicare and medicaid programs. *Todd v. Physicians & Surgeons Community Hosp.*, 165 Ga. App. 656, 302 S.E.2d 378 (1983).

Action of regulated utility not state action. — Regulated utility did not engage in "state action" because it obtained court judgment. *Cobb v. Georgia Power Co.*, 757 F.2d 1248 (11th Cir. 1985).

Creditor's power of sale derived from parties' contract, not statute. — A creditor's power of sale is derived from the parties' contractual undertaking rather than from statute. Therefore, the mere enactment and enforcement of former Code 1933, § 67-1506 (see O.C.G.A. § 44-14-162) does not itself constitute state action. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Liability under federal civil rights statute. — Because a plaintiff in a civil rights case prosecuted under 42 U.S.C. § 1983 alleging excessive force used in arrest may receive compensatory damages for such things as physical pain and suffering and mental and emotional anguish, and because such a plaintiff whose constitutional rights are violated is entitled to receive nominal damages even if the plaintiff fails to produce any evidence of compensatory damages, the district court erred in granting judgment to defendant officers as a matter of law. *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000).

Police Power

Regulation for promotion of public welfare under police power. — While the maxim *salus populi suprema lex* cannot be used as a mere pretext for the curtailment of

constitutional safeguards still, where it does apply, it acts as a limitation on the rights of the individual which otherwise would be beyond the power of the Legislature to regulate or circumscribe. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Principle of laws passed under inherent police power. — When a law is attacked on the ground that it deprives a citizen of liberty or property without due process of law, the underlying principle of laws passed under the inherent police power of the government is that it is the duty of each citizen to use the citizen's property and exercise the citizen's rights and privileges with due regard to the personal and property rights of others. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Punishment of those abusing freedom of speech and press within police power. — That a state in the exercise of its police power may punish those who abuse the freedom of speech and press by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace is not open to question. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Due process clauses not designed to interfere with police power. — The due process clauses of the state and federal Constitutions were not designed to interfere with the police power of the state. *Davis v. Stark*, 198 Ga. 223, 31 S.E.2d 592 (1944).

All property is held subject to police power of the state. — The due process clauses are not intended to limit the right of the state to properly exercise the police power in the enhancement of public safety. Damages cannot be recovered by one because he incurs expense in obeying a police regulation enacted for the common welfare and safety of the public. The police power has never been surrendered by the states; and all rights of natural persons and corporations are subject to the exercise of police power. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Constitutional amendments not designed to interfere with police power. — U.S. Const., amend. 14 does not curtail, restrain, destroy or take from states right duly and properly to exercise police power, but the law passed by reason of such inherent pow-

ers of government must not unreasonably invade the rights guaranteed by the Constitution and thus become repugnant to it. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Neither U.S. Const., amend. 14 — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Police power may not be exerted arbitrarily or unreasonably. — A statute valid as to one set of facts may be invalid as to another, and a statute valid when enacted may become invalid by change in the conditions to which it is applied; the police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955) (on motion for rehearing).

Governmental purpose may not be achieved by unnecessarily broad means invading protected freedoms. — A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971).

Even though governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can more narrowly be achieved. *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971).

Power of state to classify in adoption of police powers. — Only when attempted classification is arbitrary and unreasonable can statute be declared beyond legislative authority. *McCullers v. Williamson*, 221 Ga. 358, 144 S.E.2d 911 (1965).

The equal protection clause does not take the power away from the states to make classifications. It commands only that the classifications not be arbitrary. *Atlanta Bowling Ctr., Inc. v. Allen*, 389 F.2d 713 (5th Cir. 1968).

U.S. Const., amend. 14 does not absolutely deny the state the power to set up classes of persons and treat them differently. This is especially true in the area of economic and social welfare. What U.S. Const., amend. 14

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does, however, is deny to states the power to put persons into classes based upon criteria unrelated to the purpose of the legislation. *DeKalb Real Estate Bd., Inc. v. Chairman & Bd. of Comm'rs of Rds. & Revenues*, 372 F. Supp. 748 (N.D. Ga. 1973).

Equal protection clause of U.S. Const., amend. 14 does not take from state power to classify in adoption of police laws, but allows the exercise of the police power with great discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. *Stoner v. Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974).

Classification must rest on difference with substantial relation to object of legislation. — When classification in a law is called in question, if any state of facts reasonably can be conceived that will sustain it, the existence of that state of facts at the time the law was enacted must be assumed. *McCullers v. Williamson*, 221 Ga. 358, 144 S.E.2d 911 (1965).

Classification or regulation reasonable in relation to subject and adopted in interests of community does not deny due process. *Milner v. Burson*, 320 F. Supp. 706 (N.D. Ga. 1970).

A classification by a state must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *DeKalb Real Estate Bd., Inc. v. Chairman & Bd. of Comm'rs of Rds. & Revenues*, 372 F. Supp. 748 (N.D. Ga. 1973).

Classification of subjects for taxation. — Law recognizes right and power of municipal government to make reasonable classifications of subjects for taxation and to make subclassifications of such classes. But it does not permit an arbitrary classification, the basis for which has no reasonable relationship to the purpose for which classification is made. *Elder v. Smith*, 188 Ga. 65, 2 S.E.2d 670 (1939).

Great leeway allowed in making taxation classifications. — Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the state has large leeway in making classifications and drawing lines which in its judgment produces reasonable systems of taxation.

Blackmon v. Monroe, 233 Ga. 656, 212 S.E.2d 827 (1975); *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir.), cert. denied, 449 U.S. 1015, 101 S. Ct. 574, 66 L. Ed. 2d 474 (1980).

Classification of trades, callings, businesses, or occupations. — Very wide discretion must be conceded to legislative power of state in classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933).

Statute protecting confidentiality of records of licensing agency. — The provision of O.C.G.A. § 43-40-27(d), prohibiting the discovery of any document in the possession of the Real Estate Commission, is not violative of due process. *Demery v. Georgia Real Estate Comm'n*, 266 Ga. 288, 466 S.E.2d 591 (1996).

When state regulation for public welfare not violative of due process. — State regulation for the public welfare is not violative of the due process clause of U.S. Const., amend. 14 so long as the law has a reasonable relation to a proper legislative purpose, and the means selected have a real and substantial relation to the object sought to be obtained. *Eubanks v. Ferrier*, 245 Ga. 763, 267 S.E.2d 230 (1980).

Social welfare statutory classification valid if rationally based and free from invidious discrimination. — A statutory classification in the area of social welfare is consistent with the equal protection clauses of the U.S. Const., amends. 5 and 14 if it is rationally based and free from invidious discrimination. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga.), aff'd, 518 F.2d 1405 (5th Cir. 1975).

Regulation of businesses affected with public interest. — The prohibitory provisions as to due process of law and the equal protection of the laws do not preclude the state Legislature from regulating a business affected with a public interest, which is the equivalent of saying subject to the exercise of the police power, where, such regulation is not unreasonable, arbitrary, capricious, or

discriminatory, and the means selected have a real and substantial relation to the object sought to be attained. Under the decision, such regulation may include the prices to be charged for the products or commodities. The function of courts in the application of U.S. Const., amend. 14 is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Bohannon v. Duncan*, 185 Ga. 840, 196 S.E. 897 (1938).

State regulation of business transactions. — As a necessary consequence of a state's possession of powers, the state has the right to enforce any conditions imposed by the laws as preliminary to the transaction of business within its confines by a foreign corporation, and the state has also the further right to prohibit a citizen from contracting within the jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in its own behalf or through an agent empowered to that end. Such an intrastate transaction does not fall within the guaranty of U.S. Const., amend. 14 of the federal Constitution. *Cooper Co. v. State*, 187 Ga. 497, 1 S.E.2d 436 (1939) (decided under former Code 1933, §§ 56-528 to 56-530).

Prohibition on granting of licenses to operate adult bookstore valid. — A prohibition against granting a license to operate an adult bookstore to any person who has been convicted in the previous five years of a felony or misdemeanor involving moral turpitude, or sexual, gambling, drug, alcohol or similar offenses, is valid as a proper exercise of the police power. *Airport Bookstore, Inc. v. Jackson*, 242 Ga. 214, 248 S.E.2d 623 (1978), cert. denied, 441 U.S. 952, 99 S. Ct. 2182, 60 L. Ed. 2d 1057 (1979).

Business regulations void where without reasonable or substantial relation to general welfare. — Ga. L. 1937, p. 280, establishing a state board of photographic examiners, and providing, among other things that except as to stated classes, person desiring to engage in the business of photography or photofinishing must stand an examination and thereby qualify as to competency, ability, and integrity, and denouncing as a crime a violation of any of the terms of the act, is unconstitutional and void as an exercise of

the police power. The prescribed regulations are imposed upon a lawful business, and considered as a whole do not bear any reasonable or substantial relation to the public health, safety, or morality, or other phase of the general welfare. *Bramley v. State*, 187 Ga. 826, 2 S.E.2d 647 (1939).

Defining qualifications for those in occupation or profession affecting public health or welfare proper. — Legislation which defines the qualifications for one who engages in an occupation or profession affecting the public health, safety, morals or welfare is a proper exercise of the police power. *Airport Bookstore, Inc. v. Jackson*, 242 Ga. 214, 248 S.E.2d 623 (1978), cert. denied, 441 U.S. 952, 99 S. Ct. 2182, 60 L. Ed. 2d 1057 (1979).

Regulation of right to practice medicine. — Right to practice medicine is conditional right subordinate to state's power and duty to safeguard public health; and it is the universal rule that in the performance of such duty and in the exercise of such power, the state may regulate and control the practice of medicine and those engaging in it, subject only to the limitation that the measures adopted must be reasonable, necessary, and appropriate to accomplish the Legislature's valid objective of protecting the health and welfare of its inhabitants. *Geiger v. Jenkins*, 316 F. Supp. 370 (N.D. Ga. 1970), aff'd, 401 U.S. 985, 91 S. Ct. 1236, 28 L. Ed. 2d 525 (1971).

Residency requirement for license for retail malt beverage and wine sellers upheld. — It is not an unreasonable exercise of the police power to require that a licensee, whether as an individual or as a member of a partnership, must have been a resident of the county for one year preceding the application for license. There is a reasonable basis for distinction between wholesale and retail dealers, and the residence requirement as to retail dealers is not unfairly discriminatory because it does not apply to wholesale dealers. *Bonner v. Maddox*, 227 Ga. 598, 182 S.E.2d 122 (1971).

Objective standards for obtaining liquor license required. — While it is firmly established that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power, the due process requirement of U.S. Const., amend. 14 mandates that objective standards be set out to afford notice to applicants of require-

Police Power (Cont'd)

ments for obtaining a license. *Mayor of Hapeville v. Anderson*, 246 Ga. 786, 272 S.E.2d 713 (1980).

Regulation of nonuseful occupation potentially harmful to public. — U.S. Const., amend. 14 does not prevent state from regulating or prohibiting nonuseful occupation which may become harmful to public, and the regulation or prohibition need not be postponed until the evil is flagrant. One cannot be heard to complain about loss of money because a business which may be subject to regulation under the police power of the state is legislated out of existence. *Phillips v. City of Atlanta*, 57 F. Supp. 588 (N.D. Ga.), *aff'd*, 145 F.2d 470 (5th Cir. 1944).

Only invidious discrimination or patently arbitrary classifications barred. — Only “invidious” discrimination or classifications which are “patently arbitrary and utterly lacking in rational justification” are barred by either the due process or equal protection clauses. *Milner v. Burson*, 320 F. Supp. 706 (N.D. Ga. 1970).

Burden on one assailing classification to show it arbitrary. — One who assails the classification in a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *McCullers v. Williamson*, 221 Ga. 358, 144 S.E.2d 911 (1965).

Justification necessary for zoning classification. — As the individual’s right to the unfettered use of the individual’s property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

Police power to zone to prevent future use not subject to question or requirement for compensation. — The police power of the state to zone property to prevent its use for certain purposes in the future, as distinguished from the taking or damaging in respect to a use already in existence, is not open to question, and does not require the payment of any compensation. *National Adv.*

Co. v. State Hwy. Dep’t, 230 Ga. 119, 195 S.E.2d 895 (1973).

Power to enforce building code regulation. — Plaintiffs violated building code regulation by transporting a house through the streets of the county without having obtained a permit or giving the county the required 24 hours notice, and damaged a traffic light in the process. In the course of investigating the offense and determining how and whether to cite the plaintiffs, the police officer detained them and, although the police officer perhaps could have acted somewhat more quickly in making the officer’s determination and perhaps could have been more solicitous of the discomfort that the plaintiffs purportedly suffered by having to sit in a hot car during the process, neither the officer nor the county violated the plaintiffs’ constitutional rights. *Lyle v. Dodd*, 857 F. Supp. 958 (N.D. Ga. 1994).

Municipal ordinance duly enacted under ample grant of power is presumably constitutional and binding. *Hart v. Columbus*, 125 Ga. App. 625, 188 S.E.2d 422 (1972).

Constitutionality of ordinances favored. — It is a general rule governing the validity and construction of ordinances that their constitutionality is favored and courts are reluctant to declare an ordinance unconstitutional. *Hart v. Columbus*, 125 Ga. App. 625, 188 S.E.2d 422 (1972).

Municipal ordinances must be reasonable; the limitations of the power of a city council in this regard are not to be measured by the more extensive powers of the state Legislature. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Any municipal ordinance that is unreasonable will be held void. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Municipal ordinance cannot be oppressive or unfairly discriminate. — Ordinances cannot be oppressive or unreasonable, nor can they unfairly discriminate in favor of one citizen or of one class against another. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Municipality may make reasonable rules and regulations and may require permits. — While a municipality may make reasonable rules and regulations looking to the protection, safety and health of its citizens and may require permits for the exercise of its power of regulation, the grant or refusal of a per-

mit to dig a well cannot be left to arbitrary discretion. *City of Hawkinsville v. Clark*, 135 Ga. App. 875, 219 S.E.2d 577 (1975).

Ordinance is unconstitutional if city board of commissioners given arbitrary authority to grant permits. — An ordinance is constitutionally defective if it grants to the board of commissioners of a city the arbitrary authority to grant a permit to dig a well to some and to refuse others by prescribing no rule or guide by which it may be impartially executed and which will preclude partiality. *City of Hawkinsville v. Clark*, 135 Ga. App. 875, 219 S.E.2d 577 (1975).

Subjecting municipal bylaws and ordinances to court investigation. — Municipal bylaws and ordinances undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulation, there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business or use and enjoy property. *Borough of Atlanta v. Kirk*, 175 Ga. 395, 165 S.E. 69 (1932).

Determination of reasonableness of ordinance made under circumstances and conditions at time of case. — In determining the reasonableness of an ordinance based upon statutory authority, such determination must be made under the circumstances and conditions of the case at the present time, and not contemporaneous with the passage of the original ordinance. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Municipal government without power under "police power" to discriminate between licensees arbitrarily and without cause. — A municipal government, after adopting an ordinance pursuant to the state law regulating intoxicating liquors, providing for sale of licenses for one year unless sooner revoked for violation of rules and regulations therein, is without power under "police power" to arbitrarily and without cause discriminate between such licensees by revoking one license and not those of others who occupy exactly the same position since the licensee had something more than a "mere privilege" and was entitled to the equal protection guaranteed by the Constitution. *Mayor of Savannah v. Savannah Distrib. Co.*, 202 Ga. 559, 43 S.E.2d 704 (1947).

Municipal ordinance prohibiting sales during certain times at certain place valid under police power. — A municipal ordinance providing that it shall be illegal "for any person, firm, or corporation to sell or offer for sale any goods, wares, merchandise, pamphlets, magazines, maps, or other article of value, on any Saturday between the hours of 12 noon and 9 p.m. on any of the following congested sidewalks of said city," designating certain sidewalks and providing a penalty therefor, is a valid and reasonable regulation for public safety and convenience, under the police power of the city. Where plaintiffs seek to enjoin enforcement of the ordinance against them, on the grounds that the magazines sold and offered for sale are devoted to religious subjects, and advocate the adoption of a particular form of religion, the distribution of which is a part of their religious belief, and urge that to prohibit the sale of the magazines would be in violation of their rights of religious freedom under the state and federal Constitutions, it is not error to deny an injunction. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Reasonable basis must be shown for injunctive relief or declaratory judgment. — While a municipality can, in the exercise of its police power, make reasonable regulations to protect its citizens, including measures designed to preclude the use of water unfit for human consumption or other use, as obtained from a users' private source, or as supplied to a user by others, there is no reason to recognize a claim for injunctive relief or declaratory judgment by the city absent some indication from the claim, as alleged, to show that some reasonable basis exists for protecting the health and welfare of its citizens in this manner. *City of Midway v. Midway Nursing & Convalescent Center, Inc.*, 230 Ga. 77, 195 S.E.2d 452 (1973).

Constitutional restraints limit state power to terminate entitlement whether the entitlement is denominated a "right" or a "privilege." *Davis v. Weir*, 328 F. Supp. 317 (N.D. Ga. 1971).

Regulation of game fish proper. — While it is true that ownership of fish in private ponds is a property right, it is not an absolute and unqualified right, and is bounded by the limitation that it must always yield to the state's power to regulate and preserve for the public good. Therefore, O.C.G.A.

Police Power (Cont'd)

§ 27-4-74 (sale, purchase, transportation, etc. of game fish generally) functions to protect the stocks of fish swimming freely in waters of this state and as such is a proper exercise of the police power. *Maddox v. State*, 252 Ga. 198, 312 S.E.2d 325, cert. denied, 469 U.S. 820, 105 S. Ct. 93, 83 L. Ed. 2d 39 (1984).

Deputy's power to direct owner away from burning building. — Under the police power, a deputy sheriff is authorized to go upon private property and direct the owner to move back from a burning building when the deputy has been made aware of the possibility of an explosion. *Veit v. State*, 182 Ga. App. 753, 357 S.E.2d 113 (1987).

Nude and sexual conduct on premises where alcohol served. — Statute prohibiting certain nude and sexual conduct on premises where alcoholic beverages are sold or dispensed for consumption on the premises infringes upon protected speech and must fall as an improper exercise of the state's police power. *Harris v. Entertainment Sys.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

Although a state may have a certain amount of its police power restored to it under the twenty-first amendment that would otherwise be limited under the first amendment, the expression involved in an establishment offering sexually-oriented communication where alcohol is served is still within the purview of the first amendment, and is still protected by Georgia's free expression guarantees. Because Georgia has no constitutional equivalent to the twenty-first amendment, the state's police power, though possibly not limited under the U.S. Constitution, is limited by Georgia's Constitution. *Harris v. Entertainment Sys.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

Privileges and Immunities

Privileges and immunities not abridged by statute regulating practice of medicine where open to qualified. — A statute regulating the right to practice medicine, but leaving the field open to all who possess the prescribed qualifications, does not abridge the privileges or immunities of citizens. *Yeargin v. Hamilton Mem. Hosp.*, 225 Ga. 661, 171 S.E.2d 136 (1969), cert. denied, 397 U.S. 963, 90 S. Ct. 997, 25 L. Ed. 2d 255

(1970), later appeal, 229 Ga. 870, 195 S.E.2d 8 (1972).

Motor carriers' privilege to use highways in business may be conditioned or withholding. — Motor carriers are engaged in a business that is regulable, and doing that business on the highways by a privilege which may be conditioned or withheld. *Southern Motorways, Inc. v. Perry*, 39 F.2d 145 (N.D. Ga. 1930).

Maintenance tax on operation of vehicles on public roads upheld. — Former Code 1933, Ch. 92-29 (see O.C.G.A. Ch. 10, T. 48), which imposes a maintenance tax on the operation of motor buses, trucks, and trailers on public roads, in addition to any and all other taxes, licenses, or registration fees required, for the privilege of using the highways of the state is not violative of the commerce clause or of the privileges and immunities clause of U.S. Const., amend. 14. *Dixie-Ohio Express Co. v. State Revenue Comm'n*, 186 Ga. 228, 197 S.E. 887 (1938), aff'd, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939).

Municipal corporation created by state without privileges or immunities invokable in opposition to state. — A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal Constitution which it may invoke in opposition to the will of its creator. *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir.), cert. denied, 449 U.S. 1015, 101 S. Ct. 574, 66 L. Ed. 2d 474 (1980).

Statute penalizing writings to incite insurrection upheld. — Statute penalizing printing or circulating writings to incite insurrection does not abridge privileges and immunities guaranteed under U.S. Const., amend. 14. *Dalton v. State*, 176 Ga. 645, 169 S.E. 198 (1933).

State cannot condition granting of even privilege upon renunciation of constitutional right to procedural due process. Benefits conferred by the government cannot be conditioned on the relinquishment of constitutional rights. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Right to move from state to state is protected by privileges and immunities clause. — Right to move freely from state to state is

an incident of national citizenship protected by privileges and immunities clause of fourteenth amendment against state interference. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Right to travel is protected by due process clause. — Right to travel is a privilege of national citizenship, and an aspect of liberty that is protected by due process clauses of fifth and fourteenth amendments. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Persons, including indigents and other migrants, have a right to free travel. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Distinction between precluding inward migration and efforts to obtain return of alleged criminals for prosecution. — There is an entirely obvious difference between an attempt by a “receiving state” to preclude or discourage inward migration from “sending states” of persons deemed by the receiving state to be “undesirables,” “noncontributors” or “economically burdensome persons,” and efforts by a sending state to bring persons accused of crimes back from receiving states to face criminal trial and punishment in the sending state. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Delivering person charged with crime to state having jurisdiction. — Persons charged with commission of crimes shall be delivered up to state having jurisdiction over crime. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Right to travel cannot bar prosecution. — Person charged in Georgia with commission of a crime who has left Georgia and entered another state cannot be said to have a constitutionally protected right of free travel in interstate commerce that can be asserted to bar prosecution for Georgia offense. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

One who has committed an offense against laws of Georgia may be stopped at its borders and temporarily deprived of the freedom to travel elsewhere within or without the state. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Due Process

1. In General

Due process defined. — If one who has

been indicted for murder has had full opportunity under the Constitution and laws of the state to defend the defendant’s case in the courts having jurisdiction thereof in person, by attorney, or both, according to established constitutional rules of procedure, the defendant has been afforded due process of law under the state and federal Constitutions, which provide that no person shall be deprived of life, liberty, or property, without due process of law, and where such an opportunity has been afforded the defendant, the defendant has been accorded the equal protection of the laws. *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930), appeal dismissed, 283 U.S. 795, 51 S. Ct. 489, 75 L. Ed. 1419 (1931).

Due process of law means the administration of laws which apply equally to all persons according to established rules, and which are not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. *Norman v. State*, 171 Ga. 527, 156 S.E. 203 (1930); *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932); *Shoemaker v. Whitlock*, 226 Ga. 771, 177 S.E.2d 677 (1970).

If one indicted has had full opportunity, under the Constitution and laws of the state, to defend the defendant’s case in the courts of the state having jurisdiction thereof, in person, by attorney, or both, according to established constitutional rules of procedure the defendant has been afforded due process of law. *Shoemaker v. Whitlock*, 226 Ga. 771, 177 S.E.2d 677 (1970).

Traditionally, due process right concerns opportunity to be heard on factual basis underlying loss of liberty or property interest, rather than standard upon which that interest was lost. *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981).

Sovereign immunity. — Sovereign immunity does not violate the right to due process as it does not constitute a deprivation with no remedy. *Dollar v. Dalton Pub. Schs.*, 233 Ga. App. 827, 505 S.E.2d 789 (1998).

Due process of law merely means according to the law of the land. *Brooks v. State*, 178 Ga. 784, 175 S.E. 6 (1934).

Purpose of the due process clause is to protect the people from the state, not to ensure that the state protect them from each other. *Green v. Moreland*, 200 Ga. App. 167, 407 S.E.2d 119 (1991).

Due Process (Cont'd)**1. In General** (Cont'd)

Due process requires process of decision to be impartial. — The right to due process of law is not merely to have one's case heard by an impartial tribunal in the first instance. The process of decision must be impartial in every instance and in every respect. *Wall v. American Optometric Ass'n*, 379 F. Supp. 175 (N.D. Ga.), *aff'd*, 419 U.S. 888, 95 S. Ct. 166, 42 L. Ed. 2d 134 (1974).

Waiver of due process. — Party may waive the party's constitutional and statutory rights. *Pacolet Mfg. Co. v. Crescent Textiles, Inc.*, 219 Ga. 268, 133 S.E.2d 96 (1963).

Due process can under certain circumstances be waived, even in criminal context. *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973).

Due process can be waived in civil contracts between debtor and creditor. *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973).

Due process principles extend to every proceeding which may deprive person of life, liberty, or property. — "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property," a fortiori the finding of a bureau chief or a government department head ruling cannot do so, consistently with the guarantees embodied in the Constitutions of this state and of the United States. The protective principles summed up in these due process clauses extend to every proceeding which may deprive a person of life, liberty, or property, whether the process be judicial, administrative or executive in its nature. *Zachos v. Huiet*, 195 Ga. 780, 25 S.E.2d 806 (1943).

Due process of law does not require judicial procedure. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932).

First amendment guarantees protected. — States and municipalities may no more interfere with freedom of speech than may national government. *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971).

Guarantees in U.S. Const., amend. 1 are protected by U.S. Const., amend. 14. *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975).

Defendant's conviction for violating O.C.G.A. § 46-5-21(a)(1) was reversed as the

statute was an overbroad infringement on defendant's first amendment and Ga. Const. 1983, Art. I, Sec. I, Para. V rights to free speech; the statute does not contain the necessary language setting out the least restrictive means to further a compelling state interest as it applies to indecent or obscene speech, whether heard by children or adults, and whether not welcomed by listeners or spoken with intent to please. *McKenzie v. State*, 279 Ga. 265, 626 S.E.2d 77 (2005).

Fifth and fourteenth amendment restraints essentially same. — The restraint imposed upon legislation by the due process clause of the fifth and fourteenth amendments is essentially the same. *DeLaigle v. Federal Land Bank*, 568 F. Supp. 1432 (S.D. Ga. 1983), *overruled on other grounds*, *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544 (11th Cir. 1985).

Protection from arbitrary action of government. — Touchstone of due process is protection of individual against arbitrary action of government. *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), *rev'd on other grounds*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

Protection from undue state interference. — U.S. Const., amend. 14 protects life, liberty and property interests from undue interference by the state. *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), *cert. denied*, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977).

Applicability of due process requirements to persons and organizations in private sector. — Constitutional due process requirements are applicable in some situations to persons and organizations in the private sector, as where the state or the federal government has become so involved in the conduct of otherwise private bodies that their activities are also governmental activities and performed under government aegis without the private body's necessarily becoming either a governmental instrumentality or agent in a strict sense. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), *rev'd on other grounds*, 556 F.2d 356 (5th Cir. 1977).

Priority or preferential protection not to be given life or liberty or property interest. — The heart of U.S. Const., amend. 14 — everything it seeks to protect — is found in

its provision that there must be equal protection of the law and there must be no deprivation of "life, liberty or property" without due process of law. No judge can, with good conscience, give to either "life" or "liberty" or "property" a priority or preferential protection over the other two. *Clark v. State*, 219 Ga. 680, 135 S.E.2d 270 (1964).

Applicability of due process depends on nature of interest at stake. — To determine whether due process requirements apply in the first place, the court must look not to the weight but to the nature of the interest at stake. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Consideration of interests with regard to procedural due process. — Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Tucker v. Caldwell*, 608 F.2d 140 (5th Cir. 1979); *Crocker v. Hakes*, 616 F.2d 237 (5th Cir. 1980).

In a due process claim, three distinct factors must be weighed in a balancing approach: first, the court must consider the private interest that will be affected; second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or alternative procedural safeguards should be considered; finally, the government interest, both the fiscal and administrative burdens placed on government agencies and the government function involved, is to be weighed and enters into the balancing formula. *Jeffries v. Georgia Residential Fin. Auth.*, 503 F. Supp. 610 (N.D. Ga. 1980), *aff'd*, 678 F.2d 919 (11th Cir.), *cert. denied*, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

Due process test looks to totality of surrounding circumstances. *Ambros v. State*, 159 Ga. App. 492, 283 S.E.2d 706 (1981).

Extent of due process afforded depends on importance of interest at stake. — Extent

of due process protections which must be afforded in a particular instance varies with the importance of the interest to be protected, as compared with the interest of the state in protecting the public welfare from abuse of this interest. *Page v. Jackson*, 398 F. Supp. 263 (N.D. Ga. 1975).

Whether due process requires a particular procedure in a given situation must be determined by balancing an individual's interest in avoiding loss which lack of procedure inflicts upon the individual against interests which the government seeks to advance by denying it. *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981).

No particular state procedure guaranteed. — U.S. Const., amend. 14 does not guarantee to the citizen of the state any particular form or method of state procedure. Its requirements are satisfied if the individual has reasonable notice and opportunity to be heard, and to present the individual's claim or defense, with due regard given to the nature of the proceeding and the character of the rights that may be affected by it. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932); *State v. Sanks*, 225 Ga. 88, 166 S.E.2d 19 (1969), *appeal dismissed*, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971).

Due process has two requirements: (1) laws must provide fair notice to persons of ordinary intelligence of precise conduct proscribed; and (2) laws must provide standards and guidance to law enforcement officers, judges, and juries, to prevent arbitrary and discriminatory enforcement. *High Oil Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), *rev'd on other grounds*, 673 F.2d 1225 (11th Cir. 1982).

Prerequisite for application of procedural due process. — Before the requirements of procedural due process apply there must be a deprivation of interest encompassed by U.S. Const., amend. 14's protection of liberty and property. *Shaw v. Hospital Auth.*, 507 F.2d 625 (5th Cir. 1975).

In order to state claim of deprivation of U.S. Const., amend. 14's due process rights a plaintiff must demonstrate that: (1) the plaintiff has been deprived of liberty or property in the constitutional sense; and (2) the procedure used to deprive the plaintiff of that interest was constitutionally deficient. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir.

Due Process (Cont'd)**1. In General** (Cont'd)

1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

When due process denied. — Where a body which is vested with a duty to make judgments has unlawfully delegated that responsibility to another, or where the inseparation of judicial and prosecutory functions engenders a biased hearing, due process is denied. *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975).

Notice and hearing required prior to deprivation of property or liberty interest. — Constitutional guarantee of procedural due process applies to governmental deprivation of legitimate "property" or "liberty" interest within the meaning of U.S. Const., amend. 5 or U.S. Const., amend. 14 and requires that any such deprivation be accompanied by minimum procedural safeguards, including some form of notice and a hearing. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Opportunity to vindicate liberty interest is basic entitlement provided by due process. — An opportunity to vindicate a liberty interest, such as when one is publicly subjected to a badge of infamy, is one of the basic entitlements provided by the due process clause. *Page v. Jackson*, 398 F. Supp. 263 (N.D. Ga. 1975).

Hearing for violation of liberty interest. — Due process claim for violation of "liberty interest" entitling party to full hearing arises if — and only if — the reason given or the dismissal procedure adopted resulted in a "badge of infamy," public scorn or the like. *Press v. Board of Regents*, 489 F. Supp. 150 (M.D. Ga. 1980).

When protected interests implicated, right to prior hearing is paramount. — The requirements of procedural due process apply only to the deprivation of interests encompassed by U.S. Const., amend. 14's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. The range of interests protected by procedural due process is, however, not infinite. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Agencies to follow regulations pertaining to adjudication processes. — It is denial of due process for any government agency to

fail to follow its regulations pertaining to adjudication processes. *Courts v. Economic Opportunity Auth. For Savannah—Chatham County Area, Inc.*, 451 F. Supp. 587 (S.D. Ga. 1978).

Negligent act of official. — Due process clause is not implicated by negligent act of official causing unintended loss of or injury to life, liberty, or property. *Terrell v. Shope*, 687 F. Supp. 579 (N.D. Ga. 1988), aff'd, 911 F.2d 741 (11th Cir. 1990).

Due process principle of impartial tribunal applies to administrative proceedings. — The due process principles of impartial and fair tribunal free from bias applies not only to trials, but equally, if not more so, to administrative proceedings. *Wall v. American Optometric Ass'n*, 379 F. Supp. 175 (N.D. Ga.), aff'd, 419 U.S. 888, 95 S. Ct. 166, 42 L. Ed. 2d 134 (1974).

Due process applies to administrative acts affecting protected interest. — Not every administrative act gives rise to constitutional right of participation under due process clause. Traditionally, due process requires that an affected individual be given the right of participation, whether by a hearing or otherwise, only when the administrative act complained of directly affects a zone of interest protected by the Constitution. *Wells Fargo Armored Serv. Corp. v. Georgia Pub. Serv. Comm'n*, 547 F.2d 938 (5th Cir. 1977).

Liberty guaranteed by U.S. Const., amend. 14 denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free persons. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir. 1977), rev'd on other grounds en banc, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

Refusal to permit child to testify in deprivation hearing. — Because a child was available to testify in a deprivation hearing and the child's statements were reliable, a juvenile court's refusal to permit the child to testify, despite the mother's request, ren-

dered the evidence regarding the child's statements to other witnesses inadmissible under O.C.G.A. § 24-3-16. In the Interest of B.W., 268 Ga. App. 862, 602 S.E.2d 869 (2004).

Determination of what is liberty interest as matter of federal constitutional law. — While property rights that are protectable under the due process clause of the Constitution are generally created by state law, a determination of what is a "liberty" interest is a matter of federal constitutional law. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir. 1977), rev'd on other grounds en banc, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

Creation of nonconstitutionally based liberty interests. — Nonconstitutionally based liberty interest may be created by acts or rules "defining the obligations of the authority charged with exercising" that power, and a liberty interest will be found where the government signals the existence of such right by placing substantive limitations on official discretion in the form of particularized standards or criteria to guide decisionmakers. *Garcia-Mir v. Meese*, 781 F.2d 1450 (11th Cir.), aff'd in part and rev'd in part on other grounds, 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889, 107 S. Ct. 289, 93 L. Ed. 2d 263 (1986).

Liberty extends to full range of conduct individual is free to pursue. — Liberty is not confined to mere freedom from bodily restraint but extends to the full range of conduct which the individual is free to pursue. *Shaw v. Hospital Auth.*, 507 F.2d 625 (5th Cir. 1975).

"Deprived of liberty without due process of law" defined. — To be deprived of liberty "without due process of law" means to be deprived of liberty without authority of law. *Palmer v. Hall*, 380 F. Supp. 120 (M.D. Ga. 1974), modified, 517 F.2d 705 (5th Cir. 1975).

State law not source of true liberty rights. — True liberty rights do not flow from state laws, which can be repealed by action of the Legislature. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

Defendant not under arrest. — *Miranda* played no part in the admissibility of field

sobriety test results, notwithstanding the definition of arrest contained in O.C.G.A. § 17-4-1, as the defendant was not under arrest for constitutional purposes where the defendant failed to show any restraints comparable to those associated with formal arrest, the defendant's statement that the defendant knew the officer was going to "take her in" demonstrated the defendant's apprehension, not the fact of an arrest, the defendant was not informed that the defendant's detention would not be temporary, and the defendant's performance on the field sobriety tests did not support a claim that the defendant was exposed to custodial interrogation at the scene. *Evans v. State*, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

Refusal to allow hearsay. — Trial court did not violate the defendant's right to a fair trial under the fourteenth amendment due process clause by preventing the introduction of hearsay testimony from a person claiming to have committed the offenses the defendant was on trial for, as the trial court saw no persuasive indicia of reliability in the proffered testimony and declined to permit the defendant to present it to the jury. *Inman v. State*, 281 Ga. 67, 635 S.E.2d 125 (2006).

Requirements for restricting liberty. — A person's liberty interest dictates that rights may only be restricted upon a showing that: (1) the person was given an adequate procedural due process hearing; and (2) any decision to abridge the person's liberty interest was grounded upon a rational basis designed to further a legitimate state interest. *Shaw v. Hospital Auth.*, 614 F.2d 946 (5th Cir.), cert. denied, 449 U.S. 955, 101 S. Ct. 362, 66 L. Ed. 2d 220 (1980).

Because the plaintiff relied merely upon stigmatizing statements in conjunction with the plaintiff's suspension without pay, plaintiff failed to state a claim for deprivation of a constitutionally protected liberty interest. *Thomas v. Harvard*, 45 F. Supp. 2d 1353 (N.D. Ga. 1999).

Freedom of speech and of press among personal rights and liberties protected. — Freedom of speech and of the press — which are protected by the U.S. Const., amend. 1 from abridgement by Congress — are among the fundamental personal rights and "liberties" protected by the due process clause of U.S. Const., amend. 14 from impairment by the states. *Carr v. State*, 176 Ga.

Due Process (Cont'd)**1. In General** (Cont'd)

55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Liberty includes freedom to use property to get from place to place. — The freedom to make use of one's own property, such as a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a "liberty" which cannot be denied or curtailed by a state without due process of law under U.S. Const., amend. 14. *Roberts v. Burson*, 322 F. Supp. 380 (N.D. Ga. 1969).

Liberty includes freedom of association. — Due process clause of U.S. Const., amend. 14 prevents state governments from infringing upon right of free association. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

Freedom to engage in association for advancement of beliefs and ideas is inseparable aspect of "liberty" assured by the due process clause of U.S. Const., amend. 14 which embraces freedom of speech. *Stoner v. Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974).

Compelled disclosure of affiliation with group advocating beliefs constitutes restraint on freedom of association. — Where a group is engaged in advocacy of particular beliefs, whether they be political, economic, religious, or cultural, compelled disclosure of affiliation with such a group constitutes a restraint on one's freedom of association. *Stoner v. Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974).

State flag. — The state flag, incorporating the stars and bars of the Confederate flag, did not violate the due process clause by depriving an African-American citizen of any fundamental privacy interest in associating with white people free from unwarranted government intrusion since the record did not support the claim and, moreover, plaintiff's right to associate with white people in general was not the type of intimate relationship garnering constitutional protection under this theory. *Coleman v. Miller*, 885 F. Supp. 1561 (N.D. Ga. 1995), aff'd, 117 F.3d 527 (11th Cir. 1997), cert. denied, 523 U.S. 1011, 118 S. Ct. 1199, 140 L. Ed. 2d 328 (1998).

Peaceful picketing at department stores open to public. — Peaceful picketing to eliminate racial discrimination in depart-

ment stores open to public is right embraced in free speech under the U.S. Const., amend. 1, and made applicable to the states by U.S. Const., amend. 14. *Kelly v. Page*, 335 F.2d 114 (5th Cir. 1964).

Liberty may include, but not limited to, freedom of speech. — There is more than one kind of liberty; the term may include, but is not limited to, freedom of speech. *Herndon v. State*, 179 Ga. 597, 176 S.E. 620 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Narrow construction of statutes regulating speech. — Constitutionally guaranteed freedom of speech forbids states' punishing use of language not within "narrowly limited classes of speech." In other words, a statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

No absolute right to speak or publish. — It is a fundamental principle, long established that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932).

Constitutional protection of speech and press outside of infringement of rights of others. — When taken as it must be as a harmonious part of the entire Constitution, and in light of history, a construction is demanded that the U.S. Const., amend. 1, by the words "speech" and "press," means only speech and press outside of infringement of the rights of others. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962).

State may penalize utterances openly advocating overthrow of government. — A state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Right of free speech subject to restriction where required to protect state. — Freedom of speech and press does not protect disturbances to public peace or attempt to subvert government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

The right of free speech is not absolute and is subject to restriction "if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic, or moral." *Herndon v. State*, 179 Ga. 597, 176 S.E. 620 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Necessity which is essential to valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent. *Herndon v. State*, 179 Ga. 597, 176 S.E. 620 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Conviction and confinement for flag burning overturned. — Defendant's conviction and confinement for burning of American flag violated her rights under the first amendment, applicable to the state by virtue of U.S. Const., amend. 14. *Monroe v. State Court*, 739 F.2d 568 (11th Cir. 1984).

State's withholding expected promotion or pay raise as sanction for exercise of free speech is unconstitutional. — For a state to withhold an expected promotion or pay raise as a sanction for the exercise of that right in violation of the U.S. Const., amends. 1 and 14. *Goolsby v. Regents of Univ. Sys.*, 141 Ga. App. 605, 234 S.E.2d 165 (1977).

Provisions of the Tort Reform Act (O.C.G.A. § 51-12-5.1), relating to punitive damages, violated the due process and equal protection clauses of the federal and state constitutions, violated the excessive fines provisions of both constitutions, and violated the double jeopardy provision of the fifth amendment to the federal constitution. *McBride v. GMC*, 737 F. Supp. 1563 (M.D. Ga. 1990).

Immunity granted employers in the workers' compensation act does not violate the

due process and equal protection provisions of the state and federal constitutions. *Georgia Dep't of Human Resources v. Joseph Campbell Co.*, 261 Ga. 822, 411 S.E.2d 871 (1992).

Obscenity not protected liberty. — But freedom of expression does not extend to obscenity, though state regulation of obscenity must conform to procedure that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969); *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969).

Publications obscene as matter of law and fact. — Where publications depict acts of natural and aberrational sexual conduct, including the participants' genitals, solely for their own lewd and lascivious purpose and there is no discernible meaning other than pornographic, these magazines are obscene as a matter of law and fact. They are not protected expression under U.S. Const., amends. 1 and 14. *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980).

Private possession of obscene materials, not obscenity, is within protection of U.S. Const., amend. 14. — Obscenity is not within the protected pale of U.S. Const., amends. 1 and 14, but the private possession of obscene materials is so protected. *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga. 1969), aff'd, 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970).

Motion pictures protected by Constitution. — Motion pictures are within ambit of constitutional guarantees of freedom of speech and of the press. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962); *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969).

Right of commercial exploitation of film amounts to private right. — Although expression by means of motion pictures is included within the free expression or free press guarantee of U.S. Const., amends. 1 and 14, the right of commercial exploitation of a film does not represent a great public interest, but amounts to a private right. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Due Process (Cont'd)**1. In General (Cont'd)**

Right of privacy guaranteed. — The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law. *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939).

Right to privacy includes only personal rights deemed fundamental or implicit in concept of ordered liberty. — A right to privacy guaranteed by U.S. Const., amend. 14 includes only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), cert. denied, 418 U.S. 939, 94 S. Ct. 3227, 41 L. Ed. 2d 1173 (1974).

Though public interest in privacy may be subordinated and clandestine surveillance allowed. — Where the police have reasonable cause to believe that public toilet stalls are being used in the commission of crime, and when they confine their activities to the times when such crimes are most likely to occur, they are entitled to institute clandestine surveillance, even though they do not have probable cause to believe that the particular persons whom they may thus catch in flagrante delicto have committed or will commit the crime. The public interest in its privacy must, to that extent, be subordinated to the public interest in law enforcement. *Mitchell v. State*, 120 Ga. App. 447, 170 S.E.2d 765 (1969).

Derogatory information in confidential files. — Liberty is not infringed by mere presence of derogatory information in confidential files. *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 678 (1975).

Harm to reputation. — Governmental attack on one's reputation may infringe constitutionally protected liberty in two respects: (1) governmental degradation of one's standing in his community may be denial of "liberty"; (2) governmental communication of derogatory information to employers may be an attack on "liberty." *Sims v. Fox*, 505

F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 678 (1975).

To make out a constitutional claim for harm to reputation, a person must demonstrate that the person has been denied a right previously recognized by the state in conjunction with a defamatory finding about the person; the person must challenge this finding as factually inaccurate; and there must be publication of the defamation outside the context of litigation. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

Judge's comment about juror's "perjury" not deprivation of liberty interest. — An out-of-court comment by a state court judge about a juror in a murder trial who voted against the death penalty, that the judge considered lodging perjury charges against the juror, however seriously it may have harmed the juror's reputation, did not deprive him of any constitutionally protected liberty interest. The juror's interest in his reputation was protected by state tort law. *Emory v. Peeler*, 756 F.2d 1547 (11th Cir. 1985).

Applicant Drug Screening Act unconstitutional. — Georgia's Applicant Drug Screening Act (O.C.G.A. § 45-20-110 et seq.), requiring applicants for state employment to submit to urine tests for the presence of illegal drugs, violates applicants' rights to privacy under the fourth and fourteenth amendments. *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990).

No general right to medical treatment and services. — Due process clause confers no general right to the provision of medical treatment and services by a state or municipality. *Wideman v. Shallowford Community Hosp.*, 826 F.2d 1030 (11th Cir. 1987).

Protective services in event of medical emergency. — Federal constitutional law does not require a state to provide its citizens with protective services in the event of medical emergencies. Even if the state undertakes to provide protective services in medical emergency services, its failure to render same in a proper manner or in violation of state law does not violate the due process clause of the United States Constitution, unless the state created the medical emer-

gency or the person was in state custody or control at the time of the emergency. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

Treatment of state mental health patients.

— State mental health patients have the right under the due process clause to have all major choices concerning their treatment made in accordance with the judgment of qualified professionals who are acting within professionally accepted minimum standards. *Griffith ex rel. Griffith v. Ledbetter*, 711 F. Supp. 1108 (N.D. Ga. 1989).

The state's policy and procedure for the involuntary administration of antipsychotic drugs to patients at the state mental hospital does not violate substantive or procedural due process. *Hightower by Dehler v. Olmstead*, 959 F. Supp. 1549 (N.D. Ga. 1996).

Proof required in civil proceeding for involuntary commitment to mental hospital.

— Precepts of due process require a clear and convincing standard of proof in a civil proceeding to commit an individual to a mental hospital involuntarily. *Pitts v. State*, 151 Ga. App. 691, 261 S.E.2d 435 (1979).

Habilitation of mentally-retarded patients.

— Mentally-retarded patients residing in state institutions have no substantive due process right to habilitation in a community setting. *S.H. v. Edwards*, 860 F.2d 1045 (11th Cir. 1988), cert. denied, 491 U.S. 905, 109 S. Ct. 3187, 105 L. Ed. 2d 696, reh'g granted, 880 F.2d 1203 (11th Cir. 1989).

Commitment of juvenile to institution.

— Due process of law is requisite to the constitutional validity of proceedings in which a court reaches the conclusion that a juvenile has been at fault, has engaged in conduct prohibited by law, or has otherwise misbehaved with the consequence that the juvenile is committed to an institution in which the juvenile's freedom is curtailed. *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), rev'd on other grounds, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

Requiring putative father to pay for paternity blood test. — Requiring indigent putative father to bear initial burden of paying for paternity blood test is violative of the due process and equal protection clauses of the fourteenth amendment. *Pierce v. State*, 251 Ga. 590, 308 S.E.2d 367 (1983).

Trial court's denial of a putative father's request to require the state to make pretrial payment of the costs of the blood tests to determine paternity effectively denied the putative father access to blood test evidence and amounted to a violation of due process. *Peterson v. Moffitt ex rel. Department of Human Resources*, 253 Ga. 253, 319 S.E.2d 449 (1984). (See also *Burns v. State*, 252 Ga. 140, 312 S.E.2d 317 (1984), annotated under "10. Criminal Trials" below.).

Unwed father's right to fitness test or veto power.

— An unwed father possesses an opportunity interest to develop a relationship with his child, which interest is protected by due process of law, and, as long as he has not abandoned that interest, because Georgia law affords an unwed mother a fitness test or veto power under the same circumstances, it must also afford an unwed father a fitness test or veto power. *In re Baby Eason*, 257 Ga. 292, 358 S.E.2d 459 (1987).

Proceedings to legitimate child.

— O.C.G.A. § 19-7-22, which allows fathers, but not mothers, to petition for legitimation of a child born out of wedlock, does not violate constitutional guarantees of due process and equal protection. *Pruitt v. Lindsey*, 261 Ga. 540, 407 S.E.2d 750 (1991).

Termination of parental rights. — An "any evidence" standard or "preponderance of the evidence" standard is inadequate in dealing with finding of deprivation of a child or termination of parental rights and would violate U.S. Const., amend. 14. *In re Suggs*, 249 Ga. 365, 291 S.E.2d 233 (1982).

Only under compelling circumstances found to exist by clear and convincing proof may a court sever the parent-child custodial relationship. *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982), aff'd, 168 Ga. App. 66, 308 S.E.2d 193 (1983).

Where a fundamental liberty interest involving the right to the companionship, care, custody and management of a child is at stake, neither the "any evidence" standard of review in civil cases nor the "reasonable evidence" standard of review currently applied in termination of parental rights cases is of sufficient quality and substantiality to support the rationality of the judgment. *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982), aff'd, 168 Ga. App. 66, 308 S.E.2d 193 (1983).

Due Process (Cont'd)**1. In General (Cont'd)**

Parent incarcerated in Michigan was not required to be treated as though the parent were a Georgia prisoner for purposes of attendance at a parental rights termination proceeding. *In re R.J.P.*, 222 Ga. App. 771, 476 S.E.2d 268 (1996).

Children taken into custody when parent arrested. — Police officers who deliberately chose to transfer children to a detention facility with their parent upon the parent's arrest restrained the children's liberty such that the officers had an affirmative duty to protect the children's interests. *Matheny v. Boatright*, 970 F. Supp. 1039 (S.D. Ga. 1997).

Relationship between child and state required. — Where the noncustodial parent took and killed the child, there was no special relationship between the state and the child which imposed an affirmative duty on the state to protect the child, because the child did not rely on the state for the child's physical needs and safety, because the custodial parent was able to protect the child because the custodial parent had physical custody, because the custodial parent had access to the courts if the custodial parent was displeased with the unsupervised visitation by the killing parent, and because the custodial parent could have intervened to stop such unsupervised visitation. Therefore, the custodial parent had no substantive due process claim. *Wooten v. Campbell*, 49 F.3d 696 (11th Cir.), cert. denied, 516 U.S. 943, 116 S. Ct. 379, 133 L. Ed. 2d 302 (1995).

Relatives have no due process right in decedent's body. — Surviving relatives have no constitutionally protected due process right in a decedent's body. *Georgia Lions Eye Bank, Inc. v. Lavant*, 255 Ga. 60, 335 S.E.2d 127 (1985), cert. denied, 475 U.S. 1084, 106 S. Ct. 1464, 89 L. Ed. 2d 721 (1986).

Circumstances giving rise to right to police protection. — Government officials may be held liable for the deprivation of due process arising from the failure to protect private citizens when a special relationship exists between the victim and the criminal or the victim and the officials, and similarly, a constitutional right to police protection may exist when there has been some showing that the victim, as distinguished from the public

at large, faced a special danger, but without a special relationship, there is no constitutional right to police protection. *Trethewey v. DeKalb County*, 662 F. Supp. 246 (N.D. Ga. 1987).

Claim of excessive force. — Although a non-seizure fourteenth amendment substantive due process claim of excessive force is viable, where the deputies were reasonably attempting to serve a valid warrant, and the deputies did not know that the deceased was mentally disturbed or that the deceased definitely had a gun in the bathroom, their conduct fell below the minimum requisite level of gross negligence to trigger procedural protections. *Wilson v. Northcutt*, 987 F.2d 719 (11th Cir. 1993).

In an arrestee's 42 U.S.C. § 1983 suit that alleged that the arrestee's fourth and fourteenth amendment rights against the use of excessive force were violated when a sheriff's deputy crashed a cruiser into the car during a high-speed pursuit, rendering the arrestee a quadriplegic, the arrestee's fourteenth amendment claims were dismissed on summary judgment because the court found that the fourth amendment claims for excessive use of force raised disputed issues of fact and were cognizable. *Harris v. Coweta County*, F. Supp. 2d , 2003 U.S. Dist. LEXIS 27348 (N.D. Ga. Sept. 25, 2003).

Sheriff, county, liable for excessive force. — Consistent with U.S. Const., amend. 14's protection of a pretrial arrestee's constitutional right to be free from the use of excessive force, where substantial evidence supported the jury's conclusion that a county sheriff had broken the jaw of the hospitalized arrestee, both the sheriff in the sheriff's official capacity, and the county for its inadequate supervisory policies reflecting a deliberate indifference to these rights, were liable under a redressory claim pursuant to 42 U.S.C. § 1983. *Vineyard v. County of Murray*, 990 F.2d 1207 (11th Cir.), cert. denied, 510 U.S. 1024, 114 S. Ct. 636, 126 L. Ed. 2d 594 (1993).

Deadly force by police officer against threatening person. — As a matter of law, an officer who uses deadly force against a person who threatens the officer or others with serious harm or who the officer has probable cause to believe has already inflicted serious harm on others does not thereby commit the constitutional tort of an unreasonable

seizure or deprivation of life or liberty without due process. The use of deadly force by police officers in such circumstances is not, as a matter of law, unreasonable or excessive. *O'Neal v. DeKalb County*, 667 F. Supp. 853 (N.D. Ga. 1987), *aff'd*, 850 F.2d 653 (11th Cir. 1988).

Balancing test for determining excessive use of force by police. — In a case involving use of excessive force by police officers brought under 42 U.S.C. § 1983, the balancing test for determining whether a substantive due process violation has been committed, while similar in many respects to that for assessing a fourth amendment claim, requires a plaintiff to show that the force used by a defendant officer was applied maliciously and sadistically for the very purpose of causing harm. The fourth amendment balancing test, on the other hand, does not include a “malicious and sadistic” element; rather, the reasonableness of the seizure or intrusion is the central inquiry, as is the case with respect to fourth amendment analyses outside of the police abuse context. *Thompson v. Spikes*, 663 F. Supp. 627 (S.D. Ga. 1987).

Excessive use of force against arrestee unconstitutional. — A supervisory or non-supervisory official's failure or refusal to intervene when a constitutional violation such as the use of a chokehold once an arrestee is shackled is taking place in the official's presence establishes direct liability under 42 U.S.C. § 1983 for excessive use of force against the arrestee in violation of the arrestee's rights under the fourth and fourteenth amendments. *McQuirter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Policy and practice of police brutality unconstitutional. — Because the plaintiffs asserted in their claim against a city that the police force had an unwritten practice of deliberately overlooking acts of police brutality in order to foster a “shoot to kill” attitude among the members of the police force; and submitted an affidavit of a former officer that the officer had knowledge of its policies and practices, and that the department had a practice of not conducting thorough investigations of acts of police brutality; if believed, clearly established a cause of action against the city. *Samples ex rel. Sam-*

ples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988).

Intentional conduct by a police officer is probably necessary to hold the officer liable for a violation of substantive due process. While negligent conduct does not violate due process, the due process clause does protect against arbitrariness and abuse of power. *Easterling v. City of Glennville*, 694 F. Supp. 911 (S.D. Ga. 1986).

Custodial interrogation not found. — Defendant was not subjected to improper custodial interrogation because the officer read the defendant the defendant's implied consent warnings for suspects over 21, and placed the defendant in the back of the patrol car, during an impound search of the defendant's car, the officer found an identification card that showed that the defendant was under 21, the officer asked the defendant's age, and learned that the defendant was under 21, the officer read the defendant the implied consent notice for suspects under 21, and the question was not designed to incriminate the defendant, as the officer was arresting the defendant for driving under the influence (less safe driver), and the defendant's age was not an element of the offense. *Evans v. State*, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

City's use of handcuffs and ankle cuffs on a pre-trial detainee while the detainee was at a hospital did not violate the detainee's substantive due process right under U.S. Const., amend. 14, as these restraints did not amount to “punishment”. *Young v. City of Atlanta*, 631 F. Supp. 1498 (N.D. Ga. 1986).

Automobile negligence action not constitutional deprivation. — A person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no federal civil rights cause of action for violation of a federal right, since automobile negligence actions do not arise to the level of a constitutional deprivation. *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986).

“Bivens” action could not be maintained by a parolee against the parole officer for alleged procedural due process violations, since the Parole Commission and Reorganization Act of 1978, a complex and comprehensive remedial system to govern parole situations, which provided the parolee with

Due Process (Cont'd)**1. In General** (Cont'd)

adequate relief from the deprivations at the time they were occurring, constituted a "special factor counselling hesitation" against allowing a "Bivens" action. *Rauschenberg v. Williamson*, 785 F.2d 985 (11th Cir. 1986).

Requiring graduates of unapproved law schools to pass state bar within five years in order to be admitted to the state bar does not create an unconstitutional irrebuttable presumption of incompetence on the part of those who fail to pass within that time period. *Cline v. Supreme Court*, 781 F.2d 1541 (11th Cir. 1986).

Arbitration of attorney fee disputes. — Neither State Bar Rule 6-303(a) nor Rule 6-502 violate the state and federal constitutional rights to equal protection as the interest of a state in regulating the legal profession and attorney-client relationship is a "compelling" one. *Nodvin v. State Bar*, 273 Ga. 559, 544 S.E.2d 142 (2001).

Specialty training for physicians. — Public hospital bylaw requiring specific postgraduate specialty training or residency in order for physicians to be eligible for admission to the medical staff did not transgress the equal protection or due process rights of osteopathic physicians. *Silverstein v. Gwinnett Hosp. Auth.*, 861 F.2d 1560 (11th Cir. 1988).

Preservation of breath sample from auto-intoximeter test not required. — Neither the federal nor the state constitutional guarantee of due process requires the state to preserve a sample of the breath used in the administration of the auto-intoximeter test. *Hopper v. State*, 175 Ga. App. 358, 333 S.E.2d 201 (1985).

Use of "control questions" in polygraph examinations. — The use of "control questions" in polygraph examinations of city firefighters — questions designed to evoke a deceptive or nervous response from everyone tested — was not a violation of the firefighters' constitutional right to privacy, since the questions were general in nature, were asked for a specific, limited purpose, and, although potentially embarrassing, avoided those issues, such as those related to marriage, family, and sexual relations, generally considered to be the most personal. Further, there was no indication that the city planned to take disciplinary actions based

on the control questions, release the responses to the public, or even make the responses part of the subjects' employment records. *Hester v. City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985).

Due process guaranteed by university bulletin. — A provision in a private university bulletin to the effect that no student shall be dismissed without "due process" does not contractually obligate an educational institution to provide the full range of constitutional due-process protections enjoyed by students at tax-supported institutions, but only those procedures specifically provided for in the bulletin itself. *Life Chiropractic College, Inc. v. Fuchs*, 176 Ga. App. 606, 337 S.E.2d 45 (1985).

Ordinance unconstitutional if enjoyment of freedoms contingent upon official's uncontrolled will. — An ordinance which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958).

Ordinance unconstitutional for placing condition precedent on and unlawfully restricting freedoms of speech, press and assembly. — Ordinance of city of Baxley shows on its face that it is violative of the U.S. Const., amends. 1 and 14 in that it places a condition precedent upon, and otherwise unlawfully restricts, the defendant's freedom of speech as well as freedom of the press and freedom of lawful assembly by requiring, as conditions precedent to the exercise of those rights, the issuance of a "license" which the mayor and city council are authorized by the ordinance to grant or refuse in their discretion, and the payment of a "license fee" that is discriminatory and unreasonable in amount and constitutes a prohibitory flat tax upon the privilege of soliciting persons to join a labor union. *Staub v. City of Baxley*, 97 Ga. App. 221, 102 S.E.2d 643 (1958).

Discrimination by municipality in regulation of expression on basis of content of expression forbidden. — While a municipality may constitutionally impose reasonable

time, place, and manner regulations on the use of its streets and sidewalks for purposes of U.S. Const., amend. 1, what a municipality may not do under the U.S. Const., amends. 1 and 14 is to discriminate in the regulation of expression on the basis of the content of that expression. *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

Creation and definition of property interests. — U.S. Const., amend. 14 speaks of “property” generally. There may be many gradations in the “importance” or “necessity” of various consumer goods; but if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. *Morrow Elec. Co. v. Cruse*, 370 F. Supp. 639 (N.D. Ga. 1974).

Determination of whether interest is “property” entitled to due process protection, or a mere expectancy, is made by reference to the sufficiency of the interest under state law. *Page v. Jackson*, 398 F. Supp. 263 (N.D. Ga. 1975).

Property interests are defined by state law. *Drummond v. Fulton County Dep’t of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977), overruled on other grounds, *Boozar v. Higdon*, 252 Ga. 276, 313 S.E.2d 100 (1984).

Property interest is created and defined by source independent of the Constitution, including state laws, ordinances, or implied contracts with secure certain benefits and support claims of entitlement to those benefits. *Harrison v. Housing Auth.*, 445 F. Supp. 356 (N.D. Ga. 1978), aff’d, 592 F.2d 281 (5th Cir. 1979); *Arundar v. DeKalb County Sch. Dist.*, 620 F.2d 493 (5th Cir. 1980).

Property interests are created and dimensions defined by existing rules or understandings that stem from an independent source such as state law. *Press v. Board of Regents*, 489 F. Supp. 150 (M.D. Ga. 1980).

Protection from deprivation of property by government. — Constitutional prohibition against deprivations of property without due process of law applies only to government action. *Jeffries v. Georgia Residential Fin. Auth.*, 503 F. Supp. 610 (N.D. Ga. 1980), aff’d, 678 F.2d 919 (11th Cir.), cert. denied, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

Severity of deprivation of property interest at stake provides initial measure of degree of

procedural protection that individual is entitled to demand from government. *Jeffries v. Georgia Residential Fin. Auth.*, 503 F. Supp. 610 (N.D. Ga. 1980), aff’d, 678 F.2d 919 (11th Cir.), cert. denied, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

Prejudgment garnishment restricted to extraordinary situations. — Prejudgment garnishment not restricting summary seizure of property to “extraordinary situations,” violates U.S. Const., amend. 14. *Aaron v. Clark*, 342 F. Supp. 898 (N.D. Ga. 1972).

Garnishment of wages for alimony. — Garnishment of wages to satisfy alimony orders or judgments meets the demands of due process. *Black v. Black*, 245 Ga. 281, 264 S.E.2d 216 (1980).

Degree of property deprivation. — Any invasions, regardless of degree, of owner’s dominion over use or sale of private property is interdicted by U.S. Const., amend. 14 as well as by Ga. Const. 1983, Art. I, Sec. I, Para. I. *Durham v. State*, 219 Ga. 830, 136 S.E.2d 322 (1964).

Any significant taking of property by state is within purview of due process clause. U.S. Const., amend. 14 draws no bright lines around three-day, ten-day, or 50-day deprivations of property. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

Only “significant property interest” is protected by U.S. Const., amend. 14. *Gordon Junior College Chapter of Am. Ass’n of Univ. Professors v. Board of Regents*, 484 F. Supp. 614 (N.D. Ga. 1980).

Temporary nonfinal deprivation of property. — Temporary, nonfinal deprivation of property is nonetheless deprivation in terms of U.S. Const., amend. 14. *Brainard v. State*, 246 Ga. 586, 272 S.E.2d 683 (1980).

Right to pursue profession is property right. — The right to follow a profession, which includes the right to be compensated for services rendered, is a property right. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Right to follow one’s profession, business, or occupation, or to labor, is valuable property right, protected by the Constitution and laws of Georgia, subject only to such restrictions as the government may impose for the welfare and safety of society. *Horne v. Skelton*, 152 Ga. App. 654, 263 S.E.2d 528 (1979).

Due Process (Cont'd)**1. In General (Cont'd)**

Ordinance or implied contract creating property interest in employment. — Property interest in employment sufficient to invoke procedural due process protections need not be formal contract or tenure system, but may be created by ordinance or by implied contract. *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980).

Privileges, licenses, certificates, and franchises as property interests. — Privileges, licenses, certificates, and franchises qualify as property interests for purposes of procedural due process. The extent of the injury is irrelevant except for determining what process is due. *Wells Fargo Armored Serv. Corp. v. Georgia Pub. Serv. Comm'n*, 547 F.2d 938 (5th Cir. 1977).

Fundamental requirements of due process applicable to licensing. — Licenses are not to be taken away without procedural due process required by U.S. Const., amend. 14. *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

Since licensing consists in the determination of factual issues and the application of legal criteria to them — a judicial act — the fundamental requirements of due process are applicable to it. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Procedural due process to be followed when goods taken from user. — Statutes cannot constitutionally allow one who has a propriety interest in goods to take them from the user of the goods without following procedural due process. It follows a fortiori that statutes cannot constitutionally allow one who has only a security interest in goods to take them from the user without following procedural due process. *Mason v. Garris*, 360 F. Supp. 420 (N.D. Ga.), *clarified*, 364 F. Supp. 452 (N.D. Ga. 1973).

Vested rights required where substantial property-related expenditures made in reliance of permit. — Where substantial expenditures are made in the acquisition of property or in preparations for the construction of a building in reliance upon the granting of a permit, vested rights are acquired which cannot be displaced by the passage of a new

ordinance. *Clairmont Dev. Co. v. Morgan*, 222 Ga. 255, 149 S.E.2d 489 (1966).

Debtor's equity interest in land and right to use constitute property entitled to procedural due process. — A challenged statute which provides that any security interest holder can upon default by the debtor invoke a summary foreclosure procedure is unconstitutional. The debtor's equity interest in the land and the right to its use would constitute property entitled to procedural due process. *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973).

Issuance of building permits. — The issuance of a building permit by the county for land it either knew or should have known would not support a septic system may have given rise to an action under state law, but was not a "taking" under the fifth amendment, nor was it such an abuse of governmental power sufficient to raise the tort alleged to the stature of a substantive due process violation. Since the county could have been sued for this type of injury, a claim of denial of procedural due process was foreclosed. *Rymer v. Douglas County*, 764 F.2d 796 (11th Cir. 1985).

Liquor license holder has sufficient property interest in holding the license to the date of its automatic termination that the revocation of that license must be accompanied by rudimentary due process protections. *Page v. Jackson*, 398 F. Supp. 263 (N.D. Ga. 1975).

Lack of standards for issuance of liquor licenses. — Because state law does not grant an applicant a property interest in the opportunity to acquire a liquor license, a county commissioner's failure to establish standards for the granting of a license does not violate the applicant's due process rights. Further, where the commissioner refuses to grant any licenses whatsoever, Georgia law does not require the commissioner to follow the procedural safeguards outlined in O.C.G.A. § 3-3-2 when denying a license request. *Cheek v. Gooch*, 779 F.2d 1507 (11th Cir. 1986).

Granting beer and wine license applications based on public opposition. — Whether pursuant to specific statute or de facto practice, the granting of beer and wine license applications based on public opposition is an unconstitutional due process and equal protection violation. *McCollum v. City*

of Powder Springs, 720 F. Supp. 985 (N.D. Ga. 1989).

What due process requires prior to professional board's decision to initiate proceedings against professional. — Where an investigator was attempting to gain information concerning a doctor's fitness to practice medicine, due process did not require at this stage of the matter that the doctor be informed of the nature of the charges that have been made to the board or the names of the doctor's accusers, nor was the doctor denied due process because the doctor was not permitted to participate in selecting the documents to be collected by the investigator or to participate in the deliberations prior to the decision to initiate proceedings against the doctor. *Gilmore v. Composite State Bd. of Medical Exmrs.*, 243 Ga. 415, 254 S.E.2d 365 (1979).

Right to practice law as property right. — Right to practice law is property right within meaning of due process and equal protection provisions of U.S. Const., amend. 14 to the Constitution of the United States. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Suspension of attorney convicted of crime of moral turpitude before appeals final not violative of due process. — Promoting public confidence in the judicial system is a legitimate state end and suspension of an attorney upon conviction of a crime of moral turpitude, even before all appeals are final, is rationally related to that end and does not violate due process. *In re Stoner*, 246 Ga. 581, 272 S.E.2d 313 (1980).

Out-of-state lawyer without property interest requiring automatic recognition of right to appear. — An out-of-state lawyer has no property interest cognizable under U.S. Const., amend. 14 which requires automatic recognition of a right to appear pro hac vice in a criminal prosecution. *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980).

Right to practice medicine as property right. — Right to practice medicine is valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secure. *Yeargin v. Hamilton Mem. Hosp.*, 225 Ga. 661, 171 S.E.2d 136 (1969), cert. denied, 397 U.S. 963, 90 S. Ct. 997, 25 L. Ed. 2d 255 (1970), later appeal, 229 Ga. 870, 195 S.E.2d 8 (1972).

Hospital's evaluation of physician's personal qualities consistent with due process.

— It is consistent with due process for a hospital to evaluate those personal qualities of a physician that reasonably relate to the physician's ability to function effectively within a hospital environment, such as a doctor's ability to work well with others, which is a factor that could significantly influence the standard of care the physician's patients received. *Robbins v. Ong*, 452 F. Supp. 110 (S.D. Ga. 1978).

"Right" to attend school does not fall into the category of a fundamental right protected by substantive due process. *Kicklighter v. Evans County Sch. Dist.*, 968 F. Supp. 712 (S.D. Ga. 1997), aff'd, 140 F.3d 1043 (11th Cir. 1998).

Protection of student from bodily injury. — The school district, members of its board of education, its superintendent, and the high school principal did not have a constitutionally recognized duty to protect a student from the threats, intimidation and bodily injury from another student. *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576 (N.D. Ga.), aff'd, 981 F.2d 1263 (11th Cir. 1992).

Student has no property right in interscholastic sports. — Since a student has no right to participate in interscholastic sports, the student has no protectable property interest that would give rise to a due process claim. *Smith v. Crim*, 240 Ga. 390, 240 S.E.2d 884 (1977).

Applicability to institutionalized student. — Although the plaintiff, a residential student in the Georgia School of the Deaf, was sexually assaulted by a fellow classmate, because the plaintiff's due process claim was not clearly established at the time, the defendants were entitled to qualified immunity. *Spivey v. Elliott*, 29 F.3d 1522 (11th Cir. 1994), op. withdrawn in part on other grounds, reaff'd in part, 41 F.3d 1497 (11th Cir. 1995).

Judgment creditor without right to deprive debtor of property without due process. — The mere fact that a creditor has obtained a judgment does not give the creditor a right to enforce that judgment by depriving the alleged judgment debtor of his property without due process of law. *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699, 240 S.E.2d 171 (1977).

Due Process (Cont'd)**1. In General (Cont'd)**

Custom of child carrying parental surname not protectible interest. — Father's protectible interest in having his child bear the parental surname as customary is not property right within meaning of due process. *Fulghum v. Paul*, 229 Ga. 463, 192 S.E.2d 376 (1972).

Utility rate set by Public Service Commission as confiscation. — Rate set by Public Service Commission must reach the point of confiscation for utility to show legally protected interest. *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

Public utility has standing to challenge rate schedule on ground that schedule is so low that it is confiscatory and denies the utility substantive due process. *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

Utility rate increase not customers' property right. — Utility customers have no sufficient property interest in given utility rate increase to invoke procedural protections of due process clause of U.S. Const., amend. 14. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Pledging political subdivisions' power under Municipal Electric Authority of Georgia Act not taking of property without due process. — Under the Municipal Electric Authority of Georgia Act, former Code 1933, ch. 24B-4 (see O.C.G.A. § 46-3-110 et seq.), the pledging of the full faith and credit and taxing power of the political subdivisions does not constitute a taking of property without due process of law. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

County landfill fee schedule upheld. — County's sanitary landfill and fee schedules were not violative of due process or equal protection clauses of the United States and Georgia Constitutions. *City of Covington v. Newton County*, 243 Ga. 476, 254 S.E.2d 855 (1979).

Where telephone company has no property right guaranteeing against competition. — If a telephone company does not show before the Public Service Commission that its toll service to its subscribers would be operated at a loss or that it would not receive

a fair return on its investment, or that it would be unable to meet its financial or service obligations if competition is allowed, and its toll certificate was granted subject to the prospect of competition existing in the governing telephone utilities act, then it has no property right guaranteeing it against competition. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

Requiring extension of existing power lines beyond carrier's public service commitment violates due process. — To require extension of existing power lines beyond the scope of the carrier's commitment to the public service is taking of property in violation of the federal Constitution. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

Where state's compelling railroad company to operate at loss would deprive it of property without due process. — The usual permissive charter of a railroad company does not oblige the company to operate its railroad at a loss, so that, where it is reasonably certain that future operation will be at a loss, the company, in the absence of contract obligation to continue, may cease, and if in such circumstances the company be compelled by the state to continue to operate at a loss, it would be deprived of its property without due process of law. *Georgia Power Co. v. City of Decatur*, 281 U.S. 505, 50 S. Ct. 369, 74 L. Ed. 999 (1930).

Deprivation or regulation of liberty to contract. — Deprivation of liberty to contract is forbidden by the Constitution if without due process of law; but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process. *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949).

State without power over citizen's contracts outside state. — There is a vital distinction between acts done within and acts done without the jurisdiction of the state; and since under U.S. Const., amend. 14 a citizen of a state has "a right to contract outside of the state for insurance on his property," the power of the state does not extend to such extra-territorial transactions, and a statute imposing restrictions thereon is

in violation of the due process provision of that amendment. *Cooper Co. v. State*, 187 Ga. 497, 1 S.E.2d 436 (1939).

Seniority among railway workers is fundamentally and wholly contractual, does not arise from mere employment, and is not an inherent, natural, or constitutional right. *Lamon v. Georgia S. & F. Ry.*, 212 Ga. 63, 90 S.E.2d 658 (1955).

An employee has no inherent right to seniority in service; and where seniority arises only out of contract, such rights created and arising under the contract do not extend beyond its life when it has been legally terminated. *Lamon v. Georgia S. & F. Ry.*, 212 Ga. 63, 90 S.E.2d 658 (1955).

Violation or misapplication of existing bargaining agreement deprives employee of protectible rights. — Violation or misapplication of an existing bargaining agreement, as by preferring an employee with less seniority over another with greater seniority, where the employee is still in service of the employer under the contract, deprives the employee of the employee's seniority rights, and such seniority rights, which are property rights, will be protected in the courts. *Lamon v. Georgia S. & F. Ry.*, 212 Ga. 63, 90 S.E.2d 658 (1955).

Reduction in social security benefits to reflect workers' compensation payments. — Reduction in social security benefits to reflect workers' compensation payments to beneficiary has rational basis and does not violate the due process clause. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Application of Workers' Compensation Law to public employee comports with due process. — Ga. L. 1920, p. 167 (see O.C.G.A. § 34-9-3), making the chapter on workers' compensation applicable to public employees, is not invalid as being in violation of the due process clauses of the state and federal Constitutions; nor does it deny to the defendant the equal protection of the laws. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932).

Review of Department of Natural Resources decisions. — The Georgia Administrative Procedure Act and O.C.G.A. § 12-2-1 govern the procedure for judicial review of final decisions of the Department of Natural Resources and, where a party seeking review failed to make a timely request therefor,

affirmance of the final decision of the department did not violate due process. *Nix v. Long Mtn. Resources, Inc.*, 262 Ga. 506, 422 S.E.2d 195 (1992).

Property interest in public office explicated. — The broad statement that a public office is not property within the sense of the constitutional guaranties of due process of law does not mean that an officer duly inducted into office for a definite term may be deprived of its possession without a hearing, when the right to have it terminate is limited to specified causes. The statement that public office is not property means that it is not property in the sense that an officer is not denied due process of law by the abolition of the office before the expiration of his term, or by the passage of a statute limiting or reducing the officer's compensation, and that an officer has no property right in the books and papers pertaining to the officer's office. *Walton v. Davis*, 188 Ga. 56, 2 S.E.2d 603 (1939).

Property interests in public employment for which a person may claim U.S. Const., amend. 14's due process protection are created and their dimensions defined by existing rules and understandings that stem from an independent source such as state law, which secure certain benefits and that support claims of entitlement to those benefits. *Cotten v. Board of Regents of Univ. Sys.*, 395 F. Supp. 388 (S.D. Ga. 1974), *aff'd*, 515 F.2d 1098 (5th Cir. 1975).

Permanent or "classified" state employee has sufficient property interest in job to warrant due process protection, even though such protection may not include the right to a pretermination hearing. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Employment benefit as property interest. — Person's interest in employment benefit is "property" interest for due process purposes if there are rules or mutually explicit understandings that support the person's claim of entitlement to the benefit and that he may invoke at a hearing. *Harrison v. Housing Auth.*, 445 F. Supp. 356 (N.D. Ga. 1978), *aff'd*, 592 F.2d 281 (5th Cir. 1979).

Explicit recognition of property right in government benefit by positive law is not necessary in order for an interest to be greater than an abstract need or unilateral expectation. *Jeffries v. Georgia Residential Fin. Auth.*, 503 F. Supp. 610 (N.D. Ga. 1980),

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aff'd, 678 F.2d 919 (11th Cir.), cert. denied, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

When government benefit may only be withdrawn for cause, legitimate expectation, entitlement, or property interest arises. *Jeffries v. Georgia Residential Fin. Auth.*, 503 F. Supp. 610 (N.D. Ga. 1980), aff'd, 678 F.2d 919 (11th Cir.), cert. denied, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

Person must have legitimate claim of entitlement to have property interest in benefit. — To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it and more than a unilateral expectation of it. The person must, instead, have a legitimate claim of entitlement to it. *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974), cert. denied, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 678 (1975); *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975); *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977); *Wells Fargo Armored Serv. Corp. v. Georgia Pub. Serv. Comm'n*, 547 F.2d 938 (5th Cir. 1977); *Gordon Junior College Chapter of Am. Ass'n of Univ. Professors v. Board of Regents*, 484 F. Supp. 614 (N.D. Ga. 1980); *Press v. Board of Regents*, 489 F. Supp. 150 (M.D. Ga. 1980); *Jeffries v. Georgia Residential Fin. Auth.*, 503 F. Supp. 610 (N.D. Ga. 1980), aff'd, 678 F.2d 919 (11th Cir.), cert. denied, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

Probationary employee without sufficient property interest for procedural due process. — Before the requirements of procedural due process come into play, one must be deprived of an interest in "life, liberty, or property." A probationary employee, who has no reasonable expectation of continued employment while in the probationary status, has no property interest in his or her continued employment sufficient to call forth procedural due process when that employment is terminated. *Burnley v. Thompson*, 524 F.2d 1233 (5th Cir. 1975).

Attachment of due process protection to employment or administrative position. — The success of due process arguments de-

pends upon the finding of a constitutionally protected property interest in the expectation of continued employment, or of a liberty interest infringed by the state; absent such interest no due process protections attach to a plaintiff's employment or administrative position. *Press v. Board of Regents*, 489 F. Supp. 150 (M.D. Ga. 1980).

Termination of employment "for cause".

— When a teacher to be terminated for cause opposes the termination, minimum procedural due process requires that the teacher be advised of the cause or causes for the termination in sufficient detail to fairly enable the teacher to show any error that may exist, the teacher be advised of the names and the nature of the testimony of witnesses against the teacher, and at a reasonable time after such advice the teacher must be accorded a meaningful opportunity to be heard in the teacher's own defense before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges. *Callaway v. Kirkland*, 320 F. Supp. 1135 (N.D. Ga. 1970), supplemented, 334 F. Supp. 1034 (N.D. Ga. 1971).

Civil employment which allows termination only "for cause" creates expectation of continued employment that is constitutionally protected. *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980).

Substantial evidence of "cause" not to renew teacher's contract. — There was substantial evidence — in the form of testimony by school personnel that a teacher repeatedly left school grounds without permission, failed to attend classes and lunchroom duties to which the teacher was assigned, threatened students with academic failure if they did not play football, and directed profanity at students — to support the school board's finding of "cause" not to renew that teacher's contract. *Holley v. Seminole County Sch. Dist.*, 755 F.2d 1492 (11th Cir. 1985).

Fair Dismissal Act constitutional. — The Fair Dismissal Act of Georgia, both on its face and as applied, not only met, but exceeded, the minimum due process standard in a situation where a teacher who was to be terminated for cause opposed his termination. *Holley v. Seminole County Sch. Dist.*, 755 F.2d 1492 (11th Cir. 1985).

Standard of review for personnel appeals.

— The fact that the Georgia legislature and

courts have confined the scope of review in appeals from the State Personnel Board to an “any evidence” standard does not present a constitutional due process violation and, hence, the plaintiff was precluded as a matter of law from litigating the plaintiff’s federal constitutional claim because of the plaintiff’s previous state suit involving the same cause of action. *Howkins v. Caldwell*, 587 F. Supp. 98 (N.D. Ga. 1983), *aff’d*, 749 F.2d 731 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117, 105 S. Ct. 2361, 86 L. Ed. 2d 261 (1985).

Termination for inability to work with others not liberty violation. — Charge of inability to get along with administrative superiors or coworkers is not sufficient to create a “badge of infamy” sufficient to implicate a “liberty interest” protected by U.S. Const., amend. 14. *Press v. Board of Regents*, 489 F. Supp. 150 (M.D. Ga. 1980).

Discharge of city employee. — Discharged city employee failed to produce any evidence that the decision to terminate the employee and the personnel board’s decision to uphold the termination were arbitrary, capricious or pretextual and therefore constituted a substantive due process violation. *Jones v. City of E. Point*, 795 F. Supp. 408 (N.D. Ga. 1992), *aff’d*, 987 F.2d 775 (11th Cir. 1993).

Georgia’s state law provision for review of the personnel board’s decision through certiorari to the county superior court satisfies the requirements of procedural due process. *Jones v. City of E. Point*, 795 F. Supp. 408 (N.D. Ga. 1992), *aff’d*, 987 F.2d 775 (11th Cir. 1993).

City employees fired for drug use not denied due process. — Employees of city board of lights and water fired for use of drugs on the job in violation of city policy were not denied due process where the city had evidence of such drug use and could reasonably conclude that such drug use constituted a threat to the safety of the community, the employees were given a full and fair opportunity to attack that evidence and its credibility, the process for the adjudication of the grounds for their termination satisfied the requirements of procedural due process, and state judicial avenues of appeal of the errors presently alleged had not been utilized. *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985).

No protection from incorrect or ill-advised personnel decisions. — Due process clause of U.S. Const., amend. 14 is not guarantee against incorrect or ill-advised personnel decisions. *Harrison v. Housing Auth.*, 445 F. Supp. 356 (N.D. Ga. 1978), *aff’d*, 592 F.2d 281 (5th Cir. 1979); *Courts v. Economic Opportunity Auth. For Savannah—Chatham County Area, Inc.*, 451 F. Supp. 587 (S.D. Ga. 1978).

United States Constitution cannot feasibly be construed to require federal judicial review for every public agency error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee’s constitutionally protected rights, reviewing federal courts must presume that official action was regular and, if erroneous, can best be corrected in other ways. The due process clause of the fourteenth amendment is not a guarantee against incorrect or ill-advised personnel decisions. *Williams v. Housing Auth.*, 158 Ga. App. 734, 282 S.E.2d 141 (1981).

Pretermination hearing to protect state employees interests before termination. — Statutory and regulatory scheme governing termination of classified state employees covered by State Merit System was unconstitutional in failing to provide a list of specific charges prior to termination and in failing to provide for a pretermination hearing or other meaningful opportunity to protect employees’ interests before termination. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Employee may not be deprived of the employee’s property or liberty interest in continued government employment absent some due process protection. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Post termination hearing. — Post termination hearing was sufficient to protect interests of discharged government employee meriting due process protection, whether those interests were in the nature of property or liberty. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Exceptional cases warranting immediate discharge. — Adequate pretermination procedures for public employees may contain provision for exceptional cases warranting immediate discharge. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

In emergency situations, the government

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may terminate a protected interest without affording any protections other than the right to a hearing before the termination becomes final. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Suspended police officer with no protected liberty interest. — In suit brought under 42 U.S.C. § 1983 any “stigma” suffered by suspended police officer plus the suspension and subsequent rescinding of the suspension gave rise to no liberty interest protected by due process of law. *Sparks v. City of Atlanta*, 496 F. Supp. 770 (N.D. Ga. 1980).

Right of defendant to fair trial versus rights of public to gain access to hearings in criminal cases. — See *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982).

Hearing for certificate of public convenience and necessity. — A hearing on an application for a certificate of public convenience and necessity, whether granted or denied, is not a judicial or quasi-judicial proceeding to which due process rights applicable in such proceedings attach. *RTC Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 165 Ga. App. 539, 301 S.E.2d 896 (1983).

The failure of the Public Service Commission to set forth its findings of fact and conclusions of law does not result in a denial of the due process rights of applicants for issuance or amendment of motor carriers' certificates. *RTC Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 165 Ga. App. 539, 301 S.E.2d 896 (1983).

Hearing officer's lack of discretionary power not denial of due process. — Licensee was not denied due process and equal protection in the Department of Public Safety hearing simply because the hearing officer had no authority or discretion to reinstate a habitual violator. *Hardison v. Booker*, 179 Ga. App. 693, 347 S.E.2d 681 (1986).

When injunction not invalid as illegal prior restraint. — If prior to the issuance of an injunction an adequate determination is made that certain communication is unprotected by constitutional provisions safeguarding freedom of speech; that the order is based on a continuing course of repetitive

conduct; and that the order is clear and sweeps no more broadly than necessary, then the injunction is not invalid as an illegal prior restraint. *Retail Credit Co. v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975).

Claimant must act in timely manner. — If a claimant has a remedy provided by law, under which the claimant can assert the claim within a reasonable time, then the claimant has the claimant's “day in court.” If the claimant fails to assert it within such time, then the claimant, not the law, is at fault. The claimant has sinned away the claimant's day of grace. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Courts not only forum for redress. — The constitutional due process clause was not intended to give procedural protection to every person who has an interest in action taken by the state even though that action may affect a person by increasing the amount the person must pay for a service. The courts are not the only forum wherein an aggrieved person may seek redress. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Fee system courts as they existed prior to July 1, 1982, in which judges relied for all of their judicial income on the fees paid by litigants before them, violated due process by creating a pecuniary interest in the fees on the part of judges of such courts, and, therefore such judges and their successors in office were enjoined from making any effort to enforce judgments rendered by those courts rendered prior to that date. *Doss v. Long*, 629 F. Supp. 127 (N.D. Ga. 1985).

Overlap in judicial and prosecutory functions at administrative hearings. — Considerable overlap in judicial and prosecutory functions at administrative type hearings is not per se violative of due process. *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975).

Legislative limitation of recoverable damages after tort committed not deprivation of property without due process. — The fact that alleged libelous articles were published before the adoption of an act limiting the plaintiff's previously existing right to recover punitive damages, did not render the law unconstitutional as violating federal and state provisions against the deprivation of property without due process of law. *Kelly v. Hall*, 191 Ga. 470, 12 S.E.2d 881 (1940).

County or municipal corporation created by legislature without standing to invoke due process argument against legislature. — A county or municipal corporation, created by the legislature, does not have standing to invoke the equal protection and due process clauses of the state or federal Constitution in opposition to the legislature. *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978).

Standing to challenge constitutionality of law or municipal ordinance. — Before a law or municipal ordinance can be attacked by any person on the ground of its unconstitutionality, the person must show that its enforcement infringes upon rights of person or property, and neither a threat of arrest nor threats of repeated arrests amount to interference with person or property rights. *Jenkins v. Thomas*, 124 Ga. App. 286, 183 S.E.2d 489 (1971).

Before a statute can be attacked by anyone on the ground of its unconstitutionality, an individual must show that its enforcement is an infringement upon the right of personal property, and that such infringement results from the unconstitutional feature of the statute upon which the individual bases the attack. *Bryant v. Prior Tire Co.*, 230 Ga. 137, 196 S.E.2d 14 (1973).

Identity fraud statute not unconstitutionally vague as applied. — O.C.G.A. § 16-9-21 expressly prohibited the improper access of another's account at a financial institution such that the defendant was placed on notice that the use of a victim's social security number to obtain a job and thus access the victim's Internal Revenue Service account was illegal; thus, O.C.G.A. § 16-9-121 was not unconstitutionally vague as applied to the defendant. *Hernandez v. State*, 281 Ga. 559, 639 S.E.2d 473 (2007).

No personal jurisdiction where no transaction of business in state. — In an action seeking collection of a certain promissory note for which the nonresident defendant executed a guaranty in favor of the resident plaintiff, the defendant did not "transact business" in this state, and there was, accordingly, no personal jurisdiction over the defendant under the following circumstances: (1) The guaranty was neither solicited nor executed in Georgia; (2) no contract negotiations occurred within Georgia; (3) the defendant did not have any other financial

dealings with the plaintiff; and (4) the guaranty contained a choice-of-law provision calling for the application of Georgia law. *Algemene Bank Nederland v. Mattox*, 611 F. Supp. 144 (N.D. Ga. 1985).

Exercise of jurisdiction over nonresident former spouse in action for contempt and modification of Georgia divorce decree was consonant with due process notions of "fair play" and "substantial justice" because: (1) Georgia has a legitimate interest in protecting resident spouses and children; (2) The courts of Georgia remain open to the appellant to enforce the appellant's rights, and the appellant enjoys the benefits and protection of the laws of Georgia; (3) the inconvenience to the appellant is outweighed by the inconvenience to the appellee who would be forced to sue in a foreign forum on a cause of action which arose from their Georgia matrimonial domicile and their Georgia divorce; and (4) the Legislature gave the courts of Georgia, through O.C.G.A. § 9-10-91(5), the authority to entertain litigation against nonresidents who incur some form of family-related obligation while maintaining a matrimonial domicile or while residing within this state. *Smith v. Smith*, 254 Ga. 450, 330 S.E.2d 706 (1985).

Doctrine of sovereign immunity prevents citizen's suit against state or its political subdivisions. — The Georgia Supreme Court has often affirmed and acknowledged that the doctrine of sovereign immunity prevents a suit by a citizen against the state, or a political subdivision thereof. *Haber v. Fulton County*, 124 Ga. App. 789, 186 S.E.2d 152 (1971), overruled on other grounds, *Blackston v. State Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985).

Government not liable for mistakes in prosecution of crimes without its consent. — The safeguarding of society by the prosecution of crimes against it is a sovereign attribute inherent in all governments, and for mistakes in exercising this sovereign right there can be no liability against the government without its consent. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

U.S. Const., amend. 14 is applicable to criminal trials in state courts. *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932).

No deprivation of due process where right to sue the state is withdrawn. — The right to

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sue the state is not a vested right and cannot be property of the appellant. There is, therefore, no deprivation of due process when the right to sue is withdrawn. *Goolsby v. Regents of Univ. Sys.*, 141 Ga. App. 605, 234 S.E.2d 165 (1977).

Withdrawal of right to sue state for loss of consortium. — Taking away right to action for loss of consortium of injured spouse is not deprivation of due process. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Framing of question as to constitutionality of statute. — Where question as to constitutionality of statute is properly raised by attacking specific Code sections as denying the defendant equal protection and due process of law as guaranteed by the Constitution of Georgia and U.S. Const., amend. 14, and the answer clearly points out wherein the statute violates the constitutional provisions, the court cannot refuse to consider the question merely because it fails to point out the exact location of the due process and the equal protection clauses in the Constitutions. *Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954).

Sufficiency of constitutional challenge of ordinance posed by motion to dismiss. — In prosecution for violation of city code provision making it unlawful to possess lottery ticket demurrer (now motion to dismiss) on constitutional grounds which does not specify by chapter number, section number, or paragraph number, or in any other manner identify what law or constitutional provision it is contended is violated by the ordinance attacked is entirely too vague and general to raise any question as to the constitutionality of the ordinance insofar as it might contravene the due process clauses of the state and federal Constitutions. *Smith v. City of Albany*, 97 Ga. App. 731, 104 S.E.2d 488 (1958).

Failure to sever was not a denial of due process. — Defendant's motion to sever defendant's trial was properly denied since: (1) three defendants were not so numerous that the jury would be likely to confuse the facts and law applicable to each; (2) the relevant evidence against each co-defendant was unambiguous; (3) the applicable law was

straightforward, and there was no evidence of any spillover effect from one co-defendant to another; (4) defendant made no showing of prejudice and a consequent denial of due process; and (5) even though the evidence was not as strong against defendant as that against the co-defendants that fact did not warrant severance. *Parnell v. State*, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

Prosecutor's reference to defendant's silence. — Prosecutor's repeated and deliberate references throughout the trial to defendant's post-Miranda silence and request for counsel violated due process. *Hill v. Turpin*, 135 F.3d 1411 (11th Cir. 1998).

Litigant's right to fair trial where there are contested issues of fact. — When there are contested issues of fact no litigant has any constitutional right to have a verdict in the litigant's favor; the litigant has only the right to a fair trial under which the jury returns a verdict for that party, plaintiff or defendant, whom it believes entitled thereto. That is due process. *YMCA v. Bailey*, 112 Ga. App. 684, 146 S.E.2d 324 (1965), cert. denied, 385 U.S. 868, 87 S. Ct. 131, 17 L. Ed. 2d 95 (1966).

Pretrial publicity not prejudicial. — Even though there had been a significant amount of media coverage as a result of corporation's patent infringement litigation against other members of the office furniture industry, this pretrial publicity in no way was sufficiently prejudicial and inflammatory as to saturate the community in such a way as to prevent prospective jurors from impartially adjudicating this dispute since the vast majority of the publicity in question was factual in nature, rather than sensational or prejudicial, and had been spread over a long span of time. *Haworth, Inc. v. Herman Miller, Inc.*, 821 F. Supp. 1476 (N.D. Ga. 1992).

Disinterested jurors. — Evidence was insufficient to show that the jury pool of 1.8 million people was insufficient from which to draw a disinterested jury in a patent infringement case involving systems office furniture even though the office furniture industry was a major component of the region's business community and the parties to the case were respected members of their communities. *Haworth, Inc. v. Herman Miller, Inc.*, 821 F. Supp. 1476 (N.D. Ga. 1992).

Legislative fiat may not replace factual determination. — Mere legislative fiat may

not take place of fact in determination of issues involving life, liberty, or property as it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. *Manley v. Georgia*, 279 U.S. 1, 49 S. Ct. 215, 73 L. Ed. 575 (1929).

Pretrial discovery in termination of parental rights. — U.S. Const., amend. 14 does not mandate pretrial discovery in proceedings to terminate parental rights. In *re L.L.W.*, 141 Ga. App. 32, 232 S.E.2d 378 (1977); *Ray v. Department of Human Resources*, 155 Ga. App. 81, 270 S.E.2d 303 (1980).

Burden on government employee to prove exercise of constitutionally protected speech was substantial factor in discharge. — A government employee has the burden of proving that the employee's speech was constitutionally protected and that its exercise was a substantial factor in the employee's discharge. *Courts v. Economic Opportunity Auth. For Savannah—Chatham County Area, Inc.*, 451 F. Supp. 587 (S.D. Ga. 1978).

Application of "doctrine of binding precedent". — The "doctrine of binding precedent" was violative of due process as applied to situation where defendant was granted summary judgment in a driver's claim for damages resulting from a collision after the passenger's case was tried before a jury and resulted in a verdict for defendant. *Stanley v. Booz*, 179 Ga. App. 257, 346 S.E.2d 1 (1986).

Duty of court to adopt construction sustaining constitutionality of statute when two constructions possible. — Where a statute or an ordinance is capable of two constructions, constitutional under one construction and unconstitutional under the other, it is the duty of the court to adopt that construction which will sustain its constitutionality. *City of Newman v. Atlanta Laundries, Inc.*, 174 Ga. 99, 162 S.E. 497, appeal dismissed, 286 U.S. 526, 52 S. Ct. 495, 76 L. Ed. 1269 (1932).

Construction under state and federal due process provisions may differ. — The fact that the United States Supreme Court may construe U.S. Const., amend. 14 as not imposing a particular limitation would not prevent this court from giving a different construction to the Georgia due process clause and holding that under this clause the limitation does exist. *National Mtg. Corp. v. Suttles*, 194 Ga. 768, 22 S.E.2d 386 (1942).

"Gross negligence" or "deliberate indifference" is not the proper test for adjudging

a federal civil rights due process claim against a municipality. *Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir. 1984), aff'd in part, rev'd in part and vacated in part, 774 F.2d 1495 (11th Cir. 1985), cert. denied, 476 U.S. 1115, 106 S. Ct. 1970, 90 L. Ed. 2d 654, 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673, 493 U.S. 817, 110 S. Ct. 70, 107 L. Ed. 2d 37 (1989).

Excessive force claim by pretrial detainee. — Civil rights action by a pretrial detainee against a prison guard, alleging that the guard assaulted the detainee and used excessive force, was properly brought under the fourteenth amendment, not the eighth amendment. *Telfair v. Gilberg*, 868 F. Supp. 1396 (S.D. Ga. 1994), aff'd, 87 F.3d 1330 (11th Cir. 1996).

When jury charge stating law as to presumption accords with due process. — A jury charge that is a statement of the law as to a presumption arising from proof of certain facts accords with due process if the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt, as well as the more-likely-than-not-standard. *Davis v. State*, 140 Ga. App. 890, 232 S.E.2d 164 (1977).

Ability to make opening and closing statements when presenting antagonistic defenses. — Existence of antagonistic defenses or the loss of the right to make opening and closing statements to the jury does not constitute a showing of prejudice amounting to a denial of due process. *Parnell v. State*, 260 Ga. App. 213, 581 S.E.2d 263 (2003).

State cannot be deemed guilty of violation of due process simply because of court error. — A state cannot be deemed guilty of a violation of the due process clause of its Constitution, or of the due process clause of the federal Constitution, simply because one of its courts while acting within its jurisdiction has made erroneous rulings or decisions. In such a case a party is left to the appropriate remedies for the correction of errors in judicial proceedings. *Norman v. State*, 171 Ga. 527, 156 S.E. 203 (1930); *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932).

When parties have been fully heard in regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of that party's property without due process of law.

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Gilmore v. Mutual Benefit Life Ins. Co., 179 Ga. 267, 175 S.E. 681 (1934).

State's violation of child's right to due process. — Where the state treats a juvenile proceeding as "civil," thereby denying the child certain important rights which would be available in a criminal proceeding, and proceeds on the premise that the state is acting as *parens patriae* in order to provide measures of guidance and rehabilitation for the child and protection of society, and not fix criminal responsibility, guilt and punishment, committing the child for rehabilitative treatment which the state knows to be inadequate constitutes a violation of the child's right to due process. *Long v. Powell*, 388 F. Supp. 422 (N.D. Ga.), vacated on other grounds, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975).

Due process cannot be assumed to be same in military setting as it is in a civil setting due in part to the understanding on all sides that the peculiar nature of the military function makes quite difficult the adherence to a well-defined line of demarcation between the strictly disciplinary and the judicial functions in the military services. *Bisson v. Howard*, 224 F.2d 586 (5th Cir.), cert. denied, 350 U.S. 916, 76 S. Ct. 201, 100 L. Ed. 803 (1955).

Federal court jurisdiction. — Purely local dispute cannot be brought within federal court jurisdiction by mere invocation of the concepts of liberty and property protected by U.S. Const., amend. 14. *Gordon Junior College Chapter of Am. Ass'n of Univ. Professors v. Board of Regents*, 484 F. Supp. 614 (N.D. Ga. 1980).

Statutes creating presumption violate due process. — Statute creating presumption that is arbitrary or that operates to deny fair opportunity to repel it violates due process clause of this section. *Manley v. Georgia*, 279 U.S. 1, 49 S. Ct. 215, 73 L. Ed. 575 (1929).

Statutory presumption that contraband found in house belongs to husband violates due process. — Permissive, or rebuttable, presumption that contraband found in a house belongs to husband by virtue of his statutory status as head of household cannot withstand due process scrutiny. *Knighton v. State*, 248 Ga. 199, 282 S.E.2d 102 (1981).

Former Code 1933, § 38-118 (see O.C.G.A. § 24-4-21), relating to rebuttable presumptions, is not violative of the due process and equal protection guarantees of U.S. Const., amend. 14. *Evans v. State*, 159 Ga. App. 776, 285 S.E.2d 235 (1981).

Statute purporting to determine conclusive evidence void as unauthorized invasion of court function. — Insofar as former Civil Code 1910, § 1790 purported to make an official analysis of fertilizers by the state chemist conclusive evidence, it was an unauthorized invasion of the functions of the courts, and is void as violative of this section, because it is an unauthorized attempt to legislate the truth of facts upon which the rights of parties are made to depend in judicial investigations. *Southern Cotton Oil Co. v. Raines*, 171 Ga. 154, 155 S.E. 484 (1930).

Legislation that certain factual proof constitutes prima facie evidence valid if rational connection between proof and inference. — State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred; thus, if the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. *Manley v. Georgia*, 279 U.S. 1, 49 S. Ct. 215, 73 L. Ed. 575 (1929); *Johnson v. State*, 203 Ga. 147, 45 S.E.2d 616 (1947); *Reid v. Perkerson*, 207 Ga. 27, 60 S.E.2d 151 (1950).

Sheriff can be held liable on bond for acts of deputies outside presence and without knowledge. — To hold sheriff liable on the sheriff's bond for the acts of the sheriff's deputies committed outside of the sheriff's presence and without the sheriff's knowledge is not a violation of the due process clauses of the state and federal Constitutions, notwithstanding the fact that the sheriff does not have unlimited power in discharging or removing deputies. *Standard Sur. & Cas. Co. v. Johnson*, 74 Ga. App. 823, 41 S.E.2d 576 (1947).

Statutory liability for failure to report what is not known violates due process. — Section providing that a section foreman shall be liable for double the value of the stock killed by the railroad upon the fore-

man's failure to post the required notice, not only makes him liable for the failure to report that of which the foreman has knowledge, but goes beyond this to subject the foreman to a liability for failing to report the killing of stock of which the foreman has no knowledge. This is a clear violation of the due process clause regardless of the fact that the penalty shall be recovered in the manner provided by law for the collection of other claims. *Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954).

Offense of defrauding or obtaining property from state, county, or public officer not violative of due process. — It is an indictable offense in this state for any person to cheat and defraud the state of any of its money or other property by using any deceitful means or artful practice. It is a felony for any officer, servant or other person in any public department, station or office of government of this state to embezzle, steal, secrete or fraudulently take and carry away any money or other property or effects belonging to the state. Hence, to defraud or obtain property from the state, county or a public officer is clearly a substantive penal offense in this state, which does not offend the due process clause of the Constitution of the United States or the due process provision of Georgia's Constitution. *Rollins v. State*, 215 Ga. 437, 111 S.E.2d 63 (1959).

Appellate review of excessive punitive damage awards. — The law requires state and federal appellate courts to review de novo claims that punitive damages awards are grossly excessive in violation of the due process clause of the fourteenth amendment to the United States Constitution. *Time Warner Entm't Co. v. Six Flags Over Ga., L.L.C.*, 254 Ga. App. 598, 563 S.E.2d 178 (2002), cert. denied, 538 U.S. 977, 123 S. Ct. 1783, 155 L. Ed. 2d 665 (2003).

Excessive damages. — In an action against a truck manufacturer, a punitive damages award of \$2 million was not so excessive as to violate the due process clauses of the Georgia and United States Constitutions, the eighth amendment of the United States Constitution, and the excessive fines clause of the Ga. Const. 1983, Art. I, Sec. I, Para. XVII. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993).

Statute holding automobile owner liable for operator's negligence violates due process. — Ga. L. 1955, p. 454 clearly violates

the due process clause of both the federal and state Constitutions, for the reason that it makes the owner of a motor vehicle liable if the vehicle is being used in the prosecution of the business of or for the benefit of the owner, even though operated without notice to her or without her knowledge and without her consent, express or implied. To hold this statute constitutional, would be to hold a party liable for the negligent conduct of another, even though a trespasser were operating the vehicle against the express orders of the owner, and irrespective of how careful or free from negligence the owner was, the only condition being that it be operated for the benefit of the owner. *Frankel v. Cone*, 214 Ga. 733, 107 S.E.2d 819 (1959), overruled on other grounds, *Lott Investment Corp. v. Gerbing*, 242 Ga. 90, 249 S.E.2d 561 (1978).

State regulation of no-fault insurer's subrogation rights. — There is no constitutional impediment to state's making subrogation rights of no-fault automobile insurer dependent upon weight of vehicles involved in the accident, either under the equal protection or due process clauses. *Bituminous Cas. Corp. v. Prudential Property & Cas. Ins. Co.*, 247 Ga. 481, 277 S.E.2d 23 (1981).

Effect of state remedies redressing deprivation of procedural due process. — A school employee who was improperly dismissed did not have a claim for damages under 42 U.S.C. § 1983 when the employee was reinstated in the employee's job with back pay as the result of state remedies that redressed any procedural due process deprivation that the employee suffered. *Atlanta City Sch. Dist. v. Dowling*, 266 Ga. 217, 466 S.E.2d 588 (1996), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 21 (1996).

Even though the board of education failed to provide a school employee with pretermination notice, the employee could not maintain a claim for damages for procedural due process deprivation under 42 U.S.C. § 1983, since the employee could have sued the board in state court to enforce that right. *Merriitt v. Brantley*, 936 F. Supp. 988 (S.D. Ga. 1996).

Process for commitment to state mental institution. — Former Code 1933, § 27-1503 (see O.C.G.A. § 17-7-131) affords a person

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due process of the laws prior to a final order committing that person to a state mental institution whether or not that person is committed temporarily to a state mental institution for evaluation. *Skelton v. Slaton*, 243 Ga. 426, 254 S.E.2d 704 (1979).

Release from state mental institution. — The provisions of former Code 1933, § 27-1503 (see O.C.G.A. § 17-7-131) disallowing the filing of another application for release until one year has elapsed from the denial of the last preceding application and allowing release only upon court order to do not offend current concepts of due process or equal protection of the laws. *Skelton v. Slaton*, 243 Ga. 426, 254 S.E.2d 704 (1979).

The state's policy of not discharging a voluntary patient with a legal guardian from a state mental hospital or affording the patient an involuntary commitment hearing without the consent of the guardian deprived the patient of the patient's right to challenge the patient's confinement and violated due process. *Heichelbech v. Evans*, 798 F. Supp. 708 (M.D. Ga. 1992), *aff'd*, 995 F.2d 237 (11th Cir.), *cert. denied*, 510 U.S. 947, 114 S. Ct. 389, 126 L. Ed. 2d 338 (1993).

Determination of divorcing parties' rights by judge or jury. — Former Code 1933, § 30-122 (see O.C.G.A. § 19-5-17), providing for determination of rights and disabilities of the parties by the jury or the judge, as the case may be when a divorce is granted is not violative of the due process and equal protection clauses of the state and federal Constitutions. *Gary v. Johnson*, 210 Ga. 686, 82 S.E.2d 651 (1954) (decided under former Code 1933, § 30-122, prior to amendment by Ga. L. 1960, p. 1024, § 1 and Ga. L. 1979, p. 466, § 5).

Statute defining alimony comports with due process. — Because the legislative intent is clear and the statute provides "fair notice" of its meaning, former Code 1933, § 30-201 (see O.C.G.A. § 19-6-1), which defines and determines alimony, does not violate the due process clause of the state or federal Constitution. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Authority of security personnel to control access to state buildings and property. — Former Code 1933, §§ 91-134 (see O.C.G.A.

§ 50-16-14) and 91-9908 (see O.C.G.A. § 50-16-16), which authorize security personnel to deny entrance of persons to and to remove persons from state buildings and property, are not violative of due process or equal protection guarantees. *State v. Boone*, 243 Ga. 416, 254 S.E.2d 367, *cert. denied*, 444 U.S. 898, 100 S. Ct. 206, 62 L. Ed. 2d 133 (1979).

No denial of due process or equal protection in operation of MARTA Board's fare determining function. — Since the properly constituted Metropolitan Atlanta Rapid Transit Authority Board has the sole authority to determine transit fares, and since the MARTA Act (Ga. L. 1965, 2243) establishes very definite parameters for the necessary and desirable fare rates, the appellants demonstrated no denial of due process or equal protection in the operation of the MARTA Board with respect to the fare determining function. *Fulton County v. Metropolitan Atlanta Rapid Transit Auth.*, 247 Ga. 420, 276 S.E.2d 583 (1981).

Tort remedies for liberty deprivation satisfy due process. — The tort remedies that the State of Georgia provides as a means of redress for liberty deprivations i.e., O.C.G.A. § 51-1-13 (physical injury), O.C.G.A. § 51-1-14 (violent injury or attempt to commit injury) satisfied the due process clause of the fourteenth amendment, and the plaintiff's constitutional claim against police officers was denied. *Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir. 1984), *aff'd in part, rev'd in part and vacated in part*, 774 F.2d 1495 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115, 106 S. Ct. 1970, 90 L. Ed. 2d 654, 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673 (1986), 493 U.S. 817, 110 S. Ct. 70, 107 L. Ed. 2d 37 (1989).

Consequential damage from water meter leakage. — The plaintiff in a federal civil rights action had an adequate state law tort remedy. Consequently the plaintiff was not deprived of the plaintiff's rights without due process of law when a water meter leaked, the county did not repair the meter, water flowed onto a nearby road and froze, and the plaintiff's car skidded on the ice and collided with another car, causing extensive injuries, notwithstanding the fact that the county and its officers were immune from suit for negligence. *Rittenhouse v. DeKalb County*, 764 F.2d 1451 (11th Cir. 1985), *cert.*

denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

Failure to comply with federal cleanup act. — Failure to comply with the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., did not create a due process violation since any allegations concerning such failure should be raised in the separate CERCLA recovery action. *Amtreco, Inc. v. O.H. Materials, Inc.*, 802 F. Supp. 440 (M.D. Ga. 1992).

Motorcycle helmet law. — The motorcycle helmet law, O.C.G.A. § 40-6-315, does not require that the Georgia Board of Public Safety issue a list approving specific types of headgear and, therefore, the failure of the board to publish a list of approved headgear and eye-protective devices did not violate the plaintiff's rights under the first, fifth, and fourteenth amendments to the United States Constitution. *Abate of Ga., Inc. v. Georgia*, 264 F.3d 1315 (11th Cir. 2001), cert. denied, 536 U.S. 924, 122 S. Ct. 2592, 153 L. Ed. 2d 781 (2002).

2. Necessity for Notice and Hearing

Fundamental idea in "due process of law" is that of "notice" and "hearing." *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934); *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56 (1971); *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973).

Fundamental requirement of due process in proceeding to be accorded finality is notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Hamilton v. Edwards*, 245 Ga. 810, 267 S.E.2d 246 (1980).

Hearing must be granted before citizen is condemned. — "Due process of law" means that citizen must be afforded hearing before being condemned, and judgment can be rendered only after trial. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934).

Reasonable notice and opportunity to defend. — There is no violation of due process or the underlying principles of traditional fairness and substantial justice when reasonable notice and opportunity to defend are present. *Bosworth v. Cooney*, 156 Ga. App. 274, 274 S.E.2d 604 (1980), appeal dismissed, 452 U.S. 956, 101 S. Ct. 3101, 69 L. Ed. 2d 966 (1981).

Notice of civil action being brought against oneself is the very bedrock of due process. *Lester v. Crooms, Inc.*, 157 Ga. App. 377, 277 S.E.2d 751 (1981).

Strict construction of service of process requirements. — Courts strictly construe service of process requirements, as notice is bedrock of due process. *McGowan v. W.S. Badcock Corp.*, 144 Ga. App. 255, 240 S.E.2d 779 (1977).

Notice and hearing as a matter of right where one's property rights involved. — Due process of law as guaranteed by the federal and state Constitutions includes notice and hearing as a matter of right where one's property rights are involved. *Dansby v. Dansby*, 222 Ga. 118, 149 S.E.2d 252 (1966); *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56 (1971); *Hamilton v. Edwards*, 245 Ga. 810, 267 S.E.2d 246 (1980).

There must be some form of hearing before deprivation of constitutionally protected property interest. *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980).

Because the trustees for the property at issue, a parcel of property used for religious purposes, never received notice of a tax sale concerning the property, their due process rights were violated, making the sale of that property void. *Marathon Inv. Corp. v. Spinkston*, 281 Ga. 888, 644 S.E.2d 133 (2007).

Execution of statutory notice provisions necessary. — Statutory provisions for notice in absence of someone to execute them amount to no requirement of notice. *Ray v. Mayor of Athens*, 221 Ga. 73, 143 S.E.2d 386 (1965).

When required notice allows or requires act or response within certain time. — When notice is required by law to be given to a party who has the right or is required to in some way act or respond to the notice within a prescribed period of time, the date of the notice must run from the date of its receipt unless there is express statutory provision to the contrary. *Hamilton v. Edwards*, 245 Ga. 810, 267 S.E.2d 246 (1980).

Insufficient service by mail. — Substituted service upon a nonresident defendant by certified mail was insufficient due to the acts of the plaintiffs where the address given in the complaint was known by the plaintiffs not to be the current address of the defendants and the defendants showed that they

Due Process (Cont'd)**2. Necessity for Notice and Hearing (Cont'd)**

were separate from the party responsible. *Bethco, Inc. v. Cinema 'N' Drafthouse Int'l, Inc.*, 204 Ga. App. 143, 418 S.E.2d 467 (1992).

Notice of process reasonably certain to inform excused when persons missing or unknown. — As examples of conditions which would not permit notice of process reasonably certain to inform and which would therefore excuse the use of a form of service falling below this standard, the United States Supreme Court cited "the case of persons missing or unknown." *Benton v. Modern Fin. & Inv. Co.*, 244 Ga. 533, 261 S.E.2d 359 (1979).

Privilege may not be conditioned upon renunciation of right to due process. — State cannot condition granting of even privilege upon renunciation of constitutional right to procedural due process. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is deemed essential to due process of law. *Davis v. Weir*, 328 F. Supp. 317 (N.D. Ga. 1971).

Emergency allows termination of fundamental interest without notice and hearing. — Except in cases of emergency, due process requires that when a state seeks to terminate a fundamental interest such as liberty or property rights, it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective. *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1973); *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Temporary deprivation of property requires judicial supervision. — Judicial supervision over proposed temporary deprivation of property, and notice and opportunity for early preliminary hearing after deprivation are necessary to guard against mistaken and illegal deprivations of property. This is true even when the victim of the deprivation is an alleged judgment debtor. *Apex Supply Co. v.*

Johnny Long Homes, Inc., 143 Ga. App. 699, 240 S.E.2d 171 (1977).

Statutory provision for notice and hearings as matter of right may be express or necessarily implied. — A statute complies with constitutional provisions as to due process where it provides for notice and hearing as a matter of right, either in express terms, or by necessary implication. *Robitzsch v. State*, 189 Ga. 637, 7 S.E.2d 387 (1940); *Wallace v. State*, 224 Ga. 255, 161 S.E.2d 288 (1968), cert. denied, 393 U.S. 1123, 89 S. Ct. 995, 22 L. Ed. 2d 130 (1969).

Where notice and hearing implied. — Act providing for removal of commissioners of roads and revenues of a named county, by the judge of the superior court or the ordinary (now probate court), after investigation of charges preferred by 25 qualified voters, or by the judge of the superior court after such investigation where charges are made by the grand jury, did not violate the due process clause of either the state or the federal Constitution for lack of requirement as to notice and hearing, in view of the provision that the judge or the ordinary to whom the complaint was presented should cause an investigation to be made of such charges, "at which investigation the accused shall have the benefit of counsel, if desired," since the provision quoted implied such requirement as to notice and hearing. *Robitzsch v. State*, 189 Ga. 637, 7 S.E.2d 387 (1940).

No notice and hearing required before supplemental proceedings to satisfy judgment. — Due process does not require that a defendant who has been granted an opportunity to be heard and has had the defendant's day in court, should, after a judgment has been rendered against the defendant, have further notice and a hearing before supplemental proceedings are taken to reach the defendant's property in satisfaction of the judgment. *Halpern v. Austin*, 385 F. Supp. 1009 (N.D. Ga. 1974).

Required notice summons party to appear and speak. — Notice required by "due process" is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to the party to appear and speak, if the party has anything to say, why the judgment sought should not be rendered. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934).

Notice required in any particular situation is that reasonably calculated to inform interested parties of the action to be taken and of their opportunity to present objections. *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973); *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Newspaper notice inadequate unless defendants show they could not give plaintiff personal service. — Absent a showing that defendants could not give plaintiff personal notice, newspaper notice would not be reasonably calculated to reach plaintiff. *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973).

Adequacy of notice by publication. — Notice by publication is sufficient only if the party bringing the action cannot by due diligence ascertain either the names or whereabouts of those likely to oppose the action. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Service by publication. — There is no provision in the Nonresident Motorists' Act, the long arm statute, or in the statutes relative to torts for service on a nonresident defendant by publication; and by its own terms the provision in former Code 1933, § 81A-104(e)(1) (see O.C.G.A. § 9-11-4(e)(1)) for service by publication is limited in former Code 1933, § 81A-104(i) (see near the beginning of the second sentence. O.C.G.A. § 9-11-4(j)) by the qualification that the provisions shall apply only in actions or proceedings in which service by publication now or hereafter may be authorized by law. *National Sur. Corp. v. Hernandez*, 120 Ga. App. 307, 170 S.E.2d 318 (1969).

Publication service required remand. — In the absence of a showing that a spouse had received, or waived receipt of actual notice of a lawsuit, or that reasonable diligence had been exercised in attempting to find the spouse, judgment was vacated and case remanded to the trial court for a determination whether service by publication met due process constitutional guarantees. *McDade v. McDade*, 263 Ga. 456, 435 S.E.2d 24 (1993).

Other forms of service inadequate where personal service possible. — Service by publication and by mail does not provide due process when personal service could have been made. *Melton v. Johnson*, 242 Ga. 400, 249 S.E.2d 82 (1978).

Test of adequacy of substituted service. — Adequacy of substituted service so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give actual notice of the proceedings and an opportunity to be heard. *Melton v. Johnson*, 242 Ga. 400, 249 S.E.2d 82 (1978).

Constitutional validity of any chosen method of service may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. *Benton v. Modern Fin. & Inv. Co.*, 244 Ga. 533, 261 S.E.2d 359 (1979).

When service by publication allowed in suit for divorce or suit to set aside decree. — A suit for divorce is a proceeding in rem, and a suit to set aside a decree therein is also a proceeding in rem, unless upon the petition and the prayers thereof property rights are to be established; and service may be by publication, and the statute providing for service on nonresidents, is not in violation of the Constitution of the State of Georgia or U.S. Const., amend. 14. *Axtell v. Axtell*, 181 Ga. 24, 181 S.E. 295 (1935).

Process due must fit facts and circumstances. — Hearing required by due process clause must be "meaningful" and "appropriate to the nature of the case." *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

In cases involving the due process clause of U.S. Const., amend. 14, what "process" is due must be tailored to fit the facts and circumstances involved. *Davis v. Weir*, 359 F. Supp. 1023 (N.D. Ga. 1973), aff'd in part and modified in part on other grounds, 497 F.2d 139 (5th Cir. 1974).

Form of hearing required by due process clause may vary according to nature of case. *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973).

Whether or not one is deprived of fundamental right to fair hearing depends upon facts of each case. *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975).

Form of procedural due process hearing judged according to nature of interest. — In

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general, the form of a procedural due process hearing is judged by a flexible standard which expands and contracts according to the nature of the interest in question. *Shaw v. Hospital Auth.*, 614 F.2d 946 (5th Cir.), cert. denied, 449 U.S. 955, 101 S. Ct. 362, 66 L. Ed. 2d 220 (1980).

Determination of whether particular procedure required in given situation. — Whether due process requires a particular procedure in a given situation must be determined by balancing the individual's interest in avoiding the loss that lack of the procedure inflicts upon the individual against the interests that the government seeks to advance by denying it. *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976).

Statute upheld if persons accorded notice and hearing applicable to cases of similar nature. — A statute does not violate due process of law if all persons to whom the statute applies are accorded notice and a hearing applicable to all cases of a similar nature. *Southern Ry. v. Overnite Transp. Co.*, 223 Ga. 825, 158 S.E.2d 387 (1967).

Trial satisfies due process if procedure is same as similar cases. — When a citizen is accorded a trial according to modes of procedure applicable to cases of similar kind, it cannot be said that the citizen has been denied "due process of law." *Ford v. State*, 202 Ga. 599, 44 S.E.2d 263 (1947); *Chatterton v. Dutton*, 223 Ga. 243, 154 S.E.2d 213, cert. denied, 389 U.S. 914, 88 S. Ct. 247, 19 L. Ed. 2d 266 (1967).

No control over form of state court procedures. — Due process clause of U.S. Const., amend. 14 does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided the person condemned has had sufficient notice and adequate opportunity to defend. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

When the essential elements of jurisdiction of a court in which an opportunity for a hearing is afforded are present, the power of

a state over its methods of procedure is substantially unrestricted by the due process clause of the Constitution. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Rules for small claims courts need not be provided by state. — State need not provide same elaborate rules for small claims courts as for those of general jurisdiction. *Sellers v. Home Furnishing Co.*, 235 Ga. 831, 222 S.E.2d 34 (1976).

Denial of oral hearing not due process violation. — Court's not holding oral hearing on reconsideration of defendant's motion for summary judgment does not deny due process. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

When pretermination evidentiary hearing not required. — Where a reduction or termination of public assistance payments is not grounded on particular facts relating to an individual recipient or assistance group, there is no need for a pretermination evidentiary hearing. *Merrweather v. Burson*, 325 F. Supp. 709 (N.D. Ga. 1970), aff'd in part and remanded in part, 439 F.2d 1092 (5th Cir. 1971).

When judgment conclusive, res judicata and not subject to collateral attack. — Where the record reveals that the personal jurisdiction issue was raised by a defendant and decided adversely to him by a court of otherwise competent jurisdiction, the judgment of that court is conclusive, is res judicata and may not be collaterally attacked. *Green Acres Dist., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

Res judicata. — Where defendant made a special appearance to contest personal jurisdiction, was fully heard, was overruled as to this objection and took no further part in the case or sought review of the adverse ruling, the judgment entered against the party on the merits is res judicata with regard to the jurisdictional issue and not subject to collateral attack on that ground when sued upon in another state. *Green Acres Dist., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

When judgment entitled to full faith and credit. — A judgment is entitled to full faith and credit — even as to question of jurisdiction — when the second court's inquiry

discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. *Green Acres Disct., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

When party appears and defends, judgment of court, regular upon its face, may not be attacked in the courts of this state. *Green Acres Disct., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

Right to support allegations by argument and proof implied. — The hearing required by due process in its essence implies that one who is entitled to it shall have the right to support the party's allegations by argument and proof. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934).

Advance notice of filing of *lis pendens* is not required. *Aiken v. Citizens & S. Bank*, 249 Ga. 481, 291 S.E.2d 717, cert. denied, 459 U.S. 973, 103 S. Ct. 307, 74 L. Ed. 2d 287 (1982).

Federal court diversity jurisdiction. — In diversity case it is appropriate for federal court to exercise jurisdiction over foreign corporation if state court may do so in compliance with state law and the due process requirements of the United States Constitution. *Bankhead Enters., Inc. v. Norfolk & W. Ry.*, 642 F.2d 802 (5th Cir. 1981).

Claims against municipalities. — Since right to sue municipality is statutory, the legislature may attach notice-of-claim requirement as precondition to maintenance of such suit. *Shoemaker v. Aldmor Mgt., Inc.*, 249 Ga. 430, 291 S.E.2d 549 (1982).

Six-month time limit for presenting claims against a municipal corporation is not unreasonable. *Shoemaker v. Aldmor Mgt., Inc.*, 249 Ga. 430, 291 S.E.2d 549 (1982).

Hearing granted by administrative body must be fair and impartial. — In order to comply with the requirements of due process, the hearing granted by an administrative body must be a full and fair one, before an impartial officer, board, or body free of bias, hostility, and prejudgment. *Clary v. Mathews*, 224 Ga. 82, 160 S.E.2d 338 (1968).

Procedural defect by agency not violative of due process unless defect prejudicial. — When an agency neglects to follow a procedural rule but its failure inflicts no significant injury on the party entitled to observance of the rule, the error does not prevent

further administrative or judicial action. For a procedural defect to violate due process, the defect must be shown to be prejudicial. *Lentz v. State Personnel Bd.*, 146 Ga. App. 366, 247 S.E.2d 145 (1978).

Rights applicable in workers' compensation proceedings. — The constitutional guaranty of due process grants every party to a lawsuit the opportunity to be heard and to present the party's claim or defense, i.e., to have the party's day in court. These rights are granted to all parties and are applicable in workers' compensation proceedings. *Scott v. Tremco, Inc.*, 199 Ga. App. 606, 405 S.E.2d 347, cert. denied, 199 Ga. App. 907, 405 S.E.2d 347 (1991).

Administrative agency as both accuser and judge. — Fact that administrative agency is both accuser and judge does not deprive accused of due process of law, especially where an appeal from the determination of the agency may be had to the courts. *Clary v. Mathews*, 224 Ga. 82, 160 S.E.2d 338 (1968).

Irregularity or error in administrative hearing. — Mere irregularity or error in administrative hearing cannot be basis of claim of denial of due process, and a person cannot complain of a defect in an administrative hearing as a denial of constitutional rights as long as that person obtains a full hearing before a court on the question in issue. *Clary v. Mathews*, 224 Ga. 82, 160 S.E.2d 338 (1968).

Appeal from suspension of driver's license. — Although defendant elected to first pursue an administrative appeal of a driver's license suspension to the Department of Public Safety, and was unsuccessful in that effort, the defendant was still entitled to file an appeal in the superior court under O.C.G.A. § 40-4-66, at which the defendant could receive a meaningful hearing upon request and, accordingly, the defendant was not denied the right to procedural due process. *Miles v. Shaw*, 272 Ga. 475, 532 S.E.2d 373 (2000).

Agreement waiving due process right of notice and hearing enforceable if voluntarily and knowingly made. — An agreement which waives due process right of notice and hearing is not constitutionally infirm per se; and if such an agreement was voluntarily, intelligently, and knowingly made, which may be a question of fact in some circumstances, then such an agreement for divest-

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ment is constitutionally enforceable. *Law v. USDA*, 366 F. Supp. 1233 (N.D. Ga. 1973).

Waiver of question of jurisdiction by terms of contract. — Parties waive the question pertaining to jurisdiction as related to performance of a contract if the contract provides that all rights of the parties based upon any alleged nonperformance by either party shall be submitted to arbitration in New York, and if the contract provides that notice of further proceedings in the courts of New York may be served by registered mail. *Pacolet Mfg. Co. v. Crescent Textiles, Inc.*, 219 Ga. 268, 133 S.E.2d 96 (1963).

Only private associations have right to obtain waiver of notice and hearing before depriving member of valuable right. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Due process requirement for subjecting defendant to judgment in personam. — In personam jurisdiction is proper in a state court if the defendant has "certain minimum contacts with the forum state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Griffin v. Air S., Inc.*, 324 F. Supp. 1284 (N.D. Ga. 1971); *Interstate Paper Corp. v. Air-O-Flex Equip. Co.*, 426 F. Supp. 1323 (S.D. Ga. 1977).

Due process requires only that in order to subject a defendant to a judgment in personam, if the defendant be not present within the territory of the forum, the defendant have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22 (1980); *Coopers & Lybrand v. Cocklereece*, 157 Ga. App. 240, 276 S.E.2d 845 (1981).

Test for determining whether due process permits assertion of jurisdiction is twofold: the defendant must have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice"; and the defendant must purposefully avail itself of the privilege of conducting activities within the forum state,

thus invoking the benefits and protections of its laws. *Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375 (5th Cir. 1980).

Limits on exercise of jurisdiction are not "mechanical or quantitative" but are to be found only in the requirement that the provisions made for this purpose must be fair and reasonable in the circumstances, and must give to the defendant adequate notice of the claim against the defendant, and an adequate and realistic opportunity to appear and be heard in the defendant's defense. *Coe & Payne Co. v. Wood-Mosaic Corp.*, 230 Ga. 58, 195 S.E.2d 399 (1973).

Jurisdiction based solely on temporary presence. — Allowing jurisdiction to be based solely on temporary presence is not inconsistent with due process clause of U.S. Const., amend. 14. *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22 (1980).

Three broad rules by which to judge power of forum state to exercise jurisdiction over nonresident: (1) the nonresident must purposefully avail oneself of the privilege of doing some act or consummating some transaction with or in the forum; (2) the plaintiff must have a legal cause of action against the nonresident, which arises out of, or results from, the activity or activities of the defendant nonresident within the forum; and (3) if the requirements of rules (1) and (2) are met, there must also exist a "minimum contact" between the nonresident and the forum. *Coopers & Lybrand v. Cocklereece*, 157 Ga. App. 240, 276 S.E.2d 845 (1981).

With sufficient connection between defendant and forum state and reasonable notice to defendant. — The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought and a sufficient connection between the defendant and the forum state as to make it fair to require defense of the action in the forum. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

Due process limitations on judgments in personam where defendant has no contacts with state. — Due process prevents a binding judgment being rendered in personam against an individual or corporate defendant with which the state has no contacts, ties or relations. *Riordan v. W.J. Bremer, Inc.*, 466 F. Supp. 411 (S.D. Ga. 1979).

The due process clause of U.S. Const., amend. 14 limits the power of a court to render a valid personal judgment against an individual or corporate defendant with which the forum state has no contacts, ties, or relations. *Bankhead Enters., Inc. v. Norfolk & W. Ry.*, 642 F.2d 802 (5th Cir. 1981).

Limitation on power of state court to enter judgments against persons not served with process within state. — The due process clause of U.S. Const., amend. 14 most assuredly limits the power of the state courts to enter judgments against persons not served with process while within their respective boundaries. *Allied Fin. Co. v. Prosser*, 103 Ga. App. 538, 119 S.E.2d 813 (1961).

Personal service in foreign state. — When a party is personally served that party is subject to in personam jurisdiction of the courts of foreign state and cannot collaterally attack a judgment of such court. *Green Acres Dist., Inc. v. Freid & Appell, Inc.*, 135 Ga. App. 816, 219 S.E.2d 39 (1975).

Personal service on persons outside state's territorial limits by service officer of state where person is served complies with procedural due process requirements. *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976).

Out of state ex parte proceeding not given effect. — Where the putative father of an illegitimate child sought and obtained a decree of a Tennessee court declaring him to be the father of such child and creating the relationship of parent and child between the petitioner and the child, the decree showing on its face that it was an ex parte proceeding, it will not be given effect in this state as against the mother, where she was not made a party in the proceeding, was not served, did not appear and plead, or otherwise waive service or consent to such decree or have notice thereof, as it is violative of the due process clauses of the state and federal Constitutions. *Day v. Hatton*, 210 Ga. 749, 83 S.E.2d 6 (1954).

"Minimum contacts" of the defendant with the forum state must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Bankhead Enters., Inc. v. Norfolk & W. Ry.*, 642 F.2d 802 (5th Cir. 1981).

When a nonresident engages in some activity with or in the forum, even a significant single transaction, whether the nonres-

ident physically present there or not, and as a result business is transacted, a jurisdictional "contact" exists between that nonresident and the forum. *Bankhead Enters., Inc. v. Norfolk & W. Ry.*, 642 F.2d 802 (5th Cir. 1981).

Minimal contacts prerequisite. — Defendant may not be called on to defend action in foreign tribunal unless the defendant has had "minimal contacts" with the state that are a prerequisite to its exercise of power over the defendant. *Riordan v. W.J. Bremer, Inc.*, 466 F. Supp. 411 (S.D. Ga. 1979).

Grounds for exercise of personal jurisdiction over nonresident transacting business within state where minimum contacts. — Where jurisdiction over a nonresident is posted under former code 1933, § 24-113.1(a) (see O.C.G.A. § 9-10-91(1)), due process must be satisfied by the existence of "minimum contacts" of the nonresident in the state in which the nonresident is sued. *Newman v. Fleming*, 331 F. Supp. 973 (S.D. Ga. 1971).

With showing of nonresident's "minimum contact" with forum state. — In order to satisfy the constitutional requirement of procedural due process, it must be shown that the nonresident defendant has some "minimum contact" with the forum state so as to make that state's exercise of jurisdiction over the defendant reasonable. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979); *Bosworth v. Cooney*, 156 Ga. App. 274, 274 S.E.2d 604 (1980), appeal dismissed, 452 U.S. 956, 101 S. Ct. 3101, 69 L. Ed. 2d 966 (1981).

Minimum contacts concept of in personam jurisdiction particularly suited to resolution of domestic relations litigation. — In a country comprising 50 state judicial systems plus the District of Columbia's system, in an age of great mobility of persons and families, and in an era of vastly increasing domestic relations litigation, the minimum contacts concept of in personam jurisdiction is particularly suited, as a matter of practicality, to the resolution of issues raised in domestic relations litigation. *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976).

Residence within territorial limits of state while married is sufficient contact to confer jurisdiction in domestic relations case even though one of the parties sought to be

Due Process (Cont'd)**2. Necessity for Notice and Hearing (Cont'd)**

bound in the action moved outside the boundaries of the state prior to the commencement of the domestic relations action. *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976).

Ex parte judgment granting divorce entitled to full faith and credit if one spouse domiciled in forum. — An ex parte judgment that only grants a divorce is entitled to full faith and credit in other states if one of the spouses was domiciled in the forum that granted the divorce judgment. *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976).

Application of long arm statute to limits of due process. — Within the bounds of fairness and substantial justice to the defendant, the long arm statute will be applied to the limits of due process so that those who invoke the protection or benefits of the laws of Georgia, or who injure citizens or property in Georgia, will be made to answer therefore in the Georgia courts. *Value Eng'r Co. v. Gisell*, 140 Ga. App. 44, 230 S.E.2d 29 (1976).

Nonresident motorist statutes and long arm statutes in tort and contract areas properly confer in personam jurisdiction provided the nonresident party sought to be bound had sufficient contact or public policy association with the forum state; and provided, of course, adequate notice and service of the pending action was accorded to the nonresident so as not to violate the due process rule of fundamental procedural fairness. *Whitaker v. Whitaker*, 237 Ga. 895, 230 S.E.2d 486 (1976).

Scope of Georgia long arm statute. — Generally in long arm cases, the court must decide if the activities in question fall within the scope of the state statute, and, if so, whether the due process clause of U.S. Const., amend. 14 is satisfied by an inclusive construction. *Marival, Inc. v. Planes, Inc.*, 302 F. Supp. 201 (N.D. Ga. 1969).

The Georgia Supreme Court has held that former Code 1933, § 24-113.1 (see O.C.G.A. § 9-10-91) (Georgia long arm statute) extends personal jurisdiction to the maximum extent allowed by due process. *National Egg Co. v. Bank Leumi le-Israel*, 514 F. Supp. 1125 (N.D. Ga. 1981).

Jurisdiction over nonresident under long arm statute. — Under the long arm statute jurisdiction over a nonresident exists on the basis of transacting business in this state if the nonresident has purposefully done some act or consummated some transaction in this state, if the cause of action arises from or is connected with such act or transaction, and if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice. *Bailey v. London Marina, Inc.*, 151 Ga. App. 73, 258 S.E.2d 738 (1979); *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

Long Arm Statute allows exercise of jurisdiction over nonresident parties to maximum extent permitted by procedural due process. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979); *Bankhead Enters., Inc. v. Norfolk & W. Ry.*, 642 F.2d 802 (5th Cir. 1981).

Georgia long arm statute is coterminous with due process clause. — The broad language of the Georgia statute, expanding notions of jurisdiction, and the experience in other jurisdictions with similar statutes indicate that an expansive reading should be given to this section. *Marival, Inc. v. Planes, Inc.*, 302 F. Supp. 201 (N.D. Ga. 1969); *Griffin v. Air S., Inc.*, 324 F. Supp. 1284 (N.D. Ga. 1971).

Georgia long arm statute is coterminous with due process clause of U.S. Const., amend. 14 and the policy of the courts of this state is to exercise jurisdiction thereunder to the maximum extent permitted by procedural due process. *Interstate Paper Corp. v. Air-O-Flex Equip. Co.*, 426 F. Supp. 1323 (S.D. Ga. 1977).

Bare existence of conspiracy not enough to support long arm jurisdiction. — Bare existence of conspiracy is not enough to support long arm jurisdiction, without showing "contact" with the forum jurisdiction. A mere connection with the resident is not enough. *Coopers & Lybrand v. Cocklereece*, 157 Ga. App. 240, 276 S.E.2d 845 (1981).

Whether foreign corporation subject to in personam jurisdiction under long arm statute. — Where the plaintiff's theory of liability is predicated on contractual breach and there is no claim of any tortious act or omission by the defendant foreign corporation occurring either in or outside Georgia, inquiry in determining whether the foreign

corporation is subject to in personam jurisdiction under the Georgia long arm statute is limited to whether the corporation was transacting business within Georgia and, if so, whether it had sufficient contacts to satisfy the constitutional requirements of due process. *Interstate Paper Corp. v. Air-O-Flex Equip. Co.*, 426 F. Supp. 1323 (S.D. Ga. 1977).

Service on business corporations. — The method of service properly authorized under former Code 1933, § 22-403(b) (see O.C.G.A. § 14-2-504), which concerns business corporations, is not subject to constitutional attack because it is in itself reasonably certain to inform those affected and is not substantially less likely to bring home notice than other of the feasible and customary substitutes. *Frazier v. HMZ Property Mgt., Inc.*, 161 Ga. App. 195, 291 S.E.2d 4 (1982).

Sufficient contact if suit is based on contract with substantial connection with state. — It is sufficient for purposes of due process that a suit is based on a contract which has substantial connection with that state. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979); *Bosworth v. Cooney*, 156 Ga. App. 274, 274 S.E.2d 604 (1980), appeal dismissed, 452 U.S. 956, 101 S. Ct. 3101, 69 L. Ed. 2d 966 (1981).

To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state; the exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

Defendant's trips from Florida to Georgia to negotiate contract of sale and escrow contract, and execution of the escrow contract in Georgia provided sufficient "minimum contact" within the meaning and intent of the long arm statute. *Bosworth v. Cooney*, 156 Ga. App. 274, 274 S.E.2d 604 (1980), appeal dismissed, 452 U.S. 956, 101 S. Ct. 3101, 69 L. Ed. 2d 966 (1981).

Phrase "doing business" within corporate tax provisions not violative of due process. — The phrase "doing business" within former Code 1933, § 92-2401 (see O.C.G.A.

§ 48-13-72) (corporate net worth tax) and former Code 1933, § 92-3113 (see O.C.G.A. § 48-7-31) (corporate income tax), which means any activity or transactions for the purpose of financial profit or gain does not violate the due process requirement of either Ga. Const. 1983, Art. I, Sec. I, Para. I or U.S. Const., amend. 14. *Chattanooga Glass Co. v. Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979).

Corporation conducting activities within forum state with clear notice subject to suit. — When a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit there. *Bankhead Enters., Inc. v. Norfolk & W. Ry.*, 642 F.2d 802 (5th Cir. 1981).

Corporation putting products into stream of commerce with expectation of purchase by state consumers subject to personal jurisdiction. — The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. *National Egg Co. v. Bank Leumi le-Israel B.M.*, 504 F. Supp. 305 (N.D. Ga. 1980).

Foreseeability that product will cause injury in given state is not sufficient reason to hold the seller of the product subject to the jurisdiction of that state. *National Egg Co. v. Bank Leumi le-Israel B.M.*, 504 F. Supp. 305 (N.D. Ga. 1980).

Parties to employment contract not subject to Georgia law unless contract made or actual work done in state. — Under former Code 1933, § 114-110 (see O.C.G.A. § 34-9-7) the state acquires jurisdiction only by the act of the parties in coming within the state to execute a contract of employment. In the absence of the making of a contract within the state, where no work thereunder in the state is required, the parties thereto could not be subjected to the terms of the Georgia law, for to do so would be to deny to them due process of law, as guaranteed by the state and federal Constitutions. *Cramer v. American Mut. Liab. Ins. Co.*, 77 Ga. App. 236, 47 S.E.2d 925 (1948).

Where minimum contacts not satisfied. — Where officials of a defendant foreign corporation enter Georgia to investigate the

Due Process (Cont'd)**2. Necessity for Notice and Hearing (Cont'd)**

possibility of entering into a contract with a Georgia plaintiff to design and manufacture machinery to be installed at defendant's plant in South Carolina, inspect two similar plants and look over plaintiff's operation in Georgia, visit plaintiff's headquarters in order to observe the manufacture of the machinery, and undertake part of the negotiations in Georgia, such activities taken either in isolation or in totality do not constitute "minimum contacts" that satisfy the constitutional test for exercise of jurisdiction. *Fulghum Indus., Inc. v. Walterboro Forest Prods., Inc.*, 345 F. Supp. 296 (S.D. Ga. 1972), *aff'd*, 477 F.2d 910 (5th Cir. 1973).

Opportunity for hearing required prior to deprivation of property. — Opportunity for hearing required by due process must be given before deprivation of property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. *Burnley v. Thompson*, 524 F.2d 1233 (5th Cir. 1975).

"Pre-seizure" hearing not required with contraband condemnation. — Procedural due process of law does not require "pre-seizure" hearing in cases of contraband condemnation. *Tant v. State*, 247 Ga. 264, 275 S.E.2d 312 (1981).

"Post-seizure" cases require notice and hearing. — All that procedural due process of law requires in "post-seizure" cases is notice and hearing at which the owner or other party having an interest to be protected can appear and present a claim to the property being condemned. Any stipulated period of time as notice is not constitutionally required. All that is required by due process of law is that the affected party have reasonable notice and a reasonably fair opportunity for a hearing before the vehicle or other property is forfeited for a violation of the law. *Tant v. State*, 247 Ga. 264, 275 S.E.2d 312 (1981).

Delay in judicial determination of property rights. — Delay in judicial determination of property rights is not uncommon where essential that governmental needs be immediately satisfied. *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).

Postponement of judicial enquiry. —

Where only property rights are involved, mere postponement of judicial enquiry is not denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).

Statutes concerning proceeding before special master in condemnation procedure comport with due process. — Due process requirements are satisfied by former Code 1933, ch. 36-6A (see O.C.G.A. Art. 2, Ch. 2, T. 22), in that it gives the condemnee notice as well as an opportunity for a hearing. *Sweat v. Georgia Power Co.*, 235 Ga. 281, 219 S.E.2d 384 (1975).

Persons with property subject to forfeiture afforded adequate notice and hearing. — Former Code 1933, § 79A-828 (see O.C.G.A. § 16-13-49) affords adequate notice and adequate hearing so as to comport with due process of law as required by the federal Constitution and the Georgia Constitution. *Tant v. State*, 247 Ga. 264, 275 S.E.2d 312 (1981).

Notice to nonresident owners of property to be condemned violative of due process. — The portion of former Code 1933, § 36-610a (see O.C.G.A. § 22-2-107) that purports to provide for posting, publishing and mailing notices to known nonresident owners of property to be condemned, offends Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 14 in that it denies due process by not naming anyone to post, publish, or mail the notice therein referred to. *Ray v. Mayor of Athens*, 221 Ga. 73, 143 S.E.2d 386 (1965) (decided prior to amendment by Ga. L. 1966, p. 388, § 1, which designated the sheriff or the sheriff's deputy as responsible for posting and publishing the notice).

During tax assessment process taxpayer must have opportunity to be heard. — Hearing required by "due process" gives to taxpayer opportunity to submit evidence to support the taxpayer's objections to assessment which the taxpayer desires to contest and to show that the same is excessive. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934).

The assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and

be heard as the circumstances of the case require. Somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and this notice must be provided as an essential part of the statutory provisions, and not awarded as a mere matter of favor or grace. A denial of this right is a failure to afford due process of law within the intention of the federal and state Constitutions. *Pullman Co. v. Suttles*, 187 Ga. 217, 199 S.E. 821 (1938).

Due process entitles taxpayer to be heard on property assessment before final decision is made as to value. This requirement of a hearing is satisfied by former Code 1933, § 92-6912 (see O.C.G.A. § 48-5-311). *Ward v. Landrum*, 140 Ga. App. 497, 231 S.E.2d 347 (1976).

Taxpayer must have notice in time to contest proceeding before tax becomes absolute lien or liability. — It has been shown that there are differences between proceedings for the levy and collection of taxes and judicial proceedings. As to what constitutes notice and opportunity to be heard, in compliance with this requirement of due process, no general rule can be laid down which will cover all cases. The general rule, which may be laid down as applicable to all cases, is that the taxpayer must have the notice in time to contest the proceeding before the tax becomes an absolute lien on the taxpayer's property or before it becomes the taxpayer's absolute personal liability. *Simmons v. Newton*, 178 Ga. 806, 174 S.E. 703 (1934).

Notice and opportunity to be heard before property tax assessment final comported with due process. — Ga. L. 1918, p. 232, providing for assessment for taxation of unreturned or grossly undervalued property, or property assessed at a figure grossly below its true value, is not unconstitutional as violating the due process and equal protection clauses of the state and federal Constitutions for the reason that it fails to provide for a hearing before assessment by the tax-receiver, since it does provide for notice to the claimed delinquent, with opportunity to be heard by a suit in equity both as to excessiveness and taxability, before the assessment shall become final. *Hardin v. Reynolds*, 189 Ga. 534, 6 S.E.2d 328 (1939).

Due process not violated by government seizure of property for taxes before notice and hearing. — The failure to give one

notice and an opportunity to be heard prior to issuance of the tax fi. fa. and a subsequent levy on back accounts does not violate the due process clause of U.S. Const., amend. 14, because the seizure of property by the government for the collection of taxes constitutes one of those extraordinary situations justifying postponement of notice and hearing until after the property has been seized. *Fowler v. Strickland*, 243 Ga. 30, 252 S.E.2d 459, cert. denied, 444 U.S. 827, 100 S. Ct. 53, 62 L. Ed. 2d 35 (1979).

Farmer could not be deprived of property interest in business without pre-ejectment hearing. — Plaintiff as a Georgia farmer has a property interest in his business, i.e., selling merchandise at a public market, and could not be deprived of that interest without a due process pre-ejectment hearing even in absence of state statute providing for such hearing. *Wilder v. Irvin*, 423 F. Supp. 639 (N.D. Ga. 1976).

Procedural formalities not required at temporary injunction hearings. — Mere temporary injunction hearings to determine whether a temporary injunction should be issued restraining the showing of a film need not to be surrounded with the formalities of procedure that must attend hearings finally determining rights. *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464, cert. denied, 404 U.S. 1003, 92 S. Ct. 560, 30 L. Ed. 2d 557 (1971).

Determination on granting continuance of temporary injunction hearing within judicial discretion. — The question of whether the trial judge will grant a continuance on a hearing to determine whether a temporary injunction should be issued restraining the showing of a film is within the judge's sound legal discretion, and in the absence of a clear showing that the judge abused the judge's discretion in this regard it will not be controlled. *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464, cert. denied, 404 U.S. 1003, 92 S. Ct. 560, 30 L. Ed. 2d 557 (1971).

Termination of employment. — Procedural due process does not entitle public employee to full evidentiary hearing prior to discharge. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Adequate pretermination procedures for public employees need not include full, evidentiary hearing, provided an employee is protected by a timely and effective post-discharge hearing procedure. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

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Due process does not require hearing prior to discharge, and procedural defects prior to a fair hearing may be cured by that subsequent hearing. *Lentz v. State Personnel Bd.*, 146 Ga. App. 366, 247 S.E.2d 145 (1978).

Procedure to meet minimum due process requirements in cases of termination of employee includes, prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons, which means giving the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision. *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980).

Trial type hearing before adverse personnel action against state employee not required. — Procedural due process under U.S. Const., amend. 14 is not violated by the failure to grant a trial type hearing before rather than after an adverse personnel action taken against a state employee. *Aycock v. Police Comm.*, 133 Ga. App. 883, 212 S.E.2d 456 (1975).

Pretermination hearing required when stated reason for public employee's discharge is reputation damaging. — A pretermination hearing is required only when the stated reason for a public employee's discharge is an allegation that the employee is guilty of immoral or dishonest conduct or other behavior that might tend to stigmatize the employee or to lower the employee's standing in the eyes of the community. This is because an employee who is discharged because of allegedly dishonest conduct has an interest in the employee's reputation as well as the employee's employment. *Sheppard v. DeKalb County Merit Council*, 144 Ga. App. 115, 240 S.E.2d 316 (1977).

County's post-termination procedures cured pre-termination procedural deficiencies. — Available post-termination procedures cured public employer's failure to have a pre-termination hearing prior to termination of county employee. *Jones v. Chatham County*, 223 Ga. App. 455, 477 S.E.2d 889 (1996).

Post termination evidentiary hearing. — Evidentiary hearing subsequent to discharge of county employee, meets requirements of due process of law. *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975).

Pretextually terminated employees. — Only procedural due process claims are available to pretextually terminated employees, and not substantive due process claims. *Shaw v. Oconee County*, 863 F. Supp. 1578 (M.D. Ga. 1994).

Suspension of police officer. — City police officer was denied due process when the officer was suspended without pay for 148 days without a hearing. *Byrd v. City of Atlanta*, 709 F. Supp. 1148 (N.D. Ga. 1989).

Police officer charged with using excessive force. — Where internal affairs investigators concluded that the officer charged with using excessive force had violated departmental policy in the apprehension of the suspect, and where the officer was informed of violating the departmental policy proscribing the use of excessive force but was not given notice concerning improprieties regarding the officer's filing of reports, the officer's high speed chase, or the use of firearms, summary judgment for defendants was not proper. Further, once the plaintiff elected to have a pretermination hearing, the meeting did not constitute a proceeding in which the plaintiff received adequate notice and a hearing sufficient to deny benefits. *Bass v. City of Albany*, 968 F.2d 1067 (11th Cir. 1992).

Where municipal police officer was not granted hearing prior to initial discharge, but was granted a trial type hearing on the officer's appeal before the personnel review board where the officer was confronted by the witnesses and afforded the opportunity to cross-examine the witnesses and to offer evidence in the officer's own behalf, that due process was not violated. *In re Wiggins*, 144 Ga. App. 707, 242 S.E.2d 290 (1978).

Termination of workers' compensation benefits. — O.C.G.A. § 34-9-221(i) and Board of Workers' Compensation Rule 221(i), which set out the conditions and methods by which an employer or insurer may terminate an employee's workers' compensation benefits without a prior hearing, are constitutionally sufficient to satisfy the requirements of due process. *Cryder v. Oxendine*, 24 F.3d 175 (11th Cir. 1994).

Finding attorney in contempt. — Before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, the attorney should have reasonable notice of the specific charges and opportunity to be heard in the attorney's own behalf. *Maples v. Seeliger*, 165 Ga. App. 201, 299 S.E.2d 906 (1983).

Contempt proceedings. — Where there was no necessity to act summarily for the purpose of maintaining order in the courtroom, due process required that the attorney against whom the trial court ordered summary punishment be given notice of the charges against the attorney and that another judge hear the charges against the attorney. *In re Siemon*, 264 Ga. 641, 449 S.E.2d 832 (1994).

Adequate notice and opportunity for hearing required before termination or reduction of public assistance based on eligibility. — Public officials may not terminate or reduce the aid of any public assistance recipient prior to granting the recipient reasonable and adequate notice and opportunity for a hearing that satisfies the standards of due process of law where the proposed termination is based upon factual determinations relating to the eligibility of the particular recipient for those benefits. *Merriweather v. Burson*, 325 F. Supp. 709 (N.D. Ga. 1970), *aff'd* in part and remanded in part, 439 F.2d 1092 (5th Cir. 1971).

Notice of possible liability for Aid to Families with Dependent Children benefits. — No due process deprivation occurred because the custodial parent was proceeded against for recovery of AFDC payments although the custodial parent was never directly and explicitly notified when the custodial parent applied for benefits that the custodial parent, rather than absent non-custodial parent alone, might be held liable for their repayment. *Cox v. Department of Human Resources*, 174 Ga. App. 377, 330 S.E.2d 120, *rev'd* on other grounds, 255 Ga. 6, 334 S.E.2d 683 (1985).

Garnishment of wages. — Garnishment of wages absent notice and prior hearing, violates fundamental principles of due process since it amounts to a "taking" of property. *Aaron v. Clark*, 342 F. Supp. 898 (N.D. Ga. 1972).

Trial court deprives garnisher of due process in failing to afford it hearing on setting

aside of default and propriety of modifying amount of judgment. *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699, 240 S.E.2d 171 (1977).

Statutory procedure for garnishments comports with due process. — Procedural due process does not require opportunity for hearing before state-authorized garnishment of wages based upon prior judgment establishing the applicant's entitlement to alimony. *Halpern v. Austin*, 385 F. Supp. 1009 (N.D. Ga. 1974).

Constitutional due process requirements are adequately met by the judicial supervision and notice to the defendant mandated by the statutory procedure for garnishments. Garnishment of wages to satisfy alimony orders or judgments meets the demands of due process. *Black v. Black*, 245 Ga. 281, 264 S.E.2d 216 (1980).

Garnishment of wages for alimony. — Spouse whose assets are subject to garnishment under alimony judgment is accorded procedural due process by the fact that the affidavit for garnishment was approved by a judge before the summons of garnishment issued, under former Code 1933, § 46-102 (see O.C.G.A. § 18-4-61), and by the fact that the spouse received timely notice on the garnishment, under former Code 1933, § 46-105 (see O.C.G.A. § 18-4-64), as well as an early hearing on his traverse, in accordance with former Code 1933, § 46-401 (see O.C.G.A. § 18-4-93). *Antico v. Antico*, 241 Ga. 294, 244 S.E.2d 820 (1978).

Self-executing incarceration order in event of nonpayment of alimony not denial of due process. — Trial court's self-executing incarceration order which ordered incarceration of a parent at later time unless alimony payment, adjudicated as being owed, had been made, without providing for a further hearing, did not deny the parent due process of law. *Floyd v. Floyd*, 247 Ga. 551, 277 S.E.2d 658 (1981).

Post-judgment garnishment procedure inadequate in judicial supervision and notice. — The post-judgment garnishment procedure in former Code 1933, §§ 46-102 (see O.C.G.A. § 18-4-61) and 46-103 (see O.C.G.A. § 18-4-62) fails to meet the requirements of judicial supervision and notice to the defendant and is therefore constitutionally inadequate. *City Fin. Co. v. Winston*, 238 Ga. 10, 231 S.E.2d 45 (1976)

Due Process (Cont'd)**2. Necessity for Notice and Hearing (Cont'd)**

(decided prior to amendment by Ga. L. 1977, p. 159, § 1).

Post-judgment garnishment law (see O.C.G.A. Art. 4, Ch. 4, T. 18) is not unconstitutional for lack of due process. *Morgan v. Morgan*, 156 Ga. App. 726, 275 S.E.2d 673 (1980).

Adversary judicial hearing required before state seizure of film. — Before the state may seize any motion picture film, prior adversary judicial hearing designed to focus searchingly on the question of obscenity must be held. *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969); *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969).

Lest the nonobscene and constitutionally protected be suppressed. — The requirement that there be a prior adversary judicial hearing on the question of obscenity before a seizure does not mean that courts, either federal or state, desire to protect obscenity. It does mean that the Supreme Court of the United States has decided that lest the nonobscene and the constitutionally protected be suppressed it is better that some judicial officer judicially determine, after hearing competent evidence, that the challenged matter is obscene before its seizure. *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969).

Where allegedly obscene materials seized, federal court will not interfere while case pending in state courts. — Where allegedly obscene films and projectors are seized as evidence of a violation of former Code 1933, § 26-2101 (see O.C.G.A. § 16-12-80), and the case is pending in the state courts, federal courts will not interfere with the pending case by requiring release of the contraband as an unconstitutional seizure. *G & E Bus. Servs., Inc. v. McAuliffe*, 480 F. Supp. 239 (N.D. Ga. 1979).

Due process in juvenile court proceedings. — There must be scrupulous adherence to due process requirements in juvenile court proceedings. *C.L.T. v. State*, 157 Ga. App. 180, 276 S.E.2d 862 (1981).

No separate hearing or jury trial required when child found not amenable to treatment in juvenile court system. — Due process does not require that a separate hearing or jury

trial be held when the judge makes a finding of fact that a child is not amenable to treatment or rehabilitation in the system of the juvenile court. *Long v. Powell*, 388 F. Supp. 422 (N.D. Ga.), vacated on other grounds, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975).

Juvenile judge's refusal without hearing to accept petition alleging delinquency not violative of due process. — A juvenile judge's refusal without a hearing to accept a petition alleging delinquency and thereby accept jurisdiction of a case does not deprive a party of due process of law. *Lane v. Jones*, 626 F.2d 1296 (5th Cir. 1980), cert. denied, 450 U.S. 928, 101 S. Ct. 1384, 67 L. Ed. 2d 359 (1981).

Juvenile's right to evidentiary hearing when faced with possible transfer of case from juvenile court. — When former Code 1933, §§ 24A-2002 (see O.C.G.A. § 15-11-31(a)) and 24A-2502 (see O.C.G.A. § 15-11-39(a)(1)) are read together, a juvenile faced with the possible transfer of his case from juvenile court to "the appropriate court having jurisdiction of the offense" has the right to an evidentiary hearing at which the juvenile must be given "the opportunity to introduce evidence and otherwise be heard in the juvenile's own behalf and to cross-examine adverse witnesses." *R.S. v. State*, 156 Ga. App. 460, 274 S.E.2d 810 (1980).

Measuring up to essentials of due process and fair treatment. — Transfer hearings are critically important proceeding affecting important rights of the juvenile. While the hearing need not conform with all of the requirements of a criminal trial or even of the usual administrative hearing, the hearing must measure up to the essentials of due process and fair treatment. *R.S. v. State*, 156 Ga. App. 460, 274 S.E.2d 810 (1980).

Requirements for petition in juvenile proceedings to comport with due process. — In order to withstand attack based upon the denial of due process, the petition in juvenile proceedings must pass two tests: (1) it must contain sufficient factual details to inform the juvenile of the nature of the offense; and (2) it must provide data adequate to enable the accused to prepare a defense. *C.L.T. v. State*, 157 Ga. App. 180, 276 S.E.2d 862 (1981).

Statutory method of determining lunacy and appointing guardian comports with due

process. — In view of the express requirement as to formal examination by inspection of a person alleged to be a lunatic, the statute prescribing the method of determining an issue of lunacy, and providing for the appointment of a guardian of one adjudged to be a lunatic, does not violate the due process clause of the state Constitution or the federal Constitution, in that it fails to provide for any notice to the person alleged to be insane. *Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co.*, 180 Ga. 4, 177 S.E. 803 (1934).

Notice to and hearing of valid license holder required before revocation of license. — The holder of a valid license that has been properly issued may enjoin its revocation and the interference with the holder's lawful business thereunder in the absence of notice and a hearing. *Rose v. Grow*, 210 Ga. 664, 82 S.E.2d 222 (1954).

Revocation of liquor license involving state action requires procedural due process. — The revocation of a liquor license which involves state action that adjudicates the vital interest of the licensee to engage in a livelihood may not take place without the procedural due process required by U.S. Const., amend. 14. *Atlanta Attractions, Inc. v. Massell*, 330 F. Supp. 865 (N.D. Ga. 1971), *aff'd*, 463 F.2d 449 (5th Cir. 1972).

Liquor licenses may not be revoked during period of their effectiveness without some rudimentary due process protections. *Page v. Jackson*, 398 F. Supp. 263 (N.D. Ga. 1975).

Liquor license revocation procedures which provide for a hearing, preceded by advance notice setting forth the charge forming the basis for the revocation, are sufficient to comport adequately with due process mandates. *Page v. Jackson*, 398 F. Supp. 263 (N.D. Ga. 1975).

Notice by certified mail of driver's license revocation comports with due process. — The provision for notice by certified mail in former Code 1933, § 68B-308 (see O.C.G.A. § 40-5-58) affords due process in the administrative function of giving notice that a driver's license is revoked as a habitual violator. *Weaver v. State*, 242 Ga. 8, 247 S.E.2d 749 (1978).

Summary suspension of driver's license prior to hearing. — No prior hearing is necessary for suspension of driver's license,

under due process requirements. *Roberts v. Burson*, 322 F. Supp. 380 (N.D. Ga. 1969).

Summary suspension of driver's license prior to hearing with no provision for automatic stay pending appeal is not violative of due process clauses of the United States Constitution and the Georgia Constitution. *Williams v. Cofer*, 246 Ga. 344, 271 S.E.2d 486 (1980).

Suspension of driver's license for refusal to take breath test. — As to due process rights applicable to hearing on suspension of driver's license for refusal to submit to breath analysis test, see *Hardison v. Fayssoux*, 168 Ga. App. 398, 309 S.E.2d 397 (1983).

Notice of driver's license revocation. — A notice of a driver's license revocation must include: 1) An indication of the time, place and nature of the hearing; 2) a statement of the legal authority and jurisdiction under which the hearing is to be held; 3) a reference to the particular section of the statutes and rules involved; and 4) a statement of the matters asserted and the right of any party to subpoena witnesses and documentary evidence. *Smith v. Commissioner of Ga. Dep't of Pub. Safety*, 673 F. Supp. 446 (M.D. Ga. 1987).

A driver's license revocation hearing must: 1) protect a licensee's interest in driving on public roads and in not being unfairly labeled as having certain mental or physical disabilities; and 2) give a licensee an opportunity to confront and cross-examine evidence and witnesses. A hearing violates due process where the evidence is in the form of hearsay statements. *Smith v. Commissioner of Ga. Dep't of Pub. Safety*, 673 F. Supp. 446 (M.D. Ga. 1987).

A driver's license may be revoked for medical reasons prior to a hearing if an appropriate official of the department of public safety finds that a genuine emergency exists so that the general public is in imminent danger of being harmed if the licensee continues to drive; however, the licensee would be entitled to an immediate postrevocation hearing. *Smith v. Commissioner of Ga. Dep't of Pub. Safety*, 673 F. Supp. 446 (M.D. Ga. 1987).

The right to appeal to the state court system under O.C.G.A. § 40-5-66 from a driver's license revocation does not rectify the procedural due process flaws inherent in the revocation hearing procedures because

Due Process (Cont'd)**2. Necessity for Notice and Hearing (Cont'd)**

O.C.G.A. § 40-5-66 does not afford a prerevocation hearing. *Smith v. Commissioner of Ga. Dep't of Pub. Safety*, 673 F. Supp. 446 (M.D. Ga. 1987).

Abandoned motor vehicle provisions violative of due process. — Due process of law includes notice and hearing as a matter of right where one's property rights are involved; the Abandoned Motor Vehicles Act (see O.C.G.A. § 40-11-1 et seq.) requires notice prior to sale of abandoned motor vehicle, but makes no provision for a judicial hearing as a matter of right on issues in controversy either prior to or following the sale of the vehicle. Due process does not permit such procedure. *Gore v. Davis*, 243 Ga. 634, 256 S.E.2d 329 (1979) (decided prior to amendment by Ga. L. 1980, p. 995, § 5).

Abandoned Motor Vehicle Act violative of due process because no hearing as matter of right. — Insofar as the Abandoned Motor Vehicles Act (see O.C.G.A. § 40-11-1 et seq.) requires notice prior to a sale, but makes no provision for a judicial hearing as a matter of right on issues in controversy either prior to or following the sale of the vehicle, due process is violated. One such "issue in controversy" is the matter of security interests. *Mapp v. First Ga. Bank*, 156 Ga. App. 380, 274 S.E.2d 765 (1980) (decided prior to amendment by Ga. L. 1981, p. 469).

Statutory provision for removal of elected county officer without provision for notice or hearing unconstitutional. — A statute declaring that a county officer, elected for a fixed term, "shall be removable" from office "by the judge of the superior court of the county, on the address of two-thirds of the grand jury, for inefficiency, incapacity, general neglect of duty, or malfeasance or corruption in office," but which makes no provision for any notice to the officer, or for a hearing of the charge or charges against the officer, with opportunity to make a defense, is unconstitutional; and an order of removal based upon such a statute is a mere nullity. *Walton v. Davis*, 188 Ga. 56, 2 S.E.2d 603 (1939).

City-run utility's collection procedure denies due process where benefit terminated

without notice to recipient of benefit. — Where the effect of a city-run utility's collection procedure is to terminate the important benefit provided by the utility at cost to the customer without notice to the person who is the actual recipient of that benefit and who is the person who will suffer a serious loss with that benefit, the procedure is an unacceptable denial of due process to the customer. *Davis v. Weir*, 328 F. Supp. 317 (N.D. Ga. 1971).

Due process demands pretermination notice to actual user of public utility service. *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974).

Before public utility service cut off, consumer to be given opportunity to be heard. — In Georgia it is entirely constitutional to provide for cutting off water for failure to pay at stated times the rates therefor, provided only that a consumer cannot be deprived of an opportunity to, in good faith, present any reason why the consumer ought not to be required to pay and have the consumer's claim adjudicated, providing the consumer insures the city or other party furnishing water against loss; this applies equally to charges for sewer services. *Liner v. City of Rossville*, 213 Ga. 756, 101 S.E.2d 753 (1958).

Due process protection for students. — Students facing temporary suspension have interests qualifying for protection of due process clause; and due process requires, in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against and, if the student denies them, an explanation of the evidence the authorities have and an opportunity to present the student's side of the story. *Eley v. Morris*, 390 F. Supp. 913 (N.D. Ga. 1975).

Student cannot be suspended without hearing complying with due process, regardless of purported waiver in school board's regulations. *Roberts v. Cameron-Brown Co.*, 410 F. Supp. 988 (S.D. Ga. 1975), rev'd on other grounds, 556 F.2d 356 (5th Cir. 1977).

Extradition proceedings not violation of due process. — Summary nature of extradition proceeding does not deny petitioner due process. *Smith v. Bell*, 246 Ga. 577, 272 S.E.2d 309 (1980).

Revocation of the bond of a person charged with stalking lies within the discretion of the trial judge; however, because a

bond revocation involves the deprivation of one's liberty the decision must comport with at least minimal state and federal due process requirements. *Hood v. Carsten*, 267 Ga. 579, 481 S.E.2d 525 (1997).

Courts generally deny review when the serviceman claims due process rights were violated by arbitrary official action. *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980).

Forfeiture provision of Controlled Substances Act satisfies due process requirements. — Forfeiture provision of Art. 2 of Ch. 13 of T. 16, (Controlled Substances Act) provides for post-seizure notice and hearing and thereby satisfies requirements of due process. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Existence of state judicial procedure to set aside judgments obtained by fraud (O.C.G.A. § 9-11-60(d)) sufficient to redress the plaintiff in a federal civil rights action for the deprivation that the plaintiff alleged occurred in the plaintiff's prior divorce proceeding through the alleged conspiracy of the divorce participants to take advantage of the judge's debilitated condition to procure rulings favoring the plaintiff's spouse. There was no violation of procedural due process and because of this, the plaintiff could not state a claim for the denial of substantive due process. *Collins v. Walden*, 613 F. Supp. 1306 (N.D. Ga. 1985), *aff'd*, 784 F.2d 402 (11th Cir. 1986).

No guarantee perjured testimony not used in civil trial. — The plaintiff in a federal civil rights action did not show that the plaintiff was denied procedural due process in the hearing on the plaintiff's motion to recuse the judge in the plaintiff's prior divorce proceeding. The plaintiff had notice and a meaningful opportunity to present the plaintiff's arguments to a neutral decision maker as to the alleged conspiracy of the participants in the divorce proceeding to submit false and misleading affidavits in the recusal hearing. Procedural due process does not guarantee that perjured evidence will not be used in a civil trial. *Collins v. Walden*, 613 F. Supp. 1306 (N.D. Ga. 1985), *aff'd*, 784 F.2d 402 (11th Cir. 1986).

Notice of issues to be decided on appeal. — Where the trial court entered summary judgment on the basis of immunity against an inmate who brought a negligence action against correctional officials, but did not

rule on the issue of the work detail supervisor's negligence, the appellate court's holding that the supervisor was negligent, without having provided notice to the supervisor that it might consider the merits of the supervisor's alleged negligence, was tantamount to granting summary judgment on the negligence issue without notice and constituted a denial of due process. *Coweta County v. Simmons*, 269 Ga. 694, 507 S.E.2d 440 (1998).

Grant of mistrial not constitutional deprivation. — While a party suffered inconvenience and delay in resolving the party's claims, the trial court's grant of a mistrial did not deprive that party of the right to relitigate the matter, although the party chose to settle the matter instead. *LaBarre v. Payne*, 174 Ga. App. 32, 329 S.E.2d 533 (1985).

3. Statutory Notice of Proscribed Conduct

Statute must be definite and certain in its provisions to be valid, and when it is so vague and indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law. *City of Atlanta v. Southern Ry.*, 213 Ga. 736, 101 S.E.2d 707 (1958); *DeKalb Real Estate Bd., Inc. v. Chairman & Bd. of Comm'rs of Rds. & Revenues*, 372 F. Supp. 748 (N.D. Ga. 1973).

The void-for-vagueness doctrine as interpreted by the United States Supreme Court requires that a penal state statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Welch v. State*, 251 Ga. 197, 304 S.E.2d 391 (1983).

Doctrine of vagueness is anchored in due process clauses of fifth and fourteenth amendments. *High Oil' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), *rev'd* on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Constitution does not require impossible standards of statutory clarity, and does not require more than that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. If a statute is so designed that persons of ordinary intelli-

Due Process (Cont'd)**3. Statutory Notice of Proscribed Conduct (Cont'd)**

gence who would be law abiding can tell what conduct must be to conform to its requirements and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness. *Watts v. State*, 224 Ga. 596, 163 S.E.2d 695 (1968).

Certain amount of vagueness must be tolerated in law-making due to inherent imprecision in language; all that due process requires is that the law give sufficient warning to enable a person to conform his or her conduct in accordance with the law and to guard against discriminatory enforcement. *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Statutes not involving freedoms of U.S. Const., amend. 1 examined in light of facts of case. — Vagueness challenges to statutes which do not involve freedoms of U.S. Const., amend. 1 must be examined in light of the facts of the case at hand. *Hardison v. Shepard*, 246 Ga. 196, 269 S.E.2d 458 (1980); *State v. Hudson*, 247 Ga. 36, 273 S.E.2d 616 (1981).

Statute must convey sufficiently definite warning as to proscribed conduct when measured by common understanding and practices. *Jones v. State*, 219 Ga. 848, 136 S.E.2d 358, cert. denied, 379 U.S. 935, 85 S. Ct. 330, 13 L. Ed. 2d 345 (1964); *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975); *Constantino v. State*, 243 Ga. 595, 255 S.E.2d 710 (1979); *Johnson v. State*, 246 Ga. 126, 269 S.E.2d 18 (1980).

All the due process clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden. *In re Suggs*, 249 Ga. 365, 291 S.E.2d 233 (1982).

Language of criminal defamation statute requiring a communication which "tends to provoke a breach of the peace" is vague and overbroad under U.S. Const., amends. 1 and 14. *Williamson v. State*, 249 Ga. 851, 295 S.E.2d 305 (1982).

Absent some qualification on "bias or prejudice," O.C.G.A. § 17-10-17 is left so vague that persons of common intelligence

must necessarily guess at its meaning and differ as to its application and, thus, O.C.G.A. § 17-10-17 is too vague to justify the imposition of enhanced criminal punishment for its violation; also, O.C.G.A. § 17-10-17 may not be upheld because it impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications and therefore, the sentence enhancement that defendants selected their victims because of racial bias and prejudice violated defendants' due process rights under U.S. Const., amends. 1, 5, 8, and 14 and the corresponding state constitutional provisions. *Botts v. State*, 278 Ga. 538, 604 S.E.2d 512 (2004).

Defendant's conviction for misdemeanor reckless conduct under O.C.G.A. § 16-5-60(b) was affirmed as the statute was not unconstitutionally vague under the fourteenth amendment since it gave a person of ordinary intelligence fair notice that it prohibited a person from leaving one's children, one an infant and the other a toddler, unsupervised on the upper floor of a two-story home that was not equipped with any device to keep the children from falling down a nearby flight of stairs. *Baker v. State*, 280 Ga. 822, 633 S.E.2d 541 (2006).

Purpose of striking down statutes which are "vague" is to prevent the arbitrary enforcement of laws that fail to give officials or the public any notice of what is prohibited. *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

Laws should be clear to persons of ordinary intelligence. — Law must give person of ordinary intelligence reasonable opportunity to know what is prohibited, so that the person may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Ridley v. State*, 232 Ga. 646, 208 S.E.2d 466 (1974).

Criterion for judging statute is fair notice, not precise definition. — Precise definition is not the proper criterion for adjudging whether a statute is so vague and indefinite as to be unenforceable. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. *Southern Ry. v. Brooks*, 112 Ga. App. 324, 145 S.E.2d 76 (1965).

New statute punishing novel offense susceptible to challenge. — New statute punish-

ing novel offense that has no established bounds is particularly susceptible to void for vagueness challenge. *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Ordinary civil statute withstanding vagueness challenge. — Ordinary civil statute that can reasonably be interpreted and limited by judicial construction will withstand vagueness challenge. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), aff'd sub nom. *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981), 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

Ordinary civil statute is void for vagueness only where it exacts obedience to a rule that is so vague and indefinite as really to be no rule or standard at all. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), aff'd sub nom. *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir. 1981), 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

Where uncertainty in statute amounts to denial of due process. — The uncertainty in a statute which will amount to a denial of due process of law is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved. *Mixon v. State*, 226 Ga. 869, 178 S.E.2d 189 (1970).

A statute, to violate due process, must be so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *In re Suggs*, 249 Ga. 365, 291 S.E.2d 233 (1982).

Implying by court of missing mens rea element in statute. — Court may imply missing mens rea element in statute to give statute constitutional viability. *High Ol' Times, Inc. v. Busbee*, 515 F. Supp. 176 (N.D. Ga. 1980), rev'd on other grounds, 673 F.2d 1225 (11th Cir. 1982).

Application not as strict with respect to civil statutes. — The application of due process with respect to vagueness and uncertainty is not applied as strictly to civil statutes as to those penal in nature. The rule is that a statute may be too vague and uncertain to

be capable of enforcement as a penal statute and yet may be sufficiently certain to set forth a rule of civil conduct. *Willis v. Jackson*, 148 Ga. App. 432, 251 S.E.2d 341 (1978).

Sufficient definiteness of criminal statute. — A criminal statute that defines a crime with sufficient definiteness to enable one familiar with the acts made criminal to determine when the statute is being violated is not void as offending U.S. Const., amend. 14 or Ga. Const. 1983, Art. I, Sec. I, Para. I. *Farrar v. State*, 187 Ga. 401, 200 S.E. 803 (1939); *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975).

A criminal statute is sufficiently definite if its terms furnish a test based on normal criteria that persons of common intelligence who come in contact with the statute may use with reasonable safety in determining its command. *Stull v. State*, 230 Ga. 99, 196 S.E.2d 7 (1973); *Wilson v. State*, 245 Ga. 49, 262 S.E.2d 810 (1980).

Fundamental requirement of criminal statute is to give "fair warning" of what conduct is criminal. *King v. State*, 246 Ga. 386, 271 S.E.2d 630 (1980).

Criminal statute must make improbable misconstruing of statutory meaning by ordinary persons of equal intelligence. — A criminal statute must not be so vague, uncertain or ambiguous as to make it improbable that ordinary people of equal intelligence could misconstrue its meaning. *King v. State*, 246 Ga. 386, 271 S.E.2d 630 (1980).

Criminal statutes must give notice of prohibited offense. — Conviction under criminal enactment not giving adequate notice that conduct charged is prohibited is violative of due process. *Wright v. Georgia*, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963).

Criminal statute must be written in such definite terms to give notice of prohibited offense to those who would be prosecuted under it, or it is unconstitutional. *United States ex rel. Huguley v. Martin*, 325 F. Supp. 489 (N.D. Ga. 1971).

Willful violators of constitutional requirements which have been defined are in no position to say that they had no adequate advance notice that they would be visited with punishment. *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).

Extent of unconstitutional vagueness of generally worded statute. — A generally

Due Process (Cont'd)**3. Statutory Notice of Proscribed Conduct (Cont'd)**

worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute. *Wright v. Georgia*, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963).

Statute does not run afoul of ex post facto clause unless it makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action, or aggravates a crime, or makes it greater than it was when committed. *Federal Election Comm'n v. Lance*, 617 F.2d 365 (5th Cir. 1980), appeal dismissed, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981).

Statutory crime of reckless conduct sufficiently definite. — Section 16-5-60 is sufficiently definite to give a person of ordinary intelligence fair notice that such conduct is forbidden by the statute. *Horowitz v. State*, 243 Ga. 441, 254 S.E.2d 828 (1979).

Statutes providing for jury recommendation of mercy in capital cases not vague and uncertain. — Statutes authorizing capital punishment and providing that juries in capital cases may recommend mercy, which has the effect of reducing punishment to life imprisonment in the discretion of the jury, are not vague and uncertain although they fix no standards for recommending mercy. *Miller v. State*, 224 Ga. 627, 163 S.E.2d 730 (1968).

Statute allowing death penalty where aggravating circumstance not unconstitutionally vague. — The aggravating circumstance of former Code 1933, § 27-2534.1 (see O.C.G.A. § 17-10-30) that the offense of murder, rape, armed robbery, or kidnapping was outrageously and wantonly vile, horrible, and inhuman in that it involved torture and depravity of the mind, or an aggravated battery to the victim is not unconstitutionally vague; and therefore, the death penalty may be imposed if the factfinder finds it to have been present, especially since the Supreme Court of Georgia will only approve such a sentence for those cases that lie at its core. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1

(1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977).

Statutory prohibition of harassing phone calls comports with due process. — Former Code 1933, §§ 26-2610 (see O.C.G.A. § 16-11-39.1) and 104-9901 (see O.C.G.A. § 46-5-21), which prohibit telephone calls for the purpose of harassing, are clear and can be readily understood by people of ordinary intelligence seeking to avoid their violation, and therefore these sections are not unconstitutionally vague or broad and do not violate due process. *Constantino v. State*, 243 Ga. 595, 255 S.E.2d 710, cert. denied, 444 U.S. 940, 100 S. Ct. 293, 62 L. Ed. 2d 306 (1979).

Notice in statute making driving while intoxicated a crime adequate. — Notice given in former Code 1933, § 68A-902 (see O.C.G.A. § 40-6-391) that driving under influence of alcohol is crime is adequate. *Head v. State*, 246 Ga. 360, 271 S.E.2d 452 (1980).

Statute making vote buying or selling felony not void for vagueness. — Former Code 1933, § 34-1933 (see O.C.G.A. § 21-2-570), providing that any person who buys or sells or offers to buy or sell, or knowingly participates in the buying or selling of votes at any primary or election shall be guilty of a felony, is not void for vagueness or overbreadth. *King v. State*, 244 Ga. 536, 261 S.E.2d 333 (1979).

Statutory language of potential liability for employment security contributions and taxes meets standard of due process. — The language of former Code 1933, § 54-650.2 (see O.C.G.A. § 34-8-150) is sufficient to place the particular officer or employee of an employer who has the responsibility for filing the returns and paying the taxes for his employer on notice of his potential liability, and thus meets the standard of due process. *Brumby v. Brooks*, 234 Ga. 376, 216 S.E.2d 288 (1975), later appeal, 140 Ga. App. 210, 230 S.E.2d 359 (1976).

Bribery statute (O.C.G.A. § 16-10-2) is not unconstitutionally vague. *King v. State*, 246 Ga. 386, 271 S.E.2d 630 (1980).

Teacher's oath unconstitutional. — Language of an oath to refrain from directly or indirectly subscribing to or teaching any theory of government or economics or social relations which is inconsistent with the fundamental principles of patriotism and high ideals of Americanism provides no

ascertainable standard of conduct. It is vague and uncertain in that there is no definition of fundamental principles or patriotism or high ideas of Americanism and one would necessarily teach at one's peril in the areas of government, economics or social relations. This language is thus unconstitutional and void under the U.S. Const., amends. 1 and 14. It constitutes a denial of due process under U.S. Const., amend. 14 in light of the penal provision, and a prohibited inhibition on the U.S. Const., amend. 1, right to freedom of speech which is protected from state invasion by U.S. Const., amend. 14. *Georgia Conference of Am. Ass'n of Univ. Professors v. Board of Regents*, 246 F. Supp. 553 (N.D. Ga. 1965).

Standard for lawyer not unconstitutionally vague or overbroad. — The standard providing that a lawyer shall not without just cause to the detriment of the lawyer's client willfully abandon or willfully disregard a legal matter entrusted to the lawyer, or so continuously neglect a legal matter as to be tantamount or equivalent to willfulness is not unconstitutionally vague or overbroad. In *re Sliz*, 246 Ga. 797, 273 S.E.2d 177 (1980).

Words "place of amusement" sufficiently definite for basis of criminal prosecution. — The words "place of amusement" in former act forbidding establishment of certain businesses outside municipal limits without obtaining a license from municipal authorities were not so vague and indefinite that they could not be made the basis of a criminal prosecution. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Adult entertainment ordinance of sufficient notice. — Adult entertainment ordinance restricting establishments offering nude dancing and alcohol, while excluding certain mainstream performance houses with less than 20% of gross annual income from the sale of alcohol, was not void for vagueness as it was sufficiently specific in its terms to permit defendants to conduct themselves so as to avoid that which was forbidden. *S.J.T., Inc. v. Richmond County*, 263 Ga. 267, 430 S.E.2d 726 (1993).

Term "employing unit" within employment security law certain enough for purposes of due process. — Ga. L. 1937, pp. 806, 841 (see O.C.G.A. § 34-8-39) (employing unit) is not so vague and indefinite as not to be enforceable consistently with due

process, in that it provides no basis for imposing the tax or contribution other than the unbridled discretion of the administrator. *Jeffreys-McElrath Mfg. Co. v. Huie*, 196 Ga. 710, 27 S.E.2d 385 (1943).

Terms "nuisance" and "offensive." — Term "nuisance" itself had a definite and determined meaning in the law, and was not indefinite, vague, or uncertain; furthermore, the term "offensive" did not render a nuisance standard unconstitutionally vague; thus, *Glynn County, Ga., Ordinance § 2-16-237* was not unconstitutionally vague. *Stanfield v. Glynn County*, 280 Ga. 785, 631 S.E.2d 374 (2006).

Statute resulting in contractor possibly contributing twice upon each employee's wages constitutional. — Ga. L. 1937, pp. 806, 841 (see O.C.G.A. § 34-8-39) is not lacking in due process, because its enforcement could result in compelling the contractor, upon whom the burden ultimately falls, to contribute twice upon the wages of each employee, if perchance he should devote a portion of a day to the performance of one contract, and the remainder to the performance of another. *Jeffreys-McElrath Mfg. Co. v. Huie*, 196 Ga. 710, 27 S.E.2d 385 (1943).

Statute constitutional even though employing unit without control of amount of wages and without first-hand knowledge. — The fact that the employing unit has no control over the amount of the wages and may have no first-hand knowledge of the amount does not render the statute invalid as violating the principle of due process, as to such party. *Jeffreys-McElrath Mfg. Co. v. Huie*, 196 Ga. 710, 27 S.E.2d 385 (1943).

Ordinance revoking liquor license for any state law violation overbroad. — City ordinance that liquor license can be revoked for violation of any state law is patently overbroad and is unconstitutional. *Atlanta Attractions, Inc. v. Massell*, 330 F. Supp. 865 (N.D. Ga. 1971), *aff'd*, 463 F.2d 449 (5th Cir. 1972).

Ordinance forbidding disorderly conduct too vague and indefinite. — An ordinance forbidding "anyone to engage in or do anything that is disorderly, either by words or unbecomingly conduct at any place on any street, alley, park, or any place where such disorderly conduct may be seen or heard by any person in any said city," is too

Due Process (Cont'd)**3. Statutory Notice of Proscribed Conduct (Cont'd)**

vague and indefinite to be the basis for the infliction of corporal punishment, such as service on a city chain gang, or the imposition of a fine as an alternative. *Griffin v. Smith*, 184 Ga. 871, 193 S.E. 777 (1937).

Municipal ordinance regarding licensing plumbers discriminatory and too vague where discretionary with mayor and council.

— Municipal ordinance providing for the licensing of plumbers, which left the grant or refusal of a license entirely a matter of discretion with the mayor and general council of the city, was too general, vague, and indefinite to be enforced, and clearly discriminatory, because it was not based upon any qualification of the alleged plumber, but was dependent entirely upon the willingness or unwillingness of the mayor and general council to enforce, or not to enforce, other portions of the ordinance which required an examination as a prerequisite to the grant of a license. *DeWell v. Quarles*, 180 Ga. 864, 181 S.E. 159 (1935).

Ordinances adopted pursuant to purported charter amendment void for vagueness also unenforceable. — Ga. L. 1951, p. 3074, which purported to amend city's charter, was too vague, indefinite and uncertain in meaning to be enforced by the courts and was therefore void; and being so, the paving and curbing ordinances which the city adopted pursuant thereto were unsupported by charter authority and were therefore unenforceable. *City of Atlanta v. Southern Ry.*, 213 Ga. 736, 101 S.E.2d 707 (1958).

Legislation may require judiciary to provide definitions. — One of the traditional functions of courts is to interpret and construe legislative enactments. There is no due process prohibition on the enactment of legislation which requires definitions to be provided by the judiciary. *Bell v. Barrett*, 241 Ga. 103, 243 S.E.2d 40 (1978).

O.C.G.A. § 15-11-2(8), which provides a definition of "deprived child" for juvenile proceedings, provides adequate standards by which a person of common intelligence can regulate one's conduct and responsibilities in order to conform to it. In *re Suggs*, 249 Ga. 365, 291 S.E.2d 233 (1982).

Statute proscribing inducement to parents to part with children. — The terms of

O.C.G.A. § 19-8-24 making it unlawful to directly or indirectly hold out an inducement to parents to part with children were sufficiently clear to apprise the defendant that offering an automobile to a parent in exchange for physical custody or control of the child was proscribed. *Douglas v. State*, 263 Ga. 748, 438 S.E.2d 361 (1994).

Prohibited child care not adequately described. — Because the reckless conduct statute failed to provide the defendant with fair notice that the defendant could be held criminally responsible for leaving children in the care of an older child, the statute failed to clearly define its prohibitions, rendering it unconstitutionally vague as applied. *Hall v. State*, 268 Ga. 89, 485 S.E.2d 755 (1997).

Public drunkenness statute constitutional. — The public drunkenness statute, as presently drafted and construed by the courts of this state, contains clear standards for determining whether the conduct of an accused is violative of its terms. It describes with sufficient particularity the acts prohibited, and neither on its face nor in its application does it furnish police a tool for arbitrary encroachment upon constitutionally protected conduct. *Welch v. State*, 251 Ga. 197, 304 S.E.2d 391 (1983).

O.C.G.A. § 27-3-9, prohibiting the baiting of hunting land and prohibiting hunting "around or near" baited land, gives sufficient notice of the acts it prohibits so as to comply with the requirements of due process. *Price v. State*, 253 Ga. 250, 319 S.E.2d 849 (1984).

O.C.G.A. § 16-13-30(j)(1), prohibiting possession of marijuana with intent to distribute, is not vague and uncertain, and does not violate due process. *Walker v. State*, 261 Ga. 739, 410 S.E.2d 422 (1991).

Statute inadequately defining "exotic fish." — In deciding to prosecute a hatchery owner for violating the Fish and Game Code, based on a definition of "exotic fish" different than its generally accepted definition and not then codified or set forth in any regulation, Department of Natural Resource officials violated due process, acted outside their discretionary authority, and were not entitled to qualified immunity. *Blue Ridge Mt. Fisheries, Inc. v. Department of Natural Resources*, 217 Ga. App. 89, 456 S.E.2d 651 (1995).

4. Business

Granting, denial, or revocation of business licenses. — Granting, denial, or revocation of business licenses involves rights subject to protection of due process clause. *Housworth v. Glisson*, 485 F. Supp. 29 (N.D. Ga. 1978).

Imposition of fines and penalties on members of an association of taxicab owners in the form of suspension or revocation of their certificates of public necessity and convenience for infractions of taxicab regulations by their drivers did not violate substantive due process because the civil sanctions were a valid exercise of the police power; the city was authorized to find that in the legitimate interest of promoting and protecting the public safety, subjecting the members to civil sanctions for infractions committed by their drivers was a reasonably necessary and less onerous alternative than the imposition of vicarious criminal liability. *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 281 Ga. 342, 638 S.E.2d 307 (2006).

Governing body issuing licenses required to establish ascertainable standards for license application. — Constitutional standards of due process do require that a governing body issuing licenses establish ascertainable standards by which an applicant can intelligently seek to qualify. *Levendis v. Cobb County*, 242 Ga. 592, 250 S.E.2d 460 (1978).

Legislative power to regulate professions. — Portion of act regulating the practice of dentistry which defines the making or repairing of appliances usable on teeth or as teeth, unless ordered by a licensed dentist, as part of the practice of dentistry, did not violate this provision. *Holcomb v. Johnston*, 213 Ga. 249, 98 S.E.2d 561 (1957).

Contract bids. — Bidding insurer's summary judgment motion was properly granted as to its substantive due process claim against a county as the county's decision to throw out the entire bidding process was rational in light of the taint caused by a consultant's lack of an insurance counselor's license under O.C.G.A. §§ 33-23-1.1 and 33-23-4. *Benefit Support, Inc. v. Hall County*, 281 Ga. App. 825, 637 S.E.2d 763 (2006), cert. denied, 2007 Ga. LEXIS 214 (Ga. 2007).

Right to practice law is privilege or franchise. — A lawyer does not have a vested interest in the lawyer's status as a member of

the State Bar of Georgia. The right to practice law is not a natural or constitutional right, nor an absolute right or a right de jure, but is a privilege or franchise. *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed. 2d 71 (1970).

It has never been the law of this state that a lawyer holds an irrevocable license to practice law. The State Bar Act does not deprive an attorney of the lawyer's freedom of contract, conscience, speech, and liberty, or deprive the lawyer of the lawyer's property without due process of law. *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E.2d 732 (1969), cert. denied, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed. 2d 71 (1970).

State has legitimate and substantial interest in excluding from practice of law those not meeting standards of minimal competence and the Georgia examination, as presently constituted, tests skills and knowledge which have a logical, apparent relationship to those necessary to the practice of law. *Davidson v. Georgia*, 622 F.2d 895 (5th Cir. 1980).

Qualifications for admission to bar must have rational connection with applicant's fitness to practice law. — A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Webster v. Wofford*, 321 F. Supp. 1259 (N.D. Ga. 1970).

Residency requirement prior to lawyer's taking bar examination valid to extent necessary to protect state interests. — A reasonable period of residency prior to taking the bar examination for the purpose of permitting personal interviews and investigation with respect to an applicant's background, moral character and qualifications, since the state clearly has a legitimate interest in this area, may be imposed, but only to the extent necessary to protect legitimate state interests. *Webster v. Wofford*, 321 F. Supp. 1259 (N.D. Ga. 1970).

Twelve-month residency requirement unconstitutional. — Ga. L. 1963, p. 458, § 1, which requires an applicant for admission to the practice of law to be a bona fide resident of the State of Georgia for 12 consecutive months immediately preceding the date of

Due Process (Cont'd)**4. Business (Cont'd)**

such admission, is unconstitutional as violating the due process and equal protection clauses of U.S. Const., amend. 14. *Webster v. Wofford*, 321 F. Supp. 1259 (N.D. Ga. 1970).

City government has wide discretion and broad powers in control of liquor traffic, which are subject only to minimal demands of due process and equal protection. *Barnes v. Merritt*, 428 F.2d 284 (5th Cir. 1970).

Arbitrary denial of liquor license violates due process and equal protection. — Where county government delegated authority to citizens residing within 300 feet of store to deny liquor license to store owner, the denial of a license on such arbitrary grounds constitutes a violation of equal protection and due process of law. *Bozik v. Cobb County*, 240 Ga. 537, 242 S.E.2d 48 (1978).

Arbitrary or unreasonable licensing procedures in liquor sale regulation unconstitutional. — United States Const., amend. 21 confers upon the states broad regulatory power over the liquor traffic within their territories; however, even in the regulation of the sales of liquor, arbitrary or unreasonable licensing procedures are in violation of the due process and equal protection clauses of U.S. Const., amend. 14. *Parks v. Allen*, 409 F.2d 210 (5th Cir. 1969), later appeal, 426 F.2d 610 (5th Cir. 1970).

Regulation of alcoholic beverages where nudity may exist. — The wording of the ballot on the constitutional amendment, Ga. Const. 1983, Art. III, Sec. VI, Para. VII, giving the state authority to regulate alcoholic beverages and to delegate authority to counties and municipalities to regulate the exhibition of nudity in connection with the sale or consumption of alcoholic beverages, did not violate due process. *Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997), cert. denied, 522 U.S. 818, 118 S. Ct. 70, 139 L. Ed. 2d 31 (1997).

Standards for location of liquor stores to be grounded on ordinance. — A city may not establish standards exclusively limiting the location of liquor stores to certain areas by mere custom or practice or by official declarations not grounded upon an ordinance duly adopted and accordingly binding upon the city government as well as upon the general public. *Barnes v. Merritt*, 428 F.2d 284 (5th Cir. 1970).

County ordinance using voting districts and property lines to determine the number and location of licensed stores was reasonably related to the county's goal of regulating the retail sale of beer and wine and did not violate due process. *Bradshaw v. Dayton*, 270 Ga. 884, 514 S.E.2d 831 (1999).

Legislature empowered to regulate personal contracts in insurance industry. — The business of insurance is so far affected with a public interest as to justify legislative regulation. It is within the power of the legislature to regulate the personal contracts involved in such business. *Harrison v. Hartford Steam Boiler Inspection & Ins. Co.*, 183 Ga. 1, 187 S.E. 648 (1936), rev'd on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

Empowering county authorities to control and regulate establishment of businesses not violative of due process. — Ga. L. 1937, p. 624 providing that no person should establish a public dance hall, boxing or wrestling arena, or amusement place, tourist camps, and barbecue stands, for money or profit, outside the limits of incorporated towns or cities of a certain minimum population without first obtaining the permission of the commissioners or other authority in charge of such counties, and conferring authority on them to grant or refuse such permission for such time or under such regulations as they might deem proper for the public good, to levy a license or occupational tax on the same and to provide punishment for a violation of the act was not violative of the due process and equal protection clauses of the state and federal Constitutions. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Restricting hospital staff's privileges. — Hospital Authority may restrict staff member's privileges by reasonable and nondiscriminatory rules and regulations. *Yeargin v. Hamilton Mem. Hosp.*, 229 Ga. 870, 195 S.E.2d 8 (1972).

Power to make decisions affecting physician's hospital privileges may be vested in peers in absence of showing of prejudice, and the existence of personal differences does not preclude an individual's participation. *Robbins v. Ong*, 452 F. Supp. 110 (S.D. Ga. 1978).

Ordinance prohibiting pinball machine business not violative of due process. — Ordinance prohibiting the owning, main-

taining or operating of pinball machines and the like, authorized under the general welfare clause of the charter of the municipality enacted in pursuance of the police power of the state, is not violative of the due process of law clauses of the federal and state constitutions, for any reason assigned, or void on the ground of unreasonableness, merely because the effect of the ordinance is to destroy and confiscate the business and property of the petitioner, (distributing and leasing novelty machines used for pleasure and skill only) whereas other articles of pleasure and skill are not included in the ordinance. *Woodward v. City of Lithonia*, 191 Ga. 234, 11 S.E.2d 476 (1940).

Act prohibiting operation of public dance halls without license and permission to operate is not unconstitutional as denying "due process of law" or "equal protection of laws." *Poss v. Norris*, 197 Ga. 513, 29 S.E.2d 705 (1944).

Prohibition on scalping tickets comports with due process. — By prohibiting the practice of "scalping" tickets, former Code 1933, § 96-602 (see former O.C.G.A. § 10-1-310) was reasonably related to a proper legislative objective and consequently did not violate the due process clause of either the state or federal Constitution. Former Code 1933, § 96-602 (see former O.C.G.A. § 10-1-310) put all sports fans on an equal footing in the race to the ticket window. *State v. Major*, 243 Ga. 255, 253 S.E.2d 724 (1979).

Arbitrary declaration that home solicitors constitute nuisance and are subject to punishment violates due process. — To arbitrarily declare, without qualification, that every solicitor who goes to a private home to try to conduct an otherwise perfectly legal business is a nuisance and subject to fine or imprisonment is an unreasonable interference with a solicitor's normal legal rights, and is without due process of law. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Ordinance can vary utility service rates according to territory. — An ordinance, which provides that rates for water service shall be higher in territory outside the corporate limits, is not unconstitutional and void as denying "due process" and "equal protection" under the federal and state Constitutions. *Barr v. City Council*, 206 Ga. 753, 58 S.E.2d 823 (1950).

Court interference with valid order of Public Service Commission. — Courts should not interfere with valid order of Public Service Commission unless clearly shown to be unreasonable, arbitrary, or confiscatory. If the evidence clearly showed that the requirement of the commission was unreasonable, capricious, or confiscatory, the court would be bound to set such finding aside as unlawful in the taking of property without due process of law. Otherwise the court has no such authority. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

Protection from county's use of power to withhold services to coerce payment from those not liable. — The due process and equal protection clauses of U.S. Const., amend. 14 protect both tenants and property owners from a county's use of its power to withhold water and sewer services to coerce applicants for such services to pay water bills for which they are not liable. *Union Circulation Co. v. Russell*, 463 F. Supp. 884 (N.D. Ga. 1978).

County can refuse services to owner of property subject to liens. — If there are valid liens on a property for unpaid water bills, then it is not unconstitutional for a county to refuse services to the owner of any property subject to such liens. *Union Circulation Co. v. Russell*, 463 F. Supp. 884 (N.D. Ga. 1978).

Failure of Act granting power to license to provide for review does not make it unconstitutional. — Even though an Act granting power to license occupations may not make provision for an appeal, this will not prevent a citizen who has been wronged by an arbitrary or capricious exercise of the power from seeking aid from the courts to protect him from oppression, and the failure of the Act to provide for a review does not make it unconstitutional. *Jenkins v. Manry*, 216 Ga. 538, 118 S.E.2d 91 (1961).

State may impose license fee upon occupation without abridging constitutional rights and privileges of others carrying on business in the state, or depriving them of the equal protection of the laws, or taking their property without due process of law. *Camp v. State*, 171 Ga. 25, 154 S.E. 436 (1930).

Liability for city license fees where business income almost entirely from intrastate business. — Where radio station's income is

Due Process (Cont'd)**4. Business** (Cont'd)

derived almost entirely from intrastate business, the claim that some of its messages may go beyond state lines would not relieve it from liability from city license fees under the interstate commerce clause. *City of Atlanta v. Oglethorpe Univ.*, 178 Ga. 379, 173 S.E. 110 (1934).

Ordinance requiring laundry license applicant to give bond not unreasonable. — An ordinance which requires the applicant for a laundry license to give a bond where articles are taken from a city for the purpose of laundering is not arbitrary and unreasonable, and is not in conflict with the due process clause of the state Constitution or U.S. Const., amend. 14. *City of Newman v. Atlanta Laundries, Inc.*, 174 Ga. 99, 162 S.E. 497, appeal dismissed, 286 U.S. 526, 52 S.Ct. 495, 76 L. Ed. 1269 (1932).

Due process clause not used to strike down regulatory state laws because unwise or not of particular view. — The day is gone when this court uses the due process clause of U.S. Const., amend. 14 to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. *Wall v. American Optometric Ass'n*, 379 F. Supp. 175 (N.D. Ga.), aff'd, 419 U.S. 888, 95 S. Ct. 166, 42 L. Ed. 2d 134 (1974).

Ex parte revocation of license to equip and operate an abattoir was void, and the owner did not need to pay any attention to it unless the owner's continued operation of the business would subject the owner to penal action, in which case the owner would have remedy by injunction to keep the defendant from interfering with the owner's proper use of the property. *Davis v. Johnson*, 92 Ga. App. 858, 90 S.E.2d 426 (1955).

Hearing and determination required before revocation of business license for exhibiting obscene film. — Just as there can be no massive seizure of allegedly obscene materials for destruction without a prior adversary type hearing and determination of obscenity, there can be no valid revocation of a business license for having exhibited an obscene film without such prior hearing and determination. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd,

482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Operation of service at reduced price and for educational institution not taking without due process. — Operation of the laundry and dry-cleaning service at reduced prices in an educational institution for the benefit of students and persons connected with the school, by the Board of Regents of the University System, did not constitute the taking, by the defendants for the state, of private property of the petitioners without due process of law, in violation of Ga. Const. 1983, Art. I, Sec. I, Para. I, and U.S. Const., amend. 5. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948).

Laws impairing vested rights violate due process but first in field gets no monopoly protection. — The due process clauses of the state and federal Constitutions prohibit the enactment of a law which would impair vested rights, but do not inure to a person, first in the field, a monopoly in any line of business. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948).

Remedy of mandamus against city officials to require enforcement of ordinance. — If the officials of a city are refusing to enforce the provisions of a valid ordinance by selectively permitting some businesses to pay a lesser business license than required by such an ordinance, the proper procedure for the plaintiffs to follow would be to seek mandamus against such officials to require collection in accordance with the terms of such ordinance and not an injunction to prevent the collection of any taxes from them on the theory that equal protection and due process were denied. *Atlanta Motor Sales, Inc. v. City of Brunswick*, 231 Ga. 374, 202 S.E.2d 68 (1973).

Consent order that imposed fines for challenge. — Where defendant signed a consent order whereby it agreed to remedy the presence of benzene in the ground near defendant's underground storage tanks and eliminate the contamination, where during this time span, defendant was represented by counsel and employed its own environmental engineer to investigate the source of the contamination, and other factors as well showed defendant's consent to the order, defendant's due process rights were not violated despite defendant's argument that it

lacked the ability to challenge the validity of the consent order without the threat of enormous monetary fines. *United States v. Ownbey Enters., Inc.*, 789 F. Supp. 1145 (N.D. Ga. 1992).

5. Taking Property for Public Use

Sovereign's taking citizen's property must be for public purpose with just and adequate compensation. — The right of the sovereign in the property of the citizen is hedged by two fundamental safeguards — the taking must be for a public purpose, and it must be attended by just and adequate compensation. This includes every species of property in which the individual has a right of ownership, whether real or personal, corporeal or incorporeal. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Owner not entitled to hearing on necessity or expediency of taking. — The necessity or expediency of taking property for public use is a legislative question upon which the owner is not entitled to a hearing under the due process clause of U.S. Const., amend. 14 and the same clause of the Constitution of this state. *Miles v. Brown*, 223 Ga. 557, 156 S.E.2d 898 (1967).

No authority to take private property without notice to owner of hearing before condemnation. — Neither the General Assembly of this state, nor any municipality thereof, has authority to suspend the "due process" clauses of the federal and state Constitutions and to provide for the destruction of private property without notice to the owner of the time and place of hearing, prior to any judgment of condemnation. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

Only government action inhibited. — The fourteenth amendment proscription against deprivations of property without due process of law reaches only government action and does not inhibit the conduct of purely private persons in their ordinary activities. *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919 (11th Cir.), cert. denied, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

Taking without due process where state or municipality takes without compensation unless under police or sovereign power. — For the state or a municipal corporation to take

private property without compensation, except where it does so under a valid exercise of the police or other sovereign power, constitutes a deprivation of property without due process of law within the meaning of U.S. Const., amend. 14. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Claims concerning reasonable certainty of continuing nuisance amounting to unlawful taking of property to be heard. — Where it is alleged, inter alia, that the construction, maintenance and operation of an airport in a residential area and the flights of airplanes in connection therewith will constitute a continuing nuisance, will cause the residents irreparable and constantly recurring damages, and will amount to an unlawful taking of their properties without due process of law in violation of the state and federal Constitutions, a motion by the defendants to dismiss the complaint on the basis that it fails to state a claim and that it is anticipatory of future conditions is properly overruled by the trial court. *Camp v. Warrington*, 227 Ga. 674, 182 S.E.2d 419 (1971).

City commissioners authorized to abolish city roadways provided city liable for damages. — Neither charter amendment providing that city commissioners should have authority in their discretion to close up and abolish any city street, road or alley, or part thereof provided that city should be liable for damages to any property right of any person occasioned by the exercise of such powers, nor ordinance adopted pursuant thereto, was violative of the due process clauses of the state and federal Constitutions. *Jones v. City of Decatur*, 189 Ga. 732, 7 S.E.2d 730 (1940).

County decision to acquire land with no effect on abutting landowners' rights. — A mere decision by the governing body of a county to acquire land for an authorized public purpose, without more, in no way affects the constitutionally protected property rights of abutting landowners, and does not trigger due process considerations of personal notice because there was no deprivation of property in any cognizable sense. *Lindsey v. Guhl*, 237 Ga. 567, 229 S.E.2d 354 (1976).

When other land uses cannot be considered in condemnation case. — It is error in a condemnation case to charge that the jury might, in estimating the value of the land

Due Process (Cont'd)**5. Taking Property for Public Use (Cont'd)**

taken, consider other uses to which the land might be devoted when there is no evidence authorizing the jury to find that it was suitable for any use other than that to which it was devoted at the time of the taking or from which a reasonable inference of suitability for other uses might be drawn. *State Hwy. Dep't v. Howard*, 110 Ga. App. 373, 138 S.E.2d 597 (1964).

Contention that due process violated does not make constitutional construction case. — The contention in a damage case that the alleged taking of private property for public purposes is in violation of the due process clause of the state and federal Constitutions does not make it one that involves the construction of the state and federal Constitutions. *City of Atlanta v. Donald*, 220 Ga. 98, 137 S.E.2d 294 (1964).

Slum clearance project not taking of private property in violation of due process. — The slum clearance project inaugurated by virtue of the housing authorities law (see O.C.G.A. Art. 1, Ch. 3, T. 8) and the housing cooperative law (see O.C.G.A. Art. 2, Ch. 3, T. 8), does not involve the taking of private property in violation of the due process clause of the state Constitution, or of U.S. Const., amend. 14. *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938).

Propriety of inverse condemnation suit to challenge taking. — See *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 849 F.2d 1412 (11th Cir. 1988).

Finality of action required for pursuing takings claim. — Landowner's just compensation claims based upon adverse zoning and land use decisions made by county officials were not ripe for review where landowners failed to show that a decision to implement challenged conduct was final, i.e., unless the official in charge of implementation had fully applied a regulation, the court could not ascertain whether its application exceeded constitutional limitations. *James Emory, Inc. v. Twiggs County*, 883 F. Supp. 1546 (M.D. Ga. 1995).

Finality of action required for arbitrary and capricious claims. — Landowner's due

process claims contesting county officials' actions in zoning and land use matters as arbitrary and capricious exercises of the police power were not ripe for review where landowners failed to show that particular decisions being challenged had been finally applied to the property at issue. *James Emory, Inc. v. Twiggs County*, 883 F. Supp. 1546 (M.D. Ga. 1995).

Evidence that property was of sentimental significance to condemnees clearly would have supported a charge on uniqueness. *DOT v. Metts*, 208 Ga. App. 401, 430 S.E.2d 622 (1993).

Punitive damages law. — Paragraph (e)(2) of O.C.G.A. § 51-12-5.1, requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury does not constitute a "taking" under the fifth and fourteenth amendments to the United States Constitution. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993); *State v. Moseley*, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994).

6. Taxation

Due process requires definite link between state and person, property or transaction it seeks to tax. *Owens-Illinois Glass Co. v. Oxford*, 216 Ga. 316, 116 S.E.2d 293 (1960); *Independent Publishing Co. v. Hawes*, 119 Ga. App. 858, 168 S.E.2d 904 (1969).

State taxing power can be exerted only to effect public purpose and does not embrace the raising of revenue for private purposes under U.S. Const., amend. 14. *Smith v. State*, 222 Ga. 552, 150 S.E.2d 868 (1966).

Sole constitutional test is whether state has given anything for which it can ask return. — A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. The sole constitutional test is whether the state has given anything for which it can ask return. *Independent Publishing Co. v. Hawes*, 119 Ga. App. 858, 168 S.E.2d 904 (1969).

Corporate income subject to state tax unless derived from property owned or business done outside of state. — Before any part of income received by corporations having property or doing business in the state can lawfully escape the Georgia tax law, it must appear that such income was derived from property owned or business done outside of the state. Income derived by the corporation from unsolicited orders received by it from outside the state cannot, under U.S. Const., amend. 14 and the commerce clause of the United States Constitution, be taxed elsewhere than in the state. *State v. Coca-Cola Bottling Co.*, 214 Ga. 316, 104 S.E.2d 574 (1958).

For state to tax property over which it has no territorial jurisdiction is violation of due process clauses of the federal and state Constitutions. It would be a taking of property without due process of law. *Davis v. Penn Mut. Life Ins. Co.*, 198 Ga. 550, 32 S.E.2d 180, 160 A.L.R. 778 (1944), later appeal, 201 Ga. 821, 41 S.E.2d 406, cert. denied, 331 U.S. 829, 67 S. Ct. 1353, 91 L. Ed. 1844 (1947); *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Taxes imposed comport with due process where levied only on portion of net income arising from in-state activities. — The taxes imposed by Georgia's income tax statute are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing state. These activities form a sufficient nexus between such a tax and transactions with a state for which the tax is an exaction so that the due process clause is not violated. *Owens-Illinois Glass Co. v. Oxford*, 216 Ga. 316, 116 S.E.2d 293 (1960).

Taxation of corporate income. — Where a domesticated corporation maintains its only office and place of business in the state, owns and manufactures all its goods therein, and receives all the proceeds from its sales made within and without the state, all from its state-owned plants and products manufactured in the state, and all from its state-owned property and state-managed business and office, from which it merely sends out samples and operates a subordinate sale office with office equipment and salesmen out of the state under the control of its state office and an executive living within the state, its entire net income from

these sales would be subject to the tax imposed on net income from property owned in the state as well as from business done in the state, whether it is deemed a resident corporation, or a nonresident corporation, since neither the imposition by the statute nor the collection of such a tax would contravene U.S. Const., amend. 14. *Montag Bros. v. State Revenue Comm'n*, 50 Ga. App. 660, 179 S.E. 563 (1935), aff'd, 182 Ga. 568, 186 S.E. 558 (1936).

Graduated business tax based on reasonable classification comports with due process. — Provisions of a city ordinance imposing a graduated tax on those persons using vehicles on the streets for business purposes, in addition to the business tax required of them, and also levying a graduated tax for doing business on the streets upon carriers for hire, was not violative of Ga. Const. 1983, Art. I, Sec. I, Para. I, or this section. The city ordinance did not make unreasonable and arbitrary classifications. *Solomons v. Mayor of Savannah*, 183 Ga. 631, 189 S.E. 230 (1936).

Legislature can grant municipality power to make improvements and assess cost against abutting land. — An act of the Legislature granting charter power to a municipality to make public improvements such as sidewalks and street paving, and to collect the cost by special assessment and execution against the abutting land does not deprive the owner of due process of law when the act also permits the owner of such land to file an affidavit of illegality and thereby contest the reasonableness or the lawfulness of the assessment before payment is finally required. *Lockridge-Rogers Lumber Co. v. City of E. Point*, 214 Ga. 255, 104 S.E.2d 228 (1958).

Section of city charter which empowers it to assess the actual cost of laying or constructing a sewer line along one of its streets against the abutting property on each side of the street and which also permits the owner of such land to file an affidavit of illegality contesting the assessment, does not offend the due process clauses of the state and federal Constitutions, even though it permits the city to assess the cost without prior notice to the owner of such land and without first affording such owner an opportunity to be heard respecting the reasonableness or lawfulness of the assessment. *Lockridge-Rogers Lumber Co. v. City of E. Point*, 214 Ga. 255, 104 S.E.2d 228 (1958).

Due Process (Cont'd)**6. Taxation** (Cont'd)

City's legislative authority to pave street and to assess company using street within taxing and police power. — The city of Decatur, under the Constitution and general law of Georgia, and under its charter and the amendments thereof, had legislative authority within the taxing and the police power reserved in the state to pave its streets and to assess a portion of the costs of such improvement against the street railway company occupying and using, with the consent of the city, the paved street regardless of benefit to the company. *Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32 (1935), *aff'd sub nom. Georgia Ry. & Elec. Co. v. City of Decatur*, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).

Due process argument untimely when no legal action instituted to prevent paving. —

Where a city, in conformity to legislative authority and its ordinances, paved and incurred the expense of paving a street occupied by a street railway company, and where the company, with knowledge that the city intended, in conformity to its charter and ordinances, to charge the company with a part of the expense of such paving, stood by and saw the paving done and the expense incurred, without instituting any legal action to prevent the same, it was thereafter too late for the company to avoid payment on the ground that enforcement of the assessment would deprive the company of its property, in violation of the due process clauses of the state and federal Constitutions. *Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32 (1935), *aff'd sub nom. Georgia Ry. & Elec. Co. v. City of Decatur*, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).

Property assessment out of all proportion to benefit to property owner violative of due process. — Where railroad company's property which was not appreciably benefited by street paving was assessed equally with property on the other side of each paved street which received practically all of the benefits resulting from the paving, the assessment was out of all proportion to the benefit received by the railroad as an abutting property owner and violated the due process clause of this section and was not saved by adherence to the generally accepted front

foot rule for assessing the cost of improvements. *City of Commerce v. Southern Ry.*, 35 F.2d 331 (5th Cir. 1929).

Municipal charter provision for property tax valuation violative of due process. — Where municipal charter provision failed to provide for notice to the taxpayer and afford as matter of right a hearing before tax assessors on the question as to valuation of the property, and where the hearing provided for by the ordinance was mere matter of grace, the charter provision is repugnant to the due process clauses of the state and federal Constitutions. *Swinson v. City of Dublin*, 178 Ga. 323, 173 S.E. 93 (1934).

Due process not violated because property owners subjected to taxation by act extending municipal boundaries. — An act extending municipal boundaries does not violate the constitutional guarantee of due process of the law because it subjects property owners in the area annexed to taxation by the municipality and does not deny such property owners equal protection of the law within the meaning of U.S. Const., amend. 14. *Lee v. City of Jesup*, 222 Ga. 530, 150 S.E.2d 836 (1966), *cert. denied*, 386 U.S. 993, 87 S. Ct. 1307, 18 L. Ed. 2d 337 (1967).

Review of ordinances imposing occupation taxes. — The constitutionality and legality of an occupation tax is to be judged by its effect upon dealers generally, and is not to be construed as unreasonable because it is prohibitive upon certain financially weak persons; only those laws imposing occupation taxes that are confiscatory and oppressive in general operation are to be declared unconstitutional. *Solomons v. Mayor of Savannah*, 183 Ga. 631, 189 S.E. 230 (1936).

Ordinance imposing occupational tax on linen rental service was not violative of state or federal due process clause. *National Linen Serv. Corp. v. City of Gainesville*, 181 Ga. 397, 182 S.E. 610 (1935).

Taxation of intangibles. — While tangible property is taxable in the state where it is located, and intangibles are generally taxable in the state where the owner resides, there is an exception to the general rule regarding intangibles. The debt of a citizen of Georgia owned by a nonresident and held at the nonresident's domicile outside of the state is taxable in the state if it accrues out of or is an incident to property owned or a business conducted by the nonresident or

the nonresident's agent in the state. To tax intangibles contrary to the tax situs rule stated above would constitute a denial of due process and would offend U.S. Const., amend. 14. *Suttles v. Owens-Illinois Glass Co.*, 206 Ga. 849, 59 S.E.2d 392 (1950).

Nonresident's intangible property taxable where integral part of local business. — Intangible property of a nonresident may be taxed in this state, consistently with U.S. Const., amend. 14 and the similar or due process clause of the Constitution of Georgia, if it is so used as to become an integral part of some local business conducted by him or his agent. *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Credits or accounts receivable of nonresident corporation engaged in business in Georgia taxable. — When a nonresident corporation engaged in business in this state becomes the owner of accounts receivable arising out of the business conducted in this state, such credits or accounts receivable have a tax situs in the county wherein such business is conducted, notwithstanding the orders taken for merchandise sold in this state are filled, the shipments made, the credit of the customers passed upon, and the books of account kept, at a point without the State of Georgia. *Colgate-Palmolive-Peet Co. v. Davis*, 196 Ga. 681, 27 S.E.2d 326 (1943).

Tax enforceable on nonresident corporation's accounts receivable with situs in municipality where business conducted. — Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law in the state and federal Constitutions. *Parke, Davis & Co. v. City of Atlanta*, 200 Ga. 296, 36 S.E.2d 773 (1946).

Nonresident corporation conducting loan business in Georgia within its taxing power. — Where a nonresident life insurance company employed a loan agent in Georgia on a salary basis to solicit and submit applications for loans and make reports concerning applicants and the proffered security in a fixed office or place of business in the state, leased

in the agent's own name, with the rent paid by the company through reimbursement to the agent on expense account, and in all negotiations in reference to loans the company dealt with applicants by communications passing through the agent as the company's agent, with the notes and security deeds prepared in the home office and sent to the agent for execution by applicants in Georgia, and, after their return to and approval in the home office, checks were mailed to the agent for delivery to applicants in Georgia, so that all loan contracts were thus finally executed in Georgia, and where as many as 19 long-term loans were so made during continuous existence of such agency, the company in making such loans was conducting a loan business in Georgia, and thus came within its taxing power, as to property derived from or used in such business. Hence the credits arising from such loans had a situs for ad valorem taxation in Georgia, where the loan business was conducted, so that to tax them would not violate the due process clause of either the state or the federal Constitution. *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Loans with situs for ad valorem taxation in county where loan business conducted. — In a suit by a nonresident insurance company against county taxing officials seeking to enjoin enforcement of assessments and executions for state and county taxes, the assessments being based on credits existing in the company's favor as a result of loans made by it on county real estate before the taxable period, but remaining unpaid during the period of taxation, the evidence shows without dispute that the loans have a situs for ad valorem taxation in the county in question where the loan business was conducted, so that to tax them in such county will not violate the due process clause of either the state or federal Constitution. *Northwestern Mut. Life Ins. Co. v. Suttles*, 201 Ga. 84, 38 S.E.2d 786 (1946), cert. denied, 329 U.S. 801, 67 S. Ct. 490, 91 L. Ed. 685 (1947).

Taxation of domesticated foreign corporation's intangibles that acquired business situs outside state, and on which the corporation had paid franchise taxes out of state, did not violate due process clauses of state and federal Constitutions. *National Linen*

Due Process (Cont'd)**6. Taxation** (Cont'd)

Serv. Corp. v. Thompson, 103 Ga. App. 786, 120 S.E.2d 779 (1961).

Court order requiring county to pay school taxes to city. — Court order requiring county to pay county school taxes to city for education of children from its district does not deny due process or equal protection of the law to citizens and taxpayers of the county. *Walton County Bd. of Educ. v. Academy of Social Circle*, 229 Ga. 114, 189 S.E.2d 690 (1972).

Excise tax on wines and malt beverages. — Act imposing excise tax on wines and malt beverages was within the state's authority to determine conditions upon which liquor can come into its territory and what will be done with it after it gets there, and other alleged discriminatory provisions of the act were outside the pale of protection of the due process and equal protection clauses of U.S. Const., amend. 14 and the commerce clause of the federal Constitution by reason of the U.S. Const., amend. 21, thereof. *Capitol Distrib. Co. v. Redwine*, 206 Ga. 477, 57 S.E.2d 578 (1950).

Provision for taxpayer's affidavit of illegality to tax execution and hearing comports with due process. — Former Code 1933, § 92-7301 (see O.C.G.A. § 48-3-1), which provides that a taxpayer may tender an affidavit of illegality when any writ of execution for payment of taxes is issued and provides for a hearing in order to determine whether the tax is legally due, is not violative of the due process clause of the state Constitution or of the Constitution of the United States. *Hicks v. Stewart Oil Co.*, 182 Ga. 654, 186 S.E. 802 (1936).

The state could not hold out what plainly appeared to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes had been paid, that no such remedy existed. *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994).

Apportionment of property tax. — Since the bus company submitted evidence that some of its buses had acquired a tax situs in a state other than Georgia, the due process clause of the fourteenth amendment to the United States Constitution required that Georgia's ad valorem tax on property en-

gaged in interstate commerce, such as the bus company's buses, be apportioned; accordingly, the bus company was entitled to have the ad valorem tax assessed on its bus fleet apportioned. *Fulton County Bd. of Tax Assessors v. Harmon Bros. Charter Serv.*, 261 Ga. App. 534, 583 S.E.2d 179 (2003).

7. Zoning

Local government zoning power exercisable through different ordinances at different times affecting different areas. — Municipalities and counties which have had conferred upon them the power to zone property cannot always at one and the same time enact such a comprehensive scheme of zoning and planning as will particularly describe and embrace every piece of property by metes and bounds in the entire area of the county or municipality; but when reasonably and fairly done, such power may be exercised by the enactment of different ordinances affecting different areas at different times. *Taylor v. Shetzen*, 212 Ga. 101, 90 S.E.2d 572 (1955).

Zoning is subject to constitutional prohibition against taking private property without just compensation. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

Zoning statute is not per se unconstitutional because it deprives owner of property. — Zoning statute is not per se unconstitutional and void because it deprives owner of property without due process of law because the Legislature is constitutionally invested with authority to empower cities to pass zoning laws. *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974).

Unlawful confiscation. — For unlawful confiscation to occur, requiring that the zoning be voided, it is not necessary that the property be totally useless for the purposes classified. Where the damage to the owner is significant and is not justified by the benefit to the public, the zoning must be voided. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

If the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, the regulation is confiscatory and void. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

Application of zoning ordinance unreasonable where change of circumstances

since passage. — Evidence as to change of condition and circumstances since passage in 1939 of ordinance zoning defendants' property for residential and agricultural purposes because of uses of the property adjacent to or near the defendants' property, was sufficient to warrant conclusion that to apply the provisions of the ordinance of 1939 to the property of the defendants would render such ordinance arbitrary and unreasonable. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Determining validity of city zoning ordinance. — Validity of city zoning ordinance depends upon facts existing at the time validity is questioned, and confiscatory character of the ordinance can be proven by conditions then existing. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Claim not ripe for adjudication. — Where plaintiffs brought an action against defendants in order to have a zoning ordinance struck as being a violation of plaintiffs' substantive due process rights and a violation of the taking clause of the fifth and fourteenth amendments, but the plaintiffs failed to pursue their remedy under state law for a claim of inverse condemnation, their claim for taking without just compensation was not ripe for adjudication. *Bernstein v. Holland*, 657 F. Supp. 233 (M.D. Ga. 1987).

A zoning board's decision is not ripe for review under a 42 U.S.C. § 1983 analysis until plaintiffs can demonstrate that they have exhausted their state remedies, and where it appears that any procedural requirements that were not followed by the commission are reviewable in state court, before a federal court can hold that a deprivation of procedural due process has occurred, plaintiffs must demonstrate that the procedural safeguards set up by the zoning regulations themselves are futile or inadequate as a matter of law. *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 662 F. Supp. 1465 (M.D. Ga. 1987), *aff'd*, 896 F.2d 1264 (11th Cir.), *but see*, 896 F.2d 1267 (11th Cir. 1989).

Burden of proof on property owner. — Where it is claimed that a zoning ordinance is unreasonable as to a particular tract of property, or that a change of condition has rendered the ordinance unreasonable when applied to the particular property, the burden is on the owner of such property to

produce sufficient evidence from which the court can make findings of fact and law such as would justify a holding as a matter of law that the ordinance is arbitrary and unreasonable; there must be a showing of an abuse of discretion on the part of the zoning authority, and that there has been an unreasonable and unwarranted exercise of the police power. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Court of equity justified in restraining enforcement because of particular unreasonable application. — A zoning ordinance may in its general aspects be valid, and yet, as to a particular state of facts involving a particular parcel of real estate, be so clearly arbitrary and unreasonable as to result in confiscation, thereby justifying the interposition of a court of equity to restrain its enforcement. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Exhaustion of state remedies as prerequisite to federal civil rights action. — So long as the state provides an adequate procedure for obtaining just compensation, the aggrieved landowner may not claim a denial of just compensation until he/she has exhausted the state procedures for compensation. The nature of the constitutional right, therefore, requires that a property owner first utilize procedures under state law for obtaining compensation before he/she can bring a 42 U.S.C. § 1983 action. *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 662 F. Supp. 1465 (M.D. Ga. 1987), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

Where application completely deprives owner of beneficial use of property, attack on validity of regulation sustained. — A zoning ordinance must not infringe the constitutional guaranties of national or state Constitutions by invading personal or property rights unnecessarily or unreasonably; and if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of the property by precluding all uses, or the only use to which it is reasonably adapted, an attack upon the validity of the regulation, as applied to the particular property involved, will be sustained. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Failure to scrutinize rezoning application. — Failure to scrutinize rezoning application

Due Process (Cont'd)**7. Zoning (Cont'd)**

in light of the character of the land in question and the impact of the zoning decision upon the property owner's rights amounts to a denial of due process. *Sellars v. Cherokee County*, 254 Ga. 496, 330 S.E.2d 882 (1985).

Circumstances under which zoning ordinances held invalid. — Circumstances under which zoning ordinances have been held invalid, as applied to certain specific property, fall into three general classes: (1) where a small parcel of property is zoned for residential purposes, when it is entirely surrounded by commercial or business enterprises; (2) where property zoned for residential use is entirely unsuited for residential purposes; or (3) where the purpose of the ordinance is not to protect the public health, safety, morals, or general welfare. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Single-family residential zoning held unconstitutional. — Evidence authorized superior court to rule that single-family residential zoning on certain property was unconstitutional. The location and the irregular size and shape of lots in light of set back and minimum yard requirements of the city code rendered construction of residential dwellings on the property unfeasible. *City of Rome v. Pilgrim*, 246 Ga. 281, 271 S.E.2d 189 (1980).

Churches subject to reasonable regulations. — Generally any zoning ordinance that absolutely excludes churches from a residential area is invalid under constitutional guarantees. Churches are, however, subject to reasonable regulation both referring to property in the zone generally and to churches specifically, provided the regulations are reasonable and contain some standards. *Rogers v. Mayor of Atlanta*, 110 Ga. App. 114, 137 S.E.2d 668 (1964).

County officials prohibited from denying building permit to public housing project meeting requirements. — Where a site is legitimately zoned for the construction of apartments, U.S. Const., amend. 14 prohibits county officials from denying a building permit to a public housing project meeting zoning requirements, since the county is prohibited from placing restrictions on the

class of persons to be housed at a particular site. *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

When denial of building permit not deprivation of owner's property. — The denial of a permit to the owner of a residence lot to erect thereon a filling station, when the lot is located in a district zoned by ordinance exclusively for residences, apartments, churches, hospitals, schools, and hotels, is not a deprivation of the owner's property within the meaning of the due process clauses of the Constitution of this state and of U.S. Const., amend. 14, especially when a lot has been improved and used for residential purposes long before the passage of such ordinance. *Howden v. Mayor of Savannah*, 172 Ga. 833, 159 S.E. 401 (1931).

Basis for review of zoning classifications. — The only basis for judicial review of zoning classifications is where classification is arbitrary and unreasonable. Classification by zoning ordinance does not violate due process when it does not appear that all permitted uses are impossible. *Riddle v. Waller*, 127 Ga. App. 399, 193 S.E.2d 895 (1972).

Requirements of publication of notice of hearings not violative of due process. — Due process as required by the Constitution was not denied by the terms of Ga. L. 1952, p. 2731, a zoning statute requiring that notice of hearings be published in the county where the land affected lies and in newspapers wherein sheriff's sales are advertised instead of in the official organ of the municipality. *Orr v. Hapeville Realty Co.*, 212 Ga. 649, 94 S.E.2d 682 (1956).

Notice of hearing required on rezoning matter before county governing authority. — A party must have due and legal notice of the hearing on the matter of rezoning before the county governing authority, the body which can rezone land and thereby deprive a party of that party's property rights. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, *cert. denied*, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

County's refusal to rezone property from residential to commercial use. — County board's refusal to rezone property from residential to commercial use did not violate substantive due process, where the board's action was rationally related to legitimate

state concerns and was not arbitrary and capricious. *Habersham at Northridge v. Fulton County*, 632 F. Supp. 815 (N.D. Ga. 1985), *aff'd*, 791 F.2d 170 (11th Cir.), *cert. dismissed*, 478 U.S. 1044, 107 S. Ct. 17, 92 L. Ed. 2d 783 (1986).

Notice by publication proper and adequate. — Notice by publication of a rezoning hearing to be held by a governing authority of a county is proper and adequate insofar as the requirements of procedural due process and equal protection are concerned. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, *cert. denied*, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973); *DeKalb County v. Pine Hill Civic Club*, 254 Ga. 20, 326 S.E.2d 214, *appeal dismissed*, 474 U.S. 892, 106 S. Ct. 214, 88 L. Ed. 2d 215 (1985).

Notice not required for preliminary hearing before planning commission. — Defective notice or lack of notice of the preliminary hearing before the planning commission, which cannot rezone property so as to deprive a party of that party's property rights, is not violative of procedural due process or equal protection. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, *cert. denied*, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Inverse condemnation claim for money damages. — The recent Supreme Court case of *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), requires that the state recognize an inverse condemnation claim for money damages where a zoning regulation amounts to a taking. *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 662 F. Supp. 1465 (M.D. Ga. 1987), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

Money damages for racially motivated conspiracy affecting property rights. — Where plaintiffs are not seeking just compensation for the zoning board's decision, nor are they seeking to have their procedural or substantive due process claims vindicated, but they seek money damages for defendants' interference with their property rights through an illegal conspiracy motivated by race, plaintiffs cannot be required to seek redress under the zoning regulations of this state because they are not attacking the propriety of these regulations. *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb*

Planning & Zoning Comm'n, 662 F. Supp. 1465 (M.D. Ga. 1987), *aff'd*, 888 F.2d 1573 (11th Cir.), but see, 896 F.2d 1267 (11th Cir. 1989).

Limitation on number of animals per tract. — Where a zoning ordinance is applicable to residential districts containing large tracts, it is unconstitutionally unreasonable and irrational in limiting the number of animals per tract without taking into consideration the size of the tract. *Avant v. Douglas County*, 253 Ga. 225, 319 S.E.2d 442 (1984).

Ordinance requiring land lots at least one acre in size for the keeping of a Vietnamese pot-bellied pig as a domestic pet did not violate pig owner's substantive due process rights. *City of Lilburn v. Sanchez*, 268 Ga. 520, 491 S.E.2d 353 (1997).

8. Pretrial Criminal Proceedings

All seizures of person governed by the fourteenth amendment. — U.S. Const., amend. 4 and U.S. Const., amend. 14's prohibition of searches and seizures not supported by objective justification governs all seizures of person, including seizures that involve only a brief detention short of traditional arrest. *Reid v. Georgia*, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980).

An arrest and search, legal under federal law, is legal under state laws. *State v. Wilson*, 179 Ga. App. 334, 346 S.E.2d 111 (1986).

Discovery. — The amended discovery procedure of O.C.G.A. § 17-16-1 *et seq.* does not violate due process as it imposes reciprocal discovery upon the state; any difference in the scope of mitigating evidence and the scope of non-statutory aggravating evidence is too minimal to be of constitutional significance on the question of reciprocity of discovery. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

Investigating police officer may make reasonable inquiries for safety. — Police officer investigating unusual behavior can make reasonable inquiries to dispel reasonable fears for safety of the officer and others. *Shy v. State*, 234 Ga. 816, 218 S.E.2d 599 (1975).

Noncustodial defendant and field sobriety test. — Upon seeing the car in distress in a through-lane of traffic, a police officer was authorized to approach the car and make inquiry and, when the defendant admitted the defendant had been drinking and driving, the officer was authorized to conduct

Due Process (Cont'd)**8. Pretrial Criminal Proceedings (Cont'd)**

the field sobriety tests without giving Miranda warnings. *Coates v. State*, 216 Ga. App. 93, 453 S.E.2d 35 (1994).

Permissible police interrogation. — Single threshold inquiry of officer as to what is happening is not impermissible interrogation. *Shy v. State*, 234 Ga. 816, 218 S.E.2d 599 (1975).

Remedy for questionable police interrogation techniques. — Where the constitutional violation alleged is questionable police interrogation techniques, and the injury suffered is the possible inducement of potentially unreliable coerced or involuntary statements from witnesses subjected to these techniques, the appropriate remedy is the defendant's right to fully cross-examine any witnesses called at trial concerning their interrogations. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 246 (1987).

Presenting defendant with choice of cooperation or prosecution. — Course of conduct employed by the federal government, which presented the defendant with the alternatives of cooperating with an investigation of local government officials or facing charges on which the defendant was plainly subject to prosecution, did not violate the due process clause of the fourteenth amendment. *United States v. Wingo*, 723 F. Supp. 798 (N.D. Ga. 1989).

When momentary detention and questioning permissible. — Momentary detention and questioning are permissible if based upon specific and articulable facts, which, taken together with rational inferences from those facts, justify a reasonable scope of inquiry not based on mere inclination, caprice or harassment. *State v. Misuraca*, 157 Ga. App. 361, 276 S.E.2d 679, cert. denied, 454 U.S. 846, 102 S. Ct. 163, 70 L. Ed. 2d 133 (1981).

Curtailment of person's liberty by police requires at least reasonable, articulable suspicion of criminal activity. — While in some circumstances a person may be detained briefly, without probable cause to arrest that person, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.

Reid v. Georgia, 448 U.S. 438, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980).

Defendant's mental condition not determinative of voluntariness of statements. — A defendant's mental condition, by itself and apart from its relation to official coercion, should never dispose of an inquiry into constitutional voluntariness of statements made to law enforcement officers. *Wilson v. State*, 257 Ga. 444, 359 S.E.2d 891 (1987).

Distinction between custodial and noncustodial interrogation involves probable cause to arrest, subjective intent of the police, subjective belief of the defendant, and focus of the investigation. *Shy v. State*, 234 Ga. 816, 218 S.E.2d 599 (1975).

Noncustodial, voluntary statement by defendant to officer making investigation at scene when not suspected is admissible. — A noncustodial, voluntary statement by the defendant to an officer simply making an on-the-scene investigation to find out what has happened, when the officer has no suspects, is always admissible against the maker without the maker's having been advised of the maker's rights against self-incrimination. *Davis v. State*, 135 Ga. App. 584, 218 S.E.2d 297 (1975).

Investigatory stop by armed officer. — Investigatory stop is not automatically arrest simply because officer is armed with shotgun. *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

Electronic surveillance of suspect not in custody. — Rights to remain silent and to have assistance of counsel do not apply to electronic surveillance of suspect not in custody. *Granese v. State*, 232 Ga. 193, 206 S.E.2d 26 (1974); *Christian v. State*, 190 Ga. App. 667, 379 S.E.2d 807 (1989).

Delay in "investigative" stage. — Where delay occurs in "investigative" stage, before either arrest or indictment, due process standards apply, not U.S. Const., amend. 6 standards. *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980).

No U.S. Const., amend. 4 violation absent state action in search context. — Because U.S. Const., amend. 14, through which U.S. Const., amend. 4 applies to the state, requires state action, absent some state action in a search context there can be no U.S. Const., amend. 4 violation. *State v. Young*, 234 Ga. 488, 216 S.E.2d 586, cert. denied,

423 U.S. 1039, 96 S. Ct. 576, 46 L. Ed. 2d 413 (1975).

Consent by subject of search not in custody. — When the subject of a search is not in custody and the state attempts to justify a search on the basis of his consent, U.S. Const., amend. 4 and U.S. Const., amend. 14 require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. *Brand v. State*, 129 Ga. App. 747, 201 S.E.2d 180 (1973).

Determination of voluntariness of consent to search. — Voluntariness of consent to search by police officer is question of fact to be determined from all circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. *Brand v. State*, 129 Ga. App. 747, 201 S.E.2d 180 (1973).

Evidence voluntarily produced from body cavity. — Because a small piece of plastic containing cocaine residue was produced by the defendant from a body cavity in acquiescence to a search warrant for her person while she was in lawful detention, the evidence was admissible. *Scott v. State*, 216 Ga. App. 692, 455 S.E.2d 609 (1995).

Chemical blood testing. — Georgia Supreme Court has held that O.C.G.A. § 40-5-55(a) is unconstitutional to the extent it requires chemical testing of the driver of a vehicle involved in a traffic accident resulting in serious injuries or death as it violates the fourth and fourteenth amendments of the Constitution of the United States because it authorizes a search and seizure without probable cause; thus, where testing is conducted based upon the seriousness of injuries in an accident, rather than upon probable cause that the person has violated O.C.G.A. § 40-6-391, the results are inadmissible. *Buchanan v. State*, 264 Ga. App. 148, 589 S.E.2d 876 (2003).

Trial judge to determine reasonableness of search. — In first instance reasonableness of search is question for trial judge to determine. *Crocker v. State*, 114 Ga. App. 43, 150 S.E.2d 294 (1966).

To show probable cause for search and seizure it is not necessary that the arresting officer should have had before the officer

legal evidence of the suspected illegal act. *Crocker v. State*, 114 Ga. App. 43, 150 S.E.2d 294 (1966).

Legal search may be incident to lawful arrest or by consent of owner of premises or property. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Seizure of instrumentalities used in commission of crime. — Instrumentalities used in commission of crime may be seized at time of arrest without search warrant. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Objects that may be seized depends on nature of offense. — Nature of offense for which accused is arrested has important bearing upon what objects may be seized as incidental to the arrest. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Police justified, in exigent circumstances, to enter premises and conduct reasonable search. — In exigent circumstances, police officers are authorized, pursuant to a lawful arrest, to enter upon the premises and conduct a reasonable search of the suspect's person and immediate presence, including a search under a piece of furniture where the suspect is observed reaching for or disposing of an unknown object, which might reasonably be thought to be either a weapon or evidence. *Dennis v. State*, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

In order to qualify as "person aggrieved by unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. *Wood v. State*, 224 Ga. 121, 160 S.E.2d 368 (1968).

Mere visitor without standing to object to search. — A person has no standing to object to a search of the premises, and particularly a limited one, where the person is a mere visitor (although a frequent one) since the person has no expectation of privacy in the premises of another, where the person has neither a proprietary nor a possessory interest. *Dennis v. State*, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

Temporary detention of visitors. — It was reasonable under the fourth and fourteenth amendments for a police officer, knowing that certain persons and premises were the

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subject of the immediate execution of a search warrant, to detain temporarily a vehicle containing occupants who just departed the premises to see if one of them was a person named in the warrant. *Fritzius v. State*, 225 Ga. App. 642, 484 S.E.2d 743 (1997).

Object seen lying in "plain view" admissible. — If a police officer has a right to be in the position from which an object is seen lying in "plain view," the object is admissible as evidence. *Dennis v. State*, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

Seizure of gun located inside the passenger compartment of car in which appellant had been a passenger just before being arrested was not violative of fourth and fourteenth amendment rights. *State v. Hopkins*, 163 Ga. App. 141, 293 S.E.2d 529 (1982).

Abandoned property. — The constitutional protection of the fourth and fourteenth amendments does not apply to property which has been abandoned. *Ramsey v. State*, 183 Ga. App. 48, 357 S.E.2d 869, cert. denied, 183 Ga. App. 906, 357 S.E.2d 869 (1987).

Greater safeguards required for constructive seizure of presumptively protected material. — When dealing with presumptively protected material greater procedural safeguards must be afforded before "constructive seizure." This usually involves the requirement of a judicial determination of some type by a neutral, detached magistrate either before or immediately after the seizure of allegedly obscene material. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Retailer or distributor of presumptively protected material must be afforded greater procedural safeguards before seizure or "constructive seizure" may take place. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Judicial determination of probable cause. — The Constitution at a minimum apparently requires the imposition of a neutral, detached magistrate in the procedure to make an independent judicial determina-

tion of probable cause prior to issuing an arrest warrant or some other warrant authorizing the seizure of allegedly obscene material to be used as evidence. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Prior restraint presumed unconstitutional. — There is strong presumption against constitutional validity of system of prior restraint. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980).

Standard for obtaining search warrant same as under U.S. Const., amend. 4. — Proscriptions of U.S. Const., amend. 4 are enforced against the states through U.S. Const., amend. 14, and the standard for obtaining a search warrant is the same under the two amendments. *Carson v. State ex rel. Price*, 221 Ga. 299, 144 S.E.2d 384 (1965).

Warrant issued by justice with pecuniary interest in issuing warrant. — Issuance of search warrant by justice of the peace with pecuniary interest in issuing warrant effects violation of the protections afforded by U.S. Const., amend. 4 and U.S. Const., amend. 14. *Connally v. Georgia*, 429 U.S. 245, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977).

Issuance of search warrant by justice of peace effected violation of protections afforded by U.S. Const., amend. 14. *State v. Patterson*, 143 Ga. App. 225, 237 S.E.2d 707 (1977).

Warrant issued by court clerk or deputy as violating due process. — Seizure of defendant pursuant to warrant issued by court clerk or deputy is flagrant violation of due process. *Roberts v. Macaulay*, 232 Ga. 660, 208 S.E.2d 478 (1974).

Sufficiency of hearsay tip of reliable informer as basis of warrant, search, or seizure. — If the hearsay tip of a reliable informer on which a warrant is based does not sufficiently state the underlying circumstances from which the informant had concluded the defendants were violating the law, or does not sufficiently detail the informer's activities, but is relying on mere casual rumor or general reputation, a warrant, search or seizure based thereon is illegal. *Register v. State*, 124 Ga. App. 136, 183 S.E.2d 68 (1971), cert. denied, 405 U.S. 919, 92 S. Ct. 947, 30 L. Ed. 2d 790 (1972).

Under “fruit of the poisoned tree” doctrine, search must fall if original arrest invalid. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

Seizure of person by policeman. — Whenever police officer accosts an individual and restrains that individual’s freedom to walk away, the officer has “seized” that person. *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

Seizure is not unreasonable simply because police have taken precaution to arm themselves in light of unknown danger. *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

Causal connection between illegal arrest and confession must be attenuated, or statements unusable. — There is no per se rule that *Miranda* warnings in and of themselves suffice to cure a fourth amendment violation involved in obtaining inculpatory statements during custodial interrogation following a formal arrest on less than probable cause. In order to use such statements, the prosecution must show not only that the statements meet fifth amendment requirements (voluntariness), but also that the causal connection between the statements and the illegal arrest is sufficiently attenuated so as to purge the primary taint of the illegal arrest in light of the distinct policies and interests of the fourth amendment. *Robinson v. State*, 166 Ga. App. 741, 305 S.E.2d 381 (1983).

Where suspect interrogated from time of illegal arrest until confession, confession inadmissible. — Where the causal connection between an illegal arrest and a confession is not broken by any intervening events, but a suspect is interrogated from the time of the suspect’s arrival until the suspect confesses a short time later, the trial court errs by admitting the confession into evidence, and a conviction based solely on the confession cannot stand. *Robinson v. State*, 166 Ga. App. 741, 305 S.E.2d 381 (1983).

Confession after break in custody upheld. — Where there was a 21-month break in custody between the initial interrogation of defendant, at which time the defendant expressed the defendant’s desire to speak only through counsel, and the final interrogation, at which time the defendant confessed, there was no violation of the defendant’s

fifth and fourteenth amendment rights. *State v. Byrnes*, 258 Ga. 813, 375 S.E.2d 41 (1989).

Preseizure notice and hearing not required. — Preseizure notice and hearing is not required when seizure serves significant governmental purpose in asserting in rem jurisdiction over property to prevent its continued illicit possession and to enforce criminal sanctions. *Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820*, 232 Ga. 671, 208 S.E.2d 483 (1974).

Adversary hearing not required with sale of pornography. — No adversary hearing prior to institution of criminal action is necessary where sale of alleged pornography. *Gornto v. McDougall*, 336 F. Supp. 1372 (S.D. Ga. 1972), appeal dismissed, 482 F.2d 361 (5th Cir. 1973).

Constitutional protection not applicable to abandoned property. — Constitutional protection under U.S. Const., amend. 4 and U.S. Const., amend. 14 does not apply to property which has been abandoned. The issue of abandonment vel non of the property is a factual issue to be resolved by the trier of fact. *Vines v. State*, 142 Ga. App. 616, 237 S.E.2d 17 (1977).

Defendant not on trial during grand jury proceedings. — The court does not err in refusing to allow defendant or his counsel to appear before the grand jury to present evidence and to cross-examine witnesses. The defendant is not on trial at this stage of the proceedings and therefore this refusal denies the defendant neither the right of confrontation, nor equal protection of the laws. *Jackson v. State*, 225 Ga. 790, 171 S.E.2d 501 (1969), rev’d on other grounds, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346, vacated in part on other grounds, 229 Ga. 731, 194 S.E.2d 410 (1972).

State not required to use grand jury to bring actions. — U.S. Const., amend. 14 does not require state to use grand jury to bring criminal charges against persons. *Allen v. State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

Purpose of committal hearing. — Purpose of committal hearing is simply to determine whether there is probable cause to believe the accused guilty of the crime charged, and if so, to bind him over for indictment by the grand jury. *Douglas v. State*, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

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Determination of probable cause does not rest upon technical framework but on factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980).

Once indictment has been returned, necessity for committal hearing has been eliminated. *Douglas v. State*, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

Holding of commitment hearing is not requisite to trial for commission of felony. *Douglas v. State*, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

A preliminary hearing is not a required step in a felony prosecution and once an indictment is obtained there is no judicial oversight or review of the decision to prosecute because of any failure to hold a commitment hearing. *Williams v. State*, 157 Ga. App. 168, 276 S.E.2d 852 (1981).

Failure to hold commitment hearings. — Although the commitment hearing is a “critical stage” of criminal procedure entitling a defendant to counsel, failure to hold such a hearing does not constitute a deprivation of a defendant’s constitutional rights. *State v. Godfrey*, 204 Ga. App. 58, 418 S.E.2d 383, cert. denied, 204 Ga. App. 922, 418 S.E.2d 383 (1992).

Alleged loss of discovery occasioned by failure to conduct commitment hearing is not legally recognizable basis for reversal. *Williams v. State*, 157 Ga. App. 168, 276 S.E.2d 852 (1981).

Defendant’s absence from a pretrial conference did not thwart a fair and just hearing where there was acquiescence in the court’s ruling and the hearing involved only questions of law. *Riley v. State*, 180 Ga. App. 409, 349 S.E.2d 274 (1986).

When omission of hearing harmless. — Since the purpose of the commitment hearing is to determine whether there is probable cause to hold the accused for trial the subsequent indictment, trial and conviction of the accused render the omission of the hearing harmless. *Douglas v. State*, 132 Ga. App. 694, 209 S.E.2d 114 (1974).

Where a post-arrest preindictment delay occurs in an investigative stage before arrest or indictment, due process standards apply, not U.S. Const., amend. 6 standards.

Haisman v. State, 242 Ga. 896, 252 S.E.2d 397 (1979).

Delay of arrest following investigation. — Where investigating officer delays arrest following investigation because lacking sufficient information, no due process violation appears. *Glenn v. State*, 144 Ga. App. 557, 241 S.E.2d 447 (1978).

Delay of five years between when defendant was first identified as the possible third occupant of a murder victim’s car, at which time a previously unmatched print was lifted from the victim’s car, and when defendant was indicted and arrested did not violate due process; defendant had shown at most that the delay was the result of the state’s decision to conduct further investigation and to obtain additional evidence, and a delay occasioned by the ongoing investigation of a case did not rise to the level of a due process violation. *Roebuck v. State*, 277 Ga. 200, 586 S.E.2d 651 (2003).

Police may not delay arrest of suspect as subterfuge to coerce suspect into self incrimination. *Shy v. State*, 234 Ga. 816, 218 S.E.2d 599 (1975).

When due process requires dismissal for prearrest or preindictment delay. — Dismissal is required for prearrest or preindictment delay under due process clause when it is shown that the delay caused actual substantial prejudice to defendant’s right to a fair trial and, that it was an intentional device to gain a tactical advantage. *Hammond v. State*, 157 Ga. App. 647, 278 S.E.2d 188 (1981).

Delay in arrest insufficient to warrant dismissal. — Where error was asserted because the trial court refused to grant the defendant’s motion to dismiss the defendant’s indictment made on the grounds of a violation of due process because there was a fifty-five day delay between the commission of the offense and the defendant’s arrest, and it was argued that because of the delay the defendant could not remember the date of the alleged offense for which the defendant might have been able to provide an alibi defense, this was held not enough in itself to justify dismissing the indictment. *Croom v. State*, 165 Ga. App. 676, 302 S.E.2d 598 (1983).

Defendant, who was arrested and indicted in 2005 for a murder that occurred in 1987, had not shown that the delay between the

time of the crime and the time of the defendant's arrest violated due process; in a murder case, any prejudice resulting merely from the passage of time could not create the requisite prejudice, and the defendant had not shown that the state acted deliberately to gain a tactical advantage. *Manley v. State*, 281 Ga. 466, 640 S.E.2d 9 (2007).

Delaying medical treatment of pre-trial detainee not violation of rights. — Jail officers did not violate the rights of a pre-trial detainee by delaying medical treatment for the detainee's bleeding cut for two and a half hours, or by failing to give the detainee the icepacks and aspirin prescribed by the doctor for pain upon the detainee's return to the jail. *Aldridge v. Montgomery*, 753 F.2d 970 (11th Cir. 1985).

Where defendant not deprived of constitutional right though date crime occurred different from date charged in indictment. — The defendant was not deprived of any constitutional right by reason of the fact that the indictment charged one date, whereas the crime actually occurred shortly before midnight on the day before, since no alibi evidence was offered, nor was any continuance requested on the ground of surprise that the evidence showed the commission of the crime on a date different from that shown in the indictment, and that additional time would be needed to procure alibi testimony to account for the appellant's whereabouts on that date. *Carmichael v. State*, 228 Ga. 834, 188 S.E.2d 495 (1972).

The substitution of accusation for indictment. — The substitution of accusation for specific felonies enumerated in O.C.G.A. § 17-7-70.1 does not violate due process since statutory procedures exist to safeguard against criminal prosecution without probable cause, and to further protect all defendants equally, whether indicted or formally accused. *Lamberson v. State*, 265 Ga. 764, 462 S.E.2d 706 (1995).

Where without arrest warrant, law enforcement officer may not arrest unless probable cause. — Where an arrest warrant has not been issued, a law enforcement officer may not arrest a person unless he has probable cause to believe the person had committed or was committing a crime. *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980).

Warrantless arrest justified where reasonable information that accused charged with

serious crime. — O.C.G.A. § 17-13-34, which authorizes a warrantless arrest by officers in this state upon reasonable information that an accused is charged in the courts of a state with a crime punishable by death or imprisonment for more than a year, is justified under the fourth, fifth, and fourteenth amendments, in that it is based upon a standard which comports with the constitutional standard of probable cause as set forth in *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). *Ledesma v. State*, 251 Ga. 487, 306 S.E.2d 629, aff'd, 251 Ga. 885, 311 S.E.2d 427 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

Probable cause for warrantless arrest of drug suspect at airport. — Because the defendant exhibited suspicious "leg bulges" when the defendant exited the plane from Miami, a known source city for the distribution of drugs, which "leg bulges" attracted the immediate attention of two agents of the Federal Drug Enforcement Administration, appellant was placed under surveillance by both agents and was subsequently confronted, questioned, arrested, and searched by one of them, the defendant's false response to the inquiry about the objects in the defendant's boots, coupled with the agents' observation and experience, provided the probable cause required for the defendant's warrantless arrest. Accordingly, the search incident to that arrest was not violative of the fourth and fourteenth amendments, and the fruits of that search were properly considered by the trial court in convicting the defendant of trafficking in cocaine. *Miller v. State*, 183 Ga. App. 702, 359 S.E.2d 683 (1987).

Probable cause exists if the facts and circumstances within the enforcement officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the person had committed or was committing an offense. *Daye v. City of Albany*, 496 F. Supp. 1227 (M.D. Ga. 1980).

No right to discover state evidence before trial. — A defendant does not, as a matter of right, have the right to discover from a district attorney or other prosecuting officer of the state evidence, documentary or otherwise, for use by the defendant or defense counsel before trial. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

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8. Pretrial Criminal Proceedings (Cont'd)

Absent showing evidence requested is materially favorable to accused, pretrial discovery not required. — Pretrial discovery in favor of defendants is not required by considerations of due process in the absence of a showing that the evidence denied disclosure of by the prosecution upon request was materially favorable to the accused either as direct or impeaching evidence. *Quaid v. State*, 132 Ga. App. 478, 208 S.E.2d 336 (1974); *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

There is no general constitutional right to discovery in a criminal case, nor is there any Georgia statute or rule of practice which requires the state to open its files to a defendant's attorney; it is only when the omitted evidence creates a reasonable doubt that did not otherwise exist, that constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. *Houston v. State*, 187 Ga. App. 335, 370 S.E.2d 178 (1988).

Failure to produce information not in prosecutor's file not unconstitutional. — Defendant in criminal prosecution for delivery of cocaine was not denied due process of law because the state failed to produce the name and address of an individual identified in the records who defendant claimed was a third party in scheme to set defendant up, where prosecution's file did not contain information pertaining to such person and the record did not support defendant's factual assertions. *Upshaw v. State*, 172 Ga. App. 671, 324 S.E.2d 529 (1984).

Prosecution's suppression of favorable material evidence violates due process. — The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty or to punishment, irrespective of the good faith or bad faith of the prosecution. *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975).

Because the state's suppression of exculpatory statements in violation of *Brady* was more than sufficient to place the outcome of

an inmate's trial in doubt, amounting to a denial of the inmate's fourteenth amendment due process rights, and the state's failure to produce the inmate's own statement provided the state with the opportunity to argue strenuously and virtually without contradiction that the inmate did not tell police about any alibi witness, but simply fabricated the defense prior to trial, the violation made the state's case much stronger than the full facts would have suggested, and based on such suppression, the trial did not produce a verdict worthy of confidence; hence, the inmate was properly granted habeas relief. *Walker v. Johnson*, Ga. , S.E.2d , 2007 Ga. LEXIS 349 (May 14, 2007).

Prosecutorial duty to disclose information. — In a prosecution for aggravated assault, failure of the prosecution to disclose the victim's pre-trial oral unrecorded statement which, at best, admitted indirectly of the bare possibility that the victim was shot earlier than the victim testified by someone other than the actor identified by the victim under oath, was not a violation of *Brady v. Maryland*. *Belins v. State*, 210 Ga. App. 259, 435 S.E.2d 675 (1993).

Detectives had no affirmative duty to make the district attorney aware of an exculpatory lab report, where there was no evidence two of the detectives ever saw the report, or had a clearly established duty to ferret it out, and where the third detective did receive the report, but it was not clearly established that the detective was required to turn over exculpatory evidence to a prosecutor since the detective had reason to believe that the prosecutor already had the evidence. *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994).

Prosecutorial duty to disclose exculpatory evidence to defense may not be discharged by dumping voluminous mass of files, tapes and documentary evidence on a trial judge. The prosecutor retains the constitutional obligation of initially screening the materials before him and handing over to the defense those items to which the defense is unquestionably entitled. *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975).

Failure of officer to preserve evidence. — Defendant's due process rights were not violated by the failure of the investigating officer to preserve the physical evidence of a

child molestation as defendant failed to show that the officer's failure to preserve the evidence was in bad faith. *Ingram v. State*, 262 Ga. App. 304, 585 S.E.2d 211 (2003).

Medical expert investigator's notes from homicide scene were not a "written scientific report" within the purview of § 17-7-211 and did not have to be furnished to defendant upon the latter's request. *Pierce v. State*, 209 Ga. App. 366, 433 S.E.2d 641 (1993).

Failure to take arrestee before magistrate not constitutional issue. — Though former Code 1933, § 27-210 (see O.C.G.A. § 17-4-26) requires that an officer arresting under a warrant bring the person arrested before a committing officer within 72 hours after arrest, failure to take an arrestee before a magistrate is not a federal constitutional issue. *Stephenson v. Gaskins*, 539 F.2d 1066 (5th Cir. 1976).

Violation of due process of law in conducting confrontation depends on totality of surrounding circumstances. *Baier v. State*, 124 Ga. App. 334, 183 S.E.2d 622 (1971).

Identification procedure requires state action for application of fourteenth amendment. — For fourteenth amendment to come into play in identification procedure, state action must be involved. *Lyons v. State*, 247 Ga. 465, 277 S.E.2d 244 (1981).

In order for U.S. Const., amend. 14 to come into play in an identification procedure, state action must be involved. *Duck v. State*, 250 Ga. 592, 300 S.E.2d 121 (1983).

Lineups required to be fundamentally fair, not overly suggestive. — Without regard to the right to counsel, lineups must meet due process standards of fundamental fairness. Specifically, lineups must not be arranged in such a manner as to be overly suggestive as to the person actually pointed out by the witness or victim. *Lumpkin v. Smith*, 309 F. Supp. 1325 (N.D. Ga. 1970), rev'd on other grounds, 439 F.2d 1084 (5th Cir. 1971).

In determining whether lineup was impermissibly suggestive, decisive question is whether identifications were reliable under totality of circumstances. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977).

Lineup not impermissibly suggestive. — Where the record showed that, as to both lineups, the other participants were all of approximately the same height, size, race,

and age of the defendant, the fact that the defendant was one of only two men over six feet tall in one lineup and one of only three men over six feet tall in the other lineup did not make the lineups impermissibly suggestive. *Bennett v. State*, 186 Ga. App. 832, 368 S.E.2d 789 (1988).

Because an armed robbery victim viewed 11 photographs of males of the same race, and appearances similar to defendant, the victim did not know the defendant's name and did not turn the photographs over, and the victim identified the defendant as the perpetrator after looking at the photographs for about five minutes, it cannot be said that the photographic lineup was impermissibly suggestive. *Wright v. State*, 187 Ga. App. 311, 370 S.E.2d 160, cert. denied, 187 Ga. App. 909, S.E.2d (1988).

A photographic lineup where the defendant was the only person wearing a hooded sweatshirt was not impermissibly suggestive because there was no evidence that the perpetrator had been wearing a hooded sweatshirt. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Test of validity of identification is whether the identification confrontation staged by the law enforcement authorities, judged by the totality of the circumstances surrounding it, is so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process of law. *Moye v. State*, 122 Ga. App. 14, 176 S.E.2d 180 (1970).

Test of photographic array procedure for witnesses to try to identify the criminal suspect is whether the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. A photographic array can be suggestive when used close in time to a lineup. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977).

Photo array not impermissibly suggestive. — Photographic lineup was not impermissibly suggestive even though the defendant was the only suspect who was thin and had red hair as three of the six photographs were of suspects with red hair, the officer did not suggest to the witnesses that the defendant was the perpetrator, but simply read the standard form to them and asked them to look at the pictures, all of the suspects pictured were approximately the same age,

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the witnesses identified the defendant immediately when shown the lineup, and the witnesses both identified the defendant at trial. *Standfill v. State*, 267 Ga. App. 612, 600 S.E.2d 695 (2004).

Where photographic identification procedure impermissibly suggestive. — Where the suspect is already in custody for other reasons, and only three pictures are used for the witness to choose from, two of which depict the suspect, and one which has been altered in a manner which might suggest that it depicted the suspect, the photographic identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Baier v. State*, 124 Ga. App. 334, 183 S.E.2d 622 (1971).

"One on one" confrontation between eye-witness and suspect was not violation of due process. *Davis v. State*, 233 Ga. 847, 213 S.E.2d 695 (1975).

In-court identification outweighing other identification procedures. — It was not necessary to decide whether the identification procedure was impermissibly suggestive, since the witness's in-court identification was based on the witness's opportunity to observe the defendant at the time of the murder, rather than on the photographic display. *Baty v. State*, 257 Ga. 371, 359 S.E.2d 655 (1987).

Even if pretrial identification is tainted, in-court identification is not constitutionally inadmissible if it does not depend upon the prior identification but has an independent origin. A witness's identification of the defendant had such an independent origin where he observed defendant at the scene, evidenced by the fact that the witness's composite sketch, made only three hours after the offense was committed, was almost identical to the defendant's photograph, shown to witness a week later. *Selbo v. State*, 186 Ga. App. 779, 368 S.E.2d 548 (1988).

Factors as to reliability of in-court identification. — Where suggestive pretrial confrontations may have created a substantial likelihood of irreparable misidentification at trial, the core question is whether, under the totality of the circumstances, the in-court identification was reliable. The factors to be

weighed in arriving at the ultimate conclusion are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Jones v. Newsome*, 846 F.2d 62 (11th Cir.), cert. denied, 488 U.S. 911, 109 S. Ct. 265, 102 L. Ed. 2d 253 (1988).

Mere fact that police officer handed photographs to victim for identification did not render the photographic identification procedure impermissibly suggestive. *Whitfield v. State*, 176 Ga. App. 476, 336 S.E.2d 356 (1985).

Due process not denied if pretrial confrontation accidental and not arranged toward inevitable identification. — If a pretrial confrontation is accidental and not so arranged by the authorities as to make a resulting identification virtually inevitable, there is no denial of due process, particularly where no identification is made to the authorities at the time of the confrontation. *Moye v. State*, 122 Ga. App. 14, 176 S.E.2d 180 (1970).

Provision against self-incrimination not applicable where defendant voluntarily submits for others identifying the defendant. — The essential element in the provision against self-incrimination is that no one shall be compelled to give evidence tending to incriminate oneself. The provision is not applicable where the defendant voluntarily submits oneself for the purpose of others identifying the defendant. *Whippler v. State*, 218 Ga. 198, 126 S.E.2d 744 (1962), cert. denied, 375 U.S. 960, 84 S. Ct. 446, 11 L. Ed. 2d 318 (1963).

Privilege against self-incrimination not violated by requiring suspect to verbalize specific words. — Requiring a suspect to verbalize specified words for identification purposes, whether or not the words used are the same as those allegedly used during the commission of the offense, does not violate the privilege against self-incrimination accorded the accused by the United States Constitution and the state's statutes and Constitution. *Clark v. State*, 166 Ga. App. 366, 304 S.E.2d 494 (1983).

Conviction based upon in-court identification following pretrial identification will be

set aside on that ground only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Moye v. State*, 122 Ga. App. 14, 176 S.E.2d 180 (1970).

Constitutional privileges against self-incrimination are applicable to post-arrest, pretrial police interrogation. *Clark v. State*, 237 Ga. 901, 230 S.E.2d 277 (1976).

Where the defendant claims as error the refusal to grant a severance, the defendant must make a clear showing of prejudice and a consequent denial of due process; it is insufficient to show a mere possibility that a separate trial would give the defendant a better chance of acquittal. *Love v. State*, 173 Ga. App. 85, 325 S.E.2d 449 (1984), *aff'd*, 254 Ga. 697, 334 S.E.2d 173 (1985).

Court's comments during voir dire. — Where, in ruling on a voir dire question, the trial court stated that "The defendant is the one that's injected race into the case. The state hasn't," and the defendant argued that the comment put a chill on the voir dire process, denying the defendant an opportunity to get a racially unbiased jury in denial of the defendant's due process rights, it was held that the record did not show either that the court's comment somehow abridged the scope or effectiveness of the defendant's voir dire questions or that the court's comment prejudiced the minds of the jurors against the defendant. *Walker v. State*, 258 Ga. 443, 370 S.E.2d 149 (1988).

Reserve police officers as jurors. — Trial court did not err in overruling challenges to two prospective jurors who were challenged because they were reserve police officers. *Wilson v. State*, 250 Ga. 630, 300 S.E.2d 640, *cert. denied*, 464 U.S. 865, 104 S. Ct. 199, 73 L. Ed. 2d 174 (1983).

Asking of leading questions. — A mature individual of normal intelligence, after being fully advised of the individual's constitutional rights and consenting to be interviewed without counsel, may, during short periods of questioning when not otherwise imposed upon, be asked leading questions. *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975).

Rights to assistance of counsel and to remain silent during in-custody police interrogation waivable. — Any suspect of a crime is guaranteed the rights to assistance of

counsel and to remain silent during in-custody police interrogation, and any statement obtained in derogation of those rights is inadmissible in a subsequent criminal prosecution. The suspect may, however, waive these rights provided the waiver is knowingly and intelligently made. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972).

Giving of Miranda warnings prior to defendant's incriminating remarks sufficient legal warning. — Where prior to making incriminating remarks, the defendant was given the Miranda warnings, further warning that the defendant should have present with the defendant at the time of making such dangerous statements, an attorney or, at least, a "disinterested person," was not legally required. *Durham v. State*, 243 Ga. 408, 254 S.E.2d 359 (1979).

Considerations in determining whether waiver of constitutional rights. — Mental deficiency, age, and lack of familiarity with the criminal process are important factors to be considered in determining whether there has been a waiver of constitutional rights. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972).

No increased charges in circumstances suggesting retaliation for defendant's assertion of rights without explanation. — Once a prosecutor exercises the discretion to bring certain charges against a defendant, neither the prosecutor nor the prosecutor's successor may, without explanation, increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendant's assertion of statutory or constitutional rights. *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).

Cases in which pretrial publicity held not prejudicial to due process. See *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105, 89 S. Ct. 908, 21 L. Ed. 2d 799 (1969), later appeal, 431 F.2d 70 (5th Cir. 1970), vacated on other grounds, 408 U.S. 938, 92 S. Ct. 2867, 33 L. Ed. 2d 758 (1972).

Due process requires that a pretrial detainee not be punished; therefore, where punishment is imposed without adjudication, the pertinent constitutional guarantee is the due process clause, not the eighth amendment. *McQuirter v. City of Atlanta*,

Due Process (Cont'd)**8. Pretrial Criminal Proceedings (Cont'd)**

572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Forfeiture of seized controlled substances. — O.C.G.A. § 16-13-49(c), which requires prompt institution of forfeiture proceedings in cases involving the seizure of controlled substances does not violate the equal protection and due process clauses. *Porter v. State*, 196 Ga. App. 31, 395 S.E.2d 360 (1990).

Incompetent defendant, forced to stand trial, denied due process. — There was insufficient reason for the jury to disregard the unanimous opinions of psychiatric experts that the defendant, who suffered from schizophrenia, was incompetent to stand trial. The defendant was therefore denied due process of law when tried. *Wallace v. Kemp*, 757 F.2d 1102 (11th Cir. 1985).

Hearing on mental competency. — State trial court which possessed substantial and convincing evidence of defendant's possible mental incompetency was required to sua sponte hold a competency hearing to establish the defendant's competency to plead guilty, and the court's failure to hold such a hearing violated the defendant's procedural due process rights. *Tiller v. Esposito*, 911 F.2d 575 (11th Cir. 1990).

9. Right to Counsel

Denial of assistance of counsel in criminal case violates due process clause of U.S. Const., amend. 14. *Walker v. State*, 194 Ga. 727, 22 S.E.2d 462 (1942); *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

United States Const., amend. 6 guarantee of assistance of counsel was incorporated into U.S. Const., amend. 14 by Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978).

Denial of counsel within meaning of Constitution renders judgment of conviction void. *Morris v. Peacock*, 202 Ga. 524, 43 S.E.2d 531 (1947).

Protection of accused from conviction due to ignorance of rights. — The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from the accused's own ignorance of the accused's legal and consti-

tutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim the accused's rights removes the protection of the Constitution. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Due process requires that criminal defendant have right to counsel at critical stages.

— The mandate of U.S. Const., amend. 6 that every accused in a criminal prosecution has the right to the assistance of counsel for his defense at every critical stage of the case as an essential component of due process in a trial in a state court compels every agency of government concerned with the operation of the courts to acknowledge the necessity for and implement the means by which this necessary public purpose must be accomplished. The provisions of Georgia's Constitution make the same demand. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Benefit of counsel at critical stages of case. — Accused's right to counsel includes benefit of counsel at critical stages of case and sufficiently prior to trial for adequate preparation. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973).

Right to counsel versus right to testify. — Where a federal district court presented the defendant with a choice: either to proceed with counsel with the caveat that the defendant could be kept off the witness stand, if the defendant's attorney so desired, or to proceed pro se, the defendant was impermissibly forced to choose between two constitutional rights: the right to testify and the right to counsel. *United States v. Scott*, 909 F.2d 488 (11th Cir. 1990).

Judge's refusal of request for postponement depriving defendant of opportunity to procure counsel violates amendment. — A judge's refusal of the request of a defendant for postponement, which in effect deprives the defendant of opportunity to use normal facilities and resources to procure counsel of the defendant's own choice, violates U.S. Const., amend. 14. *Walker v. State*, 194 Ga. 727, 22 S.E.2d 462 (1942).

Court duty to assign counsel not discharged if time or circumstances precludes giving of effective aid. — It is the duty of the

court to assign counsel for the applicant as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. *Mosley v. Dutton*, 367 F.2d 913 (5th Cir. 1966), cert. denied, 387 U.S. 942, 87 S. Ct. 2074, 18 L. Ed. 2d 1328 (1967), later appeal, *Mosley v. Smith*, 404 F.2d 346 (5th Cir. 1968).

Mere appointment of counsel insufficient to comply with due process. — The duty of appointing counsel to represent the defendant is not discharged by an appointment that precluded effective assistance; the mere appointment of counsel is insufficient in and of itself to comply with the due process clause. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

Procedure used by county in appointing attorneys for indigent did not violate due process where, in the event the public defender's office was unavailable, attorneys were appointed from alphabetical list in an equitable manner and special considerations were given in death penalty cases. *Lewis v. State*, 255 Ga. 101, 335 S.E.2d 560 (1985).

When due notice or waiver of irregularity assumed. — Where the defendant was present at the hearing and was represented by counsel, and no objection was made at that time to the effect that the notice was insufficient either as to length of time or in any other respect, to allow counsel to prepare the defense, and no continuance was requested for this purpose, it must be assumed that "due notice" was in fact received by the defendant or that, in any event, the general appearance of the defendant by defense counsel constituted a waiver of any irregularity therein. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

Necessity of counsel is vital and imperative, and the failure of the trial court to make an effective appointment of counsel is likewise a denial of due process within the meaning of U.S. Const., amends. 5 and 14. *Bridwell v. Aderhold*, 13 F. Supp. 253 (N.D. Ga. 1935), aff'd sub nom. *Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937), rev'd on other grounds, *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 ALR 357 (1938), overruled on other grounds, *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998).

Defendant cannot neglect procuring counsel. — A defendant must be afforded benefit

of counsel, and this includes time sufficient for counsel to prepare for trial, but where the defendant was apprised of the charge against the defendant at a previous term of court and the defendant fails or neglects to procure counsel or ask the court to do so for the defendant there is no error in refusing a request for additional time on the ground that the counsel has had insufficient time to prepare the defense. *Bradshaw v. State*, 132 Ga. App. 363, 208 S.E.2d 173 (1974).

Defendant's diligence in obtaining counsel. — Where the trial of the defendant had been continued in order to accommodate the defendant's request to obtain different counsel and the defendant had been told when the case would be tried and warned of the dangers of proceeding without counsel and the defendant appeared without counsel on the date set, before proceeding to trial the court should have made inquiry as to whether the defendant's failure to obtain counsel was attributable to the defendant's own lack of diligence. *Hasty v. State*, 210 Ga. App. 722, 437 S.E.2d 638 (1993).

Indigent defendant must be afforded counsel if requested. — Impoverished defendant unable to employ or arrange for counsel must be afforded a attorney when the defendant requests it in order to meet the constitutional guaranty and to afford due process. *Perry v. State*, 120 Ga. App. 304, 170 S.E.2d 350 (1969).

Right to counsel includes right to appointed counsel where defendant indigent. — Right of indigent defendant in criminal trial to have assistance of counsel is fundamental right essential to a fair trial. *Broome v. Matthews*, 223 Ga. 92, 153 S.E.2d 721 (1967).

Indigent defendant's rights are violated if the defendant is denied appointed counsel at a preliminary hearing and suffers prejudice on trial as result. *Dismuke v. State*, 127 Ga. App. 835, 195 S.E.2d 259 (1973).

Indigents must be furnished counsel at every critical stage of criminal proceedings, including first appeal, under U.S. Const., amends. 6 and 14. *Thornton v. Ault*, 233 Ga. 172, 210 S.E.2d 683 (1974).

The right to counsel, guaranteed by U.S. Const., amend. 6 and applicable to the states by virtue of U.S. Const., amend. 14, includes the right to appointed counsel where the defendant is indigent. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Due Process (Cont'd)**9. Right to Counsel (Cont'd)**

Where competent counsel was provided by the court for a defendant who was financially unable to employ an attorney, the defendant was not denied effective assistance of counsel. *Willingham v. State*, 134 Ga. App. 144, 213 S.E.2d 516 (1975).

Absent showing that indigent was aware of right to appointed counsel, no intentional abandonment or waiver of right. — In the absence of any showing that a petitioner was aware of the right to appointed counsel, if the petitioner was in fact indigent, it cannot be said that the petitioner intentionally abandoned or waived that right. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Due process requirement as to representation by counsel for indigent. — Where the law of the state requires the appointment of counsel for indigent persons, as in a capital case, where the defendant is unable to engage a lawyer and is incapacitated by ignorance, illiteracy, physical disability, or the like, to adequately make the defendant's own defense, due process of law requires that the court assign counsel for the defendant's, competent to serve, who shall give more than casual or perfunctory service to the prisoner. Lip service only will not do. Also, the Constitution requires that a fair opportunity shall be afforded such counsel to consult the client and to prepare a defense against the charge. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), aff'd, 131 F.2d 110 (5th Cir. 1942), cert. denied, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

Right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and a trial and conviction without the assistance of counsel violates the fourteenth amendment. No showing of prejudice is required of a defendant who has been denied assistance of counsel because when one pleads to a criminal charge without benefit of counsel, a reviewing court does not stop to determine whether prejudice resulted. *Heath v. State*, 268 Ga. App. 235, 601 S.E.2d 758 (2004).

Indigent accused entitled to be as fully defended as one able to employ counsel. — An accused who is unable by reason of

poverty to employ counsel is entitled to be defended in all the accused's rights as fully and to the same extent as is an accused who is able to employ one's own counsel. *Downer v. Dunaway*, 53 F.2d 586 (5th Cir. 1931).

Though compensation for attorney's representation of indigent not constitutionally required. — A request by a judge of a trial court that an attorney represent an indigent defendant in a criminal case is tantamount to a demand with which the attorney must necessarily comply, but the attorney's professional services, work product and necessary out-of-pocket expenses in providing competent representation are not required by the Constitution to be compensated. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Preference for expert. — An indigent defendant does not have a constitutional right to the expert the defendant prefers. *McNeal v. State*, 263 Ga. 397, 435 S.E.2d 47 (1993).

Prior convictions in violation of indigent defendant's right to appointed counsel cannot be introduced for collateral use in subsequent trials. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Consideration of a person's prior uncounseled convictions for driving under the influence in determining an appropriate sentence for a subsequent conviction does not violate any constitutional right to counsel because the driving under the influence statute (O.C.G.A. § 40-6-391) is not an enhanced penalty statute since it neither increases the maximum confinement authorized nor converts a misdemeanor offense into a felony. *Moore v. State*, 181 Ga. App. 548, 352 S.E.2d 821, cert. denied, 484 U.S. 904, 108 S. Ct. 247, 98 L. Ed. 2d 204 (1987).

Imposing of recidivist sentence. — Prior convictions obtained in violation of a defendant's right to appointed counsel where the defendant is indigent cannot be used for the purpose of imposing a recidivist sentence. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Gideon v. Wainwright has retroactive effect where the records of prior convictions obtained in violation of its standards are introduced for collateral use in subsequent trials. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

When defendant not denied counsel. — Where it does not appear that a defendant was unable to employ counsel, or that he desired or made any request for counsel, or that the court declined to appoint counsel to represent the defendant, the defendant was not denied counsel. *Balkcom v. Shores*, 219 Ga. 429, 134 S.E.2d 3 (1963).

Due process does not require forcing counsel upon defendant. *Balkcom v. Shores*, 219 Ga. 429, 134 S.E.2d 3 (1963).

Guarantee of benefit of counsel in criminal proceeding waivable. — The constitutional guarantees of the benefit of counsel to a defendant in the trial of a criminal proceeding both federal and state may be waived by the defendant. *Williams v. Gooding*, 226 Ga. 549, 176 S.E.2d 64 (1970).

Waiver of right to counsel. — The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver of the right to counsel. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Valid waiver of right to counsel exists only if defendant intentionally relinquishes or abandons known right or privilege. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Valid waiver of appointed counsel requires broad understanding of situation. — To be valid a waiver of appointed counsel must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishment thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the matter. *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973).

Burden of valid waiver of right to counsel upon prosecution. — Burden is upon prosecution to affirmatively establish valid waiver of right to counsel, and waiver may not be presumed from a silent record. *Blaylock v. Hopper*, 233 Ga. 504, 212 S.E.2d 339 (1975).

Presumption is against waiver of benefit of counsel, which must be done voluntarily, knowingly and intelligently. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973).

Affirmative showing that court furnished accused with information to make knowing

decision about right to counsel required. — It must be affirmatively shown that the court furnished the accused with the necessary information upon which the accused could make a voluntary, knowing and intelligent decision regarding his right to counsel. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973).

Trial judge's responsibility to determine if proper waiver of appointed counsel. — It is the responsibility of the trial judge, when the accused is without counsel, to clearly determine whether there has been a proper waiver of appointed counsel. A judge must investigate as long and as thoroughly as the circumstances of the case before the judge demand. *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973).

Requiring penetrating and comprehensive examination of circumstances. — A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973).

Right to counsel attaches only at or after time that adversary judicial proceedings have been initiated against him. *West v. State*, 229 Ga. 427, 192 S.E.2d 163 (1972).

Waiver of right to counsel at plea hearing. — A judge must be present before a defendant may waive his or her constitutional right to be represented by counsel at a plea hearing. *Penney v. Vaughn*, 870 F. Supp. 1093 (M.D. Ga. 1994).

Use of jailhouse informants to obtain incriminating information. — In order to establish a prisoner's claim that the state violated the prisoner's right to counsel by using jailhouse informants deliberately to elicit incriminating information from the prisoner in the absence of counsel, the prisoner must show (1) that a fellow inmate was a government agent; and (2) that the inmate deliberately elicited incriminating statements from the prisoner. *Depree v. Thomas*, 946 F.2d 784 (11th Cir. 1991).

Admission of incriminating statements given by defendant to fellow inmate was proper where the inmate's activity in eliciting defendant's statements was not so coercive as to violate due process. *Wilson v. State*, 264 Ga. 287, 444 S.E.2d 306, cert. denied,

Due Process (Cont'd)**9. Right to Counsel (Cont'd)**

513 U.S. 988, 115 S. Ct. 486, 130 L. Ed. 2d 398 (1994).

Generally, preindictment lineup does not trigger right to counsel. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977).

In Georgia preliminary commitment hearing is not inherently critical stage of criminal proceedings. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

When due process not denied by failure to make counsel available to defendant at preliminary commitment hearing. — The failure to make counsel available to the defendant at a preliminary commitment hearing, where the defendant entered a plea of guilty that was not introduced in evidence at the defendant's trial, was not a denial of due process of law under U.S. Const., amend. 14. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Refusal to appoint counsel for defendant at commitment hearing did not violate due process. *Molignaro v. Balkcom*, 221 Ga. 150, 143 S.E.2d 748 (1965).

Denial of counsel at commitment hearing does not deny accused due process where rights not prejudiced by lack of counsel at that time. *Smith v. Fuller*, 223 Ga. 673, 157 S.E.2d 447 (1967).

Arraignment is critical stage in criminal case. The absence or lack of counsel at such time is a violation of the right of the accused to due process. In such cases courts "do not stop to determine whether prejudice resulted." *Phillips v. Smith*, 300 F. Supp. 130 (S.D. Ga. 1969).

It is unconstitutional to try a person on state felony charge unless that person has assistance of counsel or has validly waived it. *Wren v. United States Bd. of Parole*, 389 F. Supp. 938 (N.D. Ga. 1975).

Persons charged with serious criminal offenses have right to counsel. — Persons charged with serious criminal offenses have right under U.S. Const., amends. 6 and 14 to assistance of counsel in their defense. *Shepherd v. Jordan*, 425 F.2d 1174 (5th Cir. 1970).

Where offense classified as serious, counsel must be furnished. — The length of the maximum sentence authorized by a statute

proscribing criminal conduct determines the classification of an offense as petty or serious. All charges against an accused must be cumulated in measuring the possible sentence which could be imposed for the purpose of calculating whether the offense is petty or serious, and where an offense is classified as serious, counsel must be furnished. *Shepherd v. Jordan*, 425 F.2d 1174 (5th Cir. 1970).

Presumption that right to counsel not denied if no affirmative showing of denial in record. — Where the record of the trial does not affirmatively show in a felony case that the accused person of mature age was denied the benefit of counsel, it must be presumed that the trial judge did the judge's duty and that the accused was not denied the right to counsel. *White v. Grimes*, 216 Ga. 335, 116 S.E.2d 561 (1960).

Person charged with felony in state court has unconditional and absolute constitutional right to lawyer. This right attaches at the pleading stage of the criminal process, and may be waived only by voluntary and knowing action. *Boyd v. Dutton*, 405 U.S. 1, 92 S. Ct. 759, 30 L. Ed. 2d 755 (1972).

Trial court did not abuse its discretion in requiring appointed counsel to proceed with the trial of the case where appointed counsel was the only counsel recognized by the court as representing the defendant, and there was no direct evidence that any other counsel was privately employed to represent the defendant in the case. *Arnold v. State*, 156 Ga. App. 248, 274 S.E.2d 640 (1980).

Trial court's permitting appointed counsel to leave courtroom during state's argument not deprivation of right to counsel. — Under no theory can it be maintained that the trial court committed any error permitting the appellant's appointed counsel to leave the courtroom during the state's argument thereby depriving the appellant of the right of counsel under U.S. Const., amends. 6 and 14. *Bryant v. State*, 229 Ga. 60, 189 S.E.2d 435 (1972).

Appointment of additional counsel to assist regularly employed counsel. — It is not denial of due process for trial court to appoint and tender to defendant additional counsel to assist regularly employed counsel of defendant's own selection. *Andrews v. Robertson*, 145 F.2d 101 (5th Cir. 1944), cert. denied, 324 U.S. 874, 65 S. Ct. 1013, 89 L. Ed. 1427 (1945).

Where representation by counsel comports with due process. — As to the requirement under U.S. Const., amend. 14, the services of counsel meet the requirement of the due process clause when he is a member in good standing at the bar, gives the client complete loyalty, serves in good faith to the best of counsel's ability, and counsel's service is of such character as to preserve the essential integrity of the proceedings at a trial in a court of justice. Counsel is not required to be infallible. Counsel's client is entitled to a fair trial, not a perfect one. *Jones v. Balkcom*, 210 Ga. 262, 79 S.E.2d 1 (1953), cert. denied, 347 U.S. 956, 74 S. Ct. 682, 98 L. Ed. 1101 (1954).

Where counsel, representing a defendant in a criminal case, is a member of the bar in good standing, and, in representing the client in the trial of the case, gives complete loyalty to the client, serves the client in good faith to the best of counsel's ability, and counsel's service is of such a character as to preserve the essential integrity of the proceedings in a court of justice, the requirements of due process within U.S. Const., amend. 14 and Ga. Const. 1983, Art. I, Sec. I, Para. I, are met. *Bolick v. State*, 127 Ga. App. 542, 194 S.E.2d 302 (1972).

Broad latitude of advice, direction, and policy in interest of client is essentially vested in counsel in the conduct of a trial. Counsel often waive apparently important points in the bona fide belief that, on the whole, greater advantage will be gained indirectly than might have been gained directly by insisting on them, and such a waiver either express or implied would ordinarily not tend to show incompetency. No lawyer is infallible, and the constitutional guaranties of the benefit of counsel, and of due process, do not contemplate such infallibility. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Because the defendant's attorneys did not move for a continuance and obtain a longer time to prepare the case, because they allowed irrelevant or otherwise illegal evidence to be admitted without objection, because they relied solely on the statement of the defendant to the jury without introducing testimony, and because they themselves did not actively pursue the motion for new trial are not matters which would con-

stitute a denial of the right to due process, but at most would amount to alleged negligence or errors of judgment. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Defendant is entitled to effective assistance of counsel in determining how to plead and in making plea and can attack the conviction collaterally if the defendant is not given this right. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Advice of counsel to defendant entering guilty plea must be within range of competence demanded of attorneys in criminal cases. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Defendant's lawyer's duty to ascertain whether plea of guilty is entered voluntarily and knowingly. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Counsel inducing defendant to plead guilty on patently erroneous advice. — Where counsel induced defendant to plead guilty on patently erroneous advice, defendant has been denied effective assistance of counsel, as well as due process. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

Defendant's due process rights were violated where throughout the state and federal habeas proceeding the defendant was induced to plead guilty by defendant's counsel's erroneous advice that the plea bargain would enable defendant to serve the federal and state sentences concurrently. Thus, the attorney provided ineffective assistance to defendant as the guilty plea was not knowing, intelligent and voluntary. *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995).

After an inmate's counsel affirmatively misinformed the inmate that if the inmate entered a plea of guilty to a first offender offense of violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., that such would not impair the inmate's ability to become a lawyer, nor would it impact the inmate's immigration status, the trial court erred in denying the inmate's petition for a writ of habeas corpus pursuant to O.C.G.A. § 9-14-5 because under the Strickland analysis, the inmate's counsel was ineffective, as the inmate had graduated law

Due Process (Cont'd)**9. Right to Counsel (Cont'd)**

school and passed the Bar, but the inmate's admission was held up due to the conviction, and deportation proceedings had been commenced against the inmate. Thus, since the inmate relied upon a lawyer's misinformation about collateral consequences stemming from a guilty plea, the inmate had grounds to argue that counsel provided ineffective representation pursuant to U.S. Const., amend. 6, and such claims are to be analyzed under the two-part Strickland test. *Rollins v. State*, 277 Ga. 488, 591 S.E.2d 796 (2004).

Counsel's conceding client's guilt rendered assistance ineffective. — Given the petitioner's plea of not guilty, the petitioner's denial of involvement in the crime, and the insubstantiality of the petitioner's insanity defense, counsel's conceding the client's guilt was irrational and rendered the assistance at trial ineffective. *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985).

Counsel to ascertain whether voluntary, knowing plea and assist in decision whether to plead guilty. — Counsel must ascertain whether a plea is entered voluntarily and knowingly and must actually and substantially assist the defendant in deciding whether to plead guilty by providing an understanding of the law in relation to the facts. Counsel's advice need not be perfect, but it must be reasonably competent so as to permit the accused to make an informed and conscious choice. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979); *Austin v. Carter*, 248 Ga. 775, 285 S.E.2d 542 (1982).

Effective assistance of counsel does not require errorless counsel, or counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979); *Rosser v. State*, 156 Ga. App. 463, 274 S.E.2d 812 (1980), aff'd, 247 Ga. 724, 279 S.E.2d 217 (1981); *Mitchell v. Hopper*, 538 F. Supp. 77 (S.D. Ga. 1982), supplemented by 564 F. Supp. 780 (S.D. Ga. 1983), aff'd in part, rev'd in part sub nom. *Ross v. Kemp*, 756 F.2d 1483 (11th

Cir. 1985), aff'd in part sub nom. *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir.), rev'd in part sub nom. *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986), cert. denied, 487 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed. 2d 774 (1987), 500 U.S. 960, 111 S. Ct. 2276, 114 L. Ed. 2d 727 (1991); *Galloway v. State*, 165 Ga. App. 536, 301 S.E.2d 894 (1983).

Whenever actions of retained counsel operate to deprive trial of fundamental fairness, due process violated, notwithstanding any kind of specific involvement by a particular state official. If, however, retained counsel's actions in representing the defendant do not violate fundamental fairness, but are challenged as less than reasonably effective in violation of the U.S. Const., amend. 6, state involvement through actual or constructive awareness of the error by the judge, prosecutor, or other responsible official who could have corrected it, must be shown. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Counsel's significant misleading statements can rise to denial of due process. — While the good faith errors of appointed counsel are normally insufficient to justify granting a motion to vacate sentence, significant misleading statements of counsel can rise to a level of denial of due process of law and result in a vitiation of the judicial proceeding because of ineffective assistance of counsel. *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

Where accused virtually unrepresented or substantially without aid of counsel. — If appointed attorneys are so ignorant, negligent, or unfaithful that the accused was virtually unrepresented, or if the accused did not in any real or substantial sense have the aid of counsel, the accused would be deprived of a fundamental constitutional right and, if convicted, might successfully complain that the accused had been denied due process of law. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

If counsel for the defendant in a criminal case of the character of which the present defendant stands convicted, whether appointed by the court or of the defendant's selection, was so negligent or unfaithful in the trial of the case that the defendant was

virtually unrepresented, or if the defendant did not in any real or substantial sense have the aid of counsel, this amounts to deprivation of a fundamental constitutional right, and the defendant under such circumstances may complain that the defendant has been denied due process of law. *Jones v. Balkcom*, 210 Ga. 262, 79 S.E.2d 1 (1953), cert. denied, 347 U.S. 956, 74 S. Ct. 682, 98 L. Ed. 1101 (1954).

Where due process and adequate representation by counsel lacking. — Where defense counsel did not adequately investigate the matter of an insanity defense, did not adequately inform and advise the client as to the advisability of utilizing such a defense, and did not raise and press the issue of disqualification of the judge, due process and adequate representation by counsel were lacking. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Where conflict of interest is objected to before trial, prejudice need not be shown. — Whenever a defendant establishes the defense lawyer's unconstitutional multiple representation, that is, where an actual conflict of interest is objected to before or during trial, prejudice need not be demonstrated; however, in order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected the lawyer's performance. *Dean v. State*, 247 Ga. 724, 279 S.E.2d 217 (1981).

Ineffective representation due to conflict of interest renders trial fundamentally unfair. — Ineffective representation by a lawyer laboring under a conflict of interest renders trial fundamentally unfair whether judge knew of conflict or not. Unlike most fourteenth amendment due process cases, no state action in the form of a state official's knowledge of the wrongdoing need be shown. A deprivation of due process results when judgment reached in such a trial is enforced. *Johnson v. Hopper*, 639 F.2d 236 (5th Cir.), rehearing denied, 644 F.2d 36 (5th Cir.), cert. denied, 454 U.S. 1010, 102 S. Ct. 548, 70 L. Ed. 2d 412 (1981).

Counsel not absolutely necessary for fair trial. — U.S. Const., amend. 14 prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while

want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, U.S. Const., amend. 14 does not embody an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel. *Gann v. Gough*, 79 F. Supp. 912 (N.D. Ga.), rev'd on other grounds, *Hiatt v. Gann*, 170 F.2d 473 (5th Cir. 1948), cert. denied, 337 U.S. 920, 69 S. Ct. 1148, 93 L. Ed. 1729 (1949).

Denial of benefit of counsel constitutes ground for issuance of writ of habeas corpus. The deprivation of counsel is such a fundamental and radical error that it operates to render the trial illegal and void. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Where allegations of denial of benefit of counsel in habeas corpus petition insufficient. — In a habeas corpus petition, allegations to the effect that the defendant had entered a plea of guilty to an indictment for a felony offense "without the advice of counsel" were insufficient to charge that the defendant was denied the constitutional right of the privilege and benefit of counsel, since the petition failed to allege that the defendant was unable to employ counsel or that the defendant desired or made any request for counsel or that the court declined to appoint counsel to represent the defendant. *White v. Grimes*, 216 Ga. 335, 116 S.E.2d 561 (1960).

Where defendant is represented by retained counsel at trial prerequisites in showing denial of counsel for appeal: (1) it must be known to the court that the criminal defendant is indigent; and (2) it must be known to the court that the defendant wishes to appeal. *Goforth v. Dutton*, 409 F.2d 651 (5th Cir. 1969).

Effective assistance of counsel as to appeal. — An attorney renders effective assistance of counsel with regard to the decision whether to appeal when the attorney advises the client of the client's appellate rights and does not preempt the client's decision to appeal. *Murphy v. Balkcom*, 245 Ga. 13, 262 S.E.2d 784 (1980).

Appointed counsel must fully inform client of appellate rights. — Representation is

Due Process (Cont'd)**9. Right to Counsel** (Cont'd)

inadequate and right of appeal denied where appointed counsel fails to fully inform client of appellate rights. *Gregory v. United States*, 446 F.2d 498 (5th Cir. 1971); *Thornton v. Ault*, 233 Ga. 172, 210 S.E.2d 683 (1974).

Where appointed counsel can determine no basis for appeal exists. — Where the defendant's appointed counsel made an affirmative determination, as was counsel's right to do in conducting the defense, that no basis for an appeal existed, it does not appear that the appellant was denied the right to counsel on appeal or due process of law. *Blackmon v. Smith*, 226 Ga. 849, 178 S.E.2d 176 (1970).

Appointed lawyer may not forego direct appeal without client consent. — Right to appeal is violated when appointed lawyer deliberately foregoes direct appeal without client's consent. *Gregory v. United States*, 446 F.2d 498 (5th Cir. 1971); *Thornton v. Ault*, 233 Ga. 172, 210 S.E.2d 683 (1974).

Defendant is deprived of adequate representation of counsel on appeal in violation of U.S. Const., amend. 14 unless these requirements are complied with: (1) counsel must make a conscientious examination of the case; (2) if counsel finds that an appeal would be wholly frivolous, counsel must notify the court and request permission to withdraw; (3) that request must be accompanied by a brief presenting any issue which might arguably be raised on appeal; (4) petitioner should be furnished a copy of the brief and allowed an opportunity to raise any additional issues; (5) the court should examine the case to determine whether it is frivolous; (6) if the court finds the appeal frivolous, it may grant the request to withdraw and dismiss the appeal; and (7) if the court finds any of the issues arguable on their merits, it must then furnish counsel to argue the appeal. *Byrd v. Smith*, 407 F.2d 363 (5th Cir. 1969).

Appointed counsel must notify court of frivolous criminal appeal. — When appointed counsel considers criminal appeal frivolous, he must notify appellate court and request permission to withdraw, and the court must then examine the case to determine whether it is frivolous. *Thornton v.*

Ault, 233 Ga. 172, 210 S.E.2d 683 (1974).

Indigent defendant is entitled to appointment of counsel to assist the defendant on first appeal, and that appointed counsel must function in the active role of an advocate. *Goforth v. Dutton*, 409 F.2d 651 (5th Cir. 1969).

The failure to grant an indigent defendant seeking initial review of the conviction the services of an advocate violates petitioner's rights to fair procedure and equality under U.S. Const., amend. 14. *Chenoweth v. Smith*, 225 Ga. 572, 170 S.E.2d 235 (1969).

Provision for counsel for indigent defendants seeking discretionary appeals to Supreme Court not required. — Neither the due process clause nor the equal protection clause of U.S. Const., amend. 14 requires that counsel be provided for indigent defendants seeking discretionary appeals to the state Supreme Court or to the United States Supreme Court. *Wooten v. State*, 245 Ga. 724, 266 S.E.2d 927 (1980).

Denial of assistance of counsel at state habeas hearing does not constitute denial of due process. *Burston v. Caldwell*, 477 F.2d 996 (5th Cir. 1973), cert. denied, 421 U.S. 990, 95 S. Ct. 1995, 44 L. Ed. 2d 480 (1975).

Appointment of counsel on habeas corpus proceedings in state court is not required by due process clause of U.S. Const., amend. 14. *NLRB v. Brady Aviation Corp.*, 224 F.2d 23 (5th Cir. 1955).

Constitutional infirmities found in multiple representation of codefendants may violate due process clause or the sixth amendment, and for that reason relief can be granted. *Dean v. State*, 247 Ga. 724, 279 S.E.2d 217 (1981).

Ineffective counsel established. — Where a defendant, charged with murder, rape and burglary, among other crimes, was represented at trial by two attorneys, each of whom actively participated in the defense, and each attorney espoused a defense at odds with that of the other, causing a discernible split within the ranks of the defense team which prevented counsel from, among other things, effective performance of the duty to assist petitioner in the decision whether to testify in the defendant's own defense, the defendant did not receive the effective assistance of counsel guaranteed by the Constitution. *Ross v. Kemp*, 260 Ga. 312, 393 S.E.2d 244 (1990).

Ineffective assistance not shown. — Where evidence showed that the defendant's counsel discussed with the defendant the right to testify and advised against it, and the defendant never affirmatively asked to testify, defendant failed to demonstrate that counsel erroneously deprived the defendant of the choice to testify and that counsel's deficiency in this regard deprived the defendant of a fair trial. *Mobley v. State*, 264 Ga. 854, 452 S.E.2d 500 (1995); *Barron v. State*, 264 Ga. 865, 452 S.E.2d 504 (1995).

Federal abstention. — The Court of Appeals abstained from exercising its equitable jurisdiction to hear a class action claim that Georgia's indigent defense system was inherently incapable of providing constitutionally adequate services and that the system therefore violated the sixth, eighth, and fourteenth amendments to the United States Constitution. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

10. Criminal Trials

Applicability of U.S. Const., Amend 5, protections in civil and criminal actions. — The protections of U.S. Const., amend. 5 may be invoked in civil as well as criminal actions and applied fully to state proceedings through U.S. Const., amend. 14. *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

Criminal defendant is not entitled to perfect trial under U.S. Const., amend. 14. *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

State's responsibility for fair trial. — State, through the judge or prosecutor, has a responsibility to see that the defendant receives a fair trial under U.S. Const., amend. 14. *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185, cert. denied, 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d 136 (1980).

Right to fair trial denied. — The evidence below supported the habeas court's findings that (1) in failing to seek a continuance the defendant's counsel rendered ineffective assistance at the defendant's trial; and (2) counsel's ineffectiveness so prejudiced the defendant's case that the defendant was effectively denied the defendant's right to a fair trial as guaranteed by the sixth and fourteenth amendments to the United States

Constitution. *Turpin v. Bennett*, 272 Ga. 57, 525 S.E.2d 354 (2000).

Heinous offense defendants entitled to fair trial. — Even those guilty of most heinous offenses are entitled to fair trial. *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).

Justice involves delicate judgment based on circumstances of each case. — To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. *State v. Madden*, 242 Ga. 637, 250 S.E.2d 484 (1978).

Rights to be tried in court of law and not to be treated with unreasonable, unnecessary or unprovoked force while in custody. — The constitutional right to due process of law includes not only the right to be tried in a court of law for alleged offenses against the state, but also a right not to be treated with unreasonable, unnecessary or unprovoked force by those charged by the state with the duty of keeping accused and convicted offenders in custody. *United States v. Stokes*, 506 F.2d 771 (5th Cir. 1975).

Trial by jury not required. — Due process clause does not require trial by jury. *Allen v. State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

Jury trial in all state nonpetty criminal cases. — U.S. Const., amend. 14 guarantees the right of trial by jury in all state nonpetty criminal cases. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978); *Haygood v. State*, 221 Ga. App. 477, 471 S.E.2d 552 (1996).

Impartial tribunal required by due process. — Due process requires competent and impartial tribunal in administrative hearings and in trials to judge. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Bifurcated proceedings. — Defendant's conviction was affirmed as trying the issues of guilt and sentence before the same jury in bifurcated proceedings was not unconstitutional. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006).

Due process limitations on composition of jury. — If a state chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Due Process (Cont'd)**10. Criminal Trials (Cont'd)**

Due process clause protects defendant from jurors actually incapable of rendering impartial verdict, based on the evidence and the law. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Defendant cannot complain that two prospective jurors were not stricken for cause where defendant did not challenge the prospective jurors for cause and the prospective jurors did not serve on the jury that tried the case. *Thomas v. State*, 264 Ga. App. 389, 590 S.E.2d 778 (2003).

Exclusion of jurors opposed to death penalty. — Questioning of jurors and exclusion of those opposed to the death penalty does not violate the due process clause of U.S. Const., amend. 14. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

States have wide leeway in dividing responsibility between judge and jury in criminal cases. If a state concludes that jury sentencing is preferable, nothing in the due process clause of U.S. Const., amend. 14 intrudes upon that choice. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

Conviction upon charge not made or upon charge not tried constitutes denial of due process. *DeFrancis v. Manning*, 246 Ga. 307, 271 S.E.2d 209 (1980).

Conviction upon a charge not made would be sheer denial of due process. *Rowe v. State*, 166 Ga. App. 836, 305 S.E.2d 624 (1983), aff'd, 181 Ga. App. 492, 352 S.E.2d 813 (1987).

Defense that act defendant is charged with violating is unconstitutional. — Due process of law demands that a party not be penalized for exercising that party's right to raise the defense that the act which the party is being charged with violating is unconstitutional. *United States v. Northside Realty Assocs.*, 474 F.2d 1164 (5th Cir. 1973), cert. denied, 424 U.S. 977, 96 S. Ct. 1483, 47 L. Ed. 2d 747 (1976).

Defense of selective prosecution. — Though selective prosecution, if based on improper motives, can violate constitutional guarantees of equal protection, selective enforcement in and of itself is not a constitu-

tional violation; therefore, to support a defense of selective prosecution, one must establish that others similarly situated have not generally been prosecuted and that the government's discriminatory selection of defendant is invidious, or in bad faith — that is, based on constitutionally impermissible considerations, such as race or religion. *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir.), cert. denied, 447 U.S. 907, 100 S. Ct. 2991, 64 L. Ed. 2d 856 (1980).

Harmless error. — Before constitutional error can be held harmless, court must believe it harmless beyond reasonable doubt. *Good v. State*, 127 Ga. App. 775, 195 S.E.2d 264 (1972).

Constitutionality of law cannot be raised for first time in motion for new trial and the fact that the laws were declared unconstitutional pending appeal does not require a different result. *Konscol v. Konscol*, 151 Ga. App. 696, 261 S.E.2d 438 (1979), cert. denied, 449 U.S. 875, 101 S. Ct. 218, 66 L. Ed. 2d 97 (1980).

Cross-examination. — Even if the state violated the defendant's due process rights in asking whether the victim's death was accidental on cross-examination, any error was harmless, based on the overwhelming evidence that the victim's injuries were not accidental. *Thomas v. State*, 281 Ga. 550, 640 S.E.2d 255 (2007).

Presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by the defendant's absence, and to that extent only. *Bishop v. State*, 179 Ga. App. 606, 347 S.E.2d 350 (1986).

Defendant has the privilege under U.S. Const., amend. 14 to be present personally whenever the defendant's presence has a relation, reasonably substantial, to the fullness of the defendant's opportunity to defend against the charge. *Bishop v. State*, 179 Ga. App. 606, 347 S.E.2d 350 (1986).

Due process requires that the defendant be personally present to the extent that a fair and just hearing would be thwarted by the defendant's absence, and to that extent only. *Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Due process error must deny fundamental fairness to warrant reversal. — In evaluating

whether an admission of evidence constituted a due process violation, a court reviews the record only to determine whether any error it finds is of such magnitude as to deny fundamental fairness to the criminal trial. To show a denial of fundamental fairness, any error must be material in the sense of a crucial, critical, highly significant factor. *Collins v. Francis*, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984).

Governmental misconduct. — When considering the appropriate remedy for an alleged constitutional violation involving governmental misconduct, the remedy should be tailored to the injury suffered from the violation alleged and should not result in the dismissal of an indictment, or in the granting of a directed verdict, when the case may proceed with full recognition of the defendant's right to a fair trial. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 246 (1987).

Vicarious liability unconstitutional. — Vicarious criminal liability in misdemeanor cases which involve as punishment a fine and not imprisonment violates due process. *Davis v. City of Peachtree City*, 251 Ga. 219, 304 S.E.2d 701 (1983).

Indictment failing to specify exact cause of death. — Where the defendant argued that the defendant was denied due process since the indictment did not allege the cause of the defendant's spouse's death and, therefore, denied the defendant the opportunity to prepare a defense, it was held that an indictment failing to specify the cause of death is sufficient when the circumstances of the case will not admit of greater certainty in stating the means of death, and the available evidence at the time of the indictment was that the victim's body was discovered in a decomposed condition near a trash dump. The medical examiner ruled out several possible causes of death but could not ascertain the actual cause of death due to the condition of the body. *Phillips v. State*, 258 Ga. 228, 368 S.E.2d 91 (1988).

Intent to commit criminal act will sustain conviction and the state may fix the punishment based on the result of that criminal act. *Head v. State*, 246 Ga. 360, 271 S.E.2d 452 (1980).

Defendant taking the stand. — Criminal defendant may not be compelled to take the

stand at all, thus in effect being allowed to invoke U.S. Const., amend. 5 against any and all questions. *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977).

Silence of accused. — Although the use of a defendant's silence, after the defendant has received Miranda warnings, to impeach the defendant violates due process, where a defendant is not silent but makes a statement, the state can impeach the defendant's trial testimony with inconsistencies or omissions in the defendant's pre-trial statement. *Pye v. State*, 269 Ga. 779, 505 S.E.2d 4 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1767, 143 L. Ed. 2d 797 (1999).

Constitutional right against self-incrimination is incorporated in former Code 1933, § 38-415 (see O.C.G.A. § 24-9-20). *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), sentence vacated, 243 Ga. 244, 253 S.E.2d 707 (1979).

Double jeopardy. — Double jeopardy prohibition of U.S. Const., amend. 5 is enforceable against states through U.S. Const., amend. 14. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970); *Staggers v. Stynchcombe*, 319 F. Supp. 1305 (N.D. Ga. 1970), aff'd, 436 F.2d 585 (5th Cir. 1971).

It was error to grant the defendants' plea in bar based on double jeopardy after granting the defendants' motion for a mistrial when the prosecutor told the defense that a rifle could not be located; even if the conduct of the prosecutor's staff in not telling the prosecutor that the rifle was missing could be imputed to the prosecutor, there was no evidence that those persons intended to goad the defendants into moving for a mistrial. *State v. Traylor*, 281 Ga. 730, 642 S.E.2d 700 (2007).

Applicability of doctrine of collateral estoppel. — The doctrine of collateral estoppel is a part of the guarantee of U.S. Const., amend. 5 against double jeopardy and is applicable against the states through U.S. Const., amend. 14. *Clark v. State*, 144 Ga. App. 69, 240 S.E.2d 270 (1977).

Person may not be convicted by both state and municipality for same crime. The test for determining if there is a fatal identity between the crime and the ordinance is whether the ordinance contains an ingredient or element, essential to the city's peace

Due Process (Cont'd)**10. Criminal Trials (Cont'd)**

but not essential to the state offense, or if the offense created by the ordinance lacks some element essential to the state crime. *Barrett v. State*, 123 Ga. App. 210, 180 S.E.2d 271 (1971).

Defense counsel cannot later prosecute accused for same offense against which counsel had previously defended accused. *Burkett v. State*, 131 Ga. App. 662, 206 S.E.2d 848 (1974).

Delay in filing trial transcript. — Unless it clearly appears that the delay in filing a trial transcript prevented the presentation of an adequate appeal or impaired a defense which would otherwise be available to an appellant where a new trial is ordered due to trial error, an appellant has not suffered the prejudice which turns a transcript delay into a violation of due process of law. *Graham v. State*, 171 Ga. App. 242, 319 S.E.2d 484 (1984).

Delay in investigative stage before arrest of indictment. — Where delay in bringing defendant to trial occurs in investigative stage before either arrest or indictment, due process, not sixth amendment, standards apply. *Andrews v. State*, 175 Ga. App. 22, 332 S.E.2d 299 (1985).

Standard of review for due process claims based upon preindictment or prearrest delay. See *Madden v. State*, 242 Ga. 637, 250 S.E.2d 484 (1978).

Dismissal for prearrest or preindictment delay required when substantial prejudice caused by intentional delay. — Dismissal is required for prearrest or preindictment delay under the due process clause when it is shown that delay caused actual, substantial prejudice to defendant's right to a fair trial and that the delay was an intentional device to gain a tactical advantage over defendant. *Armour v. State*, 140 Ga. App. 196, 230 S.E.2d 346 (1976).

Although there is no constitutional right to a speedy indictment or arrest, the due process clause requires dismissal of an indictment if it is shown at trial that preindictment delay caused substantial prejudice to defendant's rights with respect to the events occurring prior to indictment. *State v. Maden*, 242 Ga. 637, 250 S.E.2d 484 (1978).

To support a due process claim of unlaw-

ful preindictment delay, the defendant must show actual prejudice resulting from the preindictment delay and that the delay was purposefully designed to gain a tactical advantage or to harass the defendant. *State v. Hight*, 156 Ga. App. 246, 274 S.E.2d 638 (1980).

Speedy trial is fundamental constitutional right, not privilege. *Blevins v. State*, 113 Ga. App. 702, 149 S.E.2d 423 (1966).

Purposes of right to speedy trial. — The right to a speedy trial is intended to avoid oppression and prevent delay by imposing on the courts and on the prosecution an obligation to proceed with reasonable dispatch. The guaranty has been held to serve a threefold purpose: it protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves the accused of the anxiety and public suspicion attendant upon an untried accusation of crime; and, like statutes of limitation, it prevents the accused from being exposed to the hazard of a trial after the lapse of so great a time that the means of proving one's innocence may have been lost. It also applies to a person who is at large on bail, since, in addition to protecting an accused against prolonged incarceration, the right also serves other purposes which are applicable whether the defendant is on bail or not. *Blevins v. State*, 113 Ga. App. 702, 149 S.E.2d 423 (1966).

Unexcused denial of right to speedy trial by state is generally prejudice per se upon defendant's bona fide assertion of it. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Denial of speedy trial not prejudice per se. — Denial of right to speedy trial is constitutional deprivation which can work to accused's advantage; thus, failure to provide a speedy trial does not per se prejudice the accused's ability to defend oneself. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Assertion or failure to assert the right to speedy trial is a factor to be considered in an inquiry into the deprivation of the right though the accused has no responsibility to assert the right to speedy trial. The accused's assertion of that right would be entitled to strong evidentiary weight in determining whether the accused has been deprived of the right. The accused's failure to assert the right to a speedy trial would make it difficult

to prove that the accused was denied that right. *Powell v. State*, 143 Ga. App. 684, 239 S.E.2d 560 (1977).

Factors to be assessed in determining whether accused has been deprived of right to speedy trial are: length of delay, the reason for the delay, the accused's assertion of the accused's right, and prejudice to the accused. *Powell v. State*, 143 Ga. App. 684, 239 S.E.2d 560 (1977).

In determining whether the right to speedy trial has been violated, a court is required to consider four factors: length of the delay, the reasons for the delay, the accused's assertion of the right and prejudice to the accused. *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Courts should assess four factors in determining whether a particular defendant has been deprived of the right to speedy trial: length of delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. This balancing test is a delicate, sensitive process, and each case must rely upon its own circumstances. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Each case involving right to speedy trial must be analyzed on ad hoc basis, upon its own particular facts and circumstances. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Defendant is held to have some responsibility to assert speedy trial claim even though it is the state's duty to bring the defendant to trial; and unlike other constitutional rights, both society and the individual criminal defendant have a potential interest in either having a speedy trial or delaying any trial. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Defendant is required to show more than mere claim of prejudice in right to speedy trial. *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Defendant must show actual substantial prejudice because of delay in trial. — Since mere delay, even if unexcused, does not alone prejudice the defendant's ability to defend oneself, and since the defendant may be only too delighted to have the trial delayed, before the defendant is held deprived of the right to a speedy trial and there ensues the unsatisfactorily severe remedy of dismissal of the indictment with the serious

consequence that a defendant who may be guilty of a serious crime will go free, without having been tried, the defendant must show some actual substantial prejudice to the defendant. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Although the state was negligent in failing to bring the defendant to trial in a timely fashion, that consideration was outweighed by the facts that the defendant suffered little actual prejudice from the delay and no unduly oppressive pretrial incarceration, and waited a significant amount of time before asserting a speedy trial right; hence, the defendant's constitutional rights to a speedy trial were not violated. *Christian v. State*, 281 Ga. 474, 640 S.E.2d 21 (2007).

More than mere passage of time needed to constitute denial. — To constitute a denial of due process in the right to a speedy trial there must be more than the mere passage of time. *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Where overcrowded docket. — While a deliberate attempt by the prosecution to delay the trial in order to hamper the defense is weighed heavily against the government, an overcrowded docket is considered to be a more neutral reason although it cannot be overlooked. *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Delay solely by state authorities. — The fifth, sixth, and fourteenth amendments did not bar a federal prosecution in which any arguably improper or unconstitutional delay in the prosecution was occasioned solely by Georgia authorities; there was no basis for imputing Georgia's dilatory conduct to the United States or to the federal prosecution. *United States v. Boone*, 959 F.2d 1550 (11th Cir. 1992).

Motion to dismiss or quash indictment for denial of speedy trial, not requesting immediate trial, is not demand for trial and is not an assertion of the right to speedy trial. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

Where trial court erred as matter of law in right to speedy trial case. — Although the determination is in every case a matter of judicial discretion, the trial court erred as a matter of law in holding that the defendant had asserted the right to speedy trial by merely moving to dismiss the indictment; and in holding that the defendant suffered

Due Process (Cont'd)**10. Criminal Trials (Cont'd)**

actual prejudice by the death of an alibi witness whose testimony was merely cumulative; and in granting an overwhelming weight of legal burden to the duty of the state to provide a speedy trial, as against the failure of the defendant to assert the right to speedy trial in five and one-half years and the minimal prejudice caused by the delay. *State v. Lively*, 155 Ga. App. 402, 270 S.E.2d 812 (1980).

During the second trial of a convicted murderer to determine whether the death penalty should be imposed. (see O.C.G.A. § 17-10-2) refusal to admit testimony, as being hearsay (see O.C.G.A. § 24-3-1), to the effect that the accused did not commit the murder may constitute a violation of the due process clause of U.S. Const., amend. 14. *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738, on remand, 244 Ga. 27, 257 S.E.2d 543 (1979).

No due process if trial dominated by mob so jury intimidated, judge yields, and state executes judgment. — If a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. If the state supplies no corrective process and carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of life or liberty without due process of law. *Downer v. Dunaway*, 53 F.2d 586 (5th Cir. 1931).

Likelihood or appearance of bias. — Due process is denied by circumstances creating likelihood or appearance of bias even if there is no showing of actual bias. *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

Knowing and intelligent waiver of constitutional rights necessary. — Waiver of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).

Federal court can abide by state imposed waiver of federal constitutional right when waiver is a part of the trial and direct appeal of a state criminal case. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

Defendant need not personally waive right to jury trial. — It is not necessary for preservation of due process that defendant personally waive right to jury trial. *Little v. Stynchcombe*, 227 Ga. 311, 180 S.E.2d 541 (1971).

Waiver of right to jury trial. — Where record indicated that valid waiver of right to jury trial may have occurred but did not reflect whether defendant personally, knowingly, voluntarily, and intelligently participated in such waiver, case was remanded to trial court for hearing on that issue. *Wooten v. State*, 162 Ga. App. 719, 293 S.E.2d 11 (1982).

Waiver of defendant's presence at trial. — Defendant has right to be present at trial, but may waive that right, even in a death-penalty case. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 818, 102 L. Ed. 2d 808 (1989).

No bias shown by remedial restraint on defendant during trial. — Trial court's utilization on defendant of an electronic restraint device as a security measure during trial was not error where the device was shielded from the jury's view and defendant failed to show that defendant was harmed by its use. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Presumption of innocence. — Defendant enters into trial with presumption of innocence. *Byrd v. Hopper*, 402 F. Supp. 787 (N.D. Ga. 1975).

Presumption of innocence and burden of proof are fundamental rights. — Presumption of innocence and burden of proof placed on state in criminal prosecutions are fundamental rights protected by the Constitution, and are far too important and fundamental to be classified as less than constitutionally protected. *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

State always bears burden of proof in criminal trial, and any shift of burden of essential element of the crime renders the trial fundamentally unfair. *Johnson v. Wright*, 509 F.2d 828 (5th Cir.), cert. denied,

423 U.S. 1014, 96 S. Ct. 445, 46 L. Ed. 2d 384 (1975).

State required to prove guilt beyond reasonable doubt. — Due process clause of U.S. Const., amend. 14 requires the state to prove guilt beyond a reasonable doubt in a criminal prosecution. *Byrd v. Hopper*, 402 F. Supp. 787 (N.D. Ga. 1975).

Due process requires proof beyond reasonable doubt of every fact necessary to constitute crime. *Johnson v. Wright*, 509 F.2d 828 (5th Cir.), cert. denied, 423 U.S. 1014, 96 S. Ct. 445, 46 L. Ed. 2d 384 (1975); *Burdett v. State*, 159 Ga. App. 394, 283 S.E.2d 622 (1981); *Mason v. Balkcom*, 669 F.2d 222 (5th Cir. 1982), cert. denied, 460 U.S. 1016, 103 S. Ct. 1260, 75 L. Ed. 2d 487 (1983).

Due process requires state to prove beyond reasonable doubt every essential element of crime charged. *Avery v. State*, 138 Ga. App. 65, 225 S.E.2d 454, rev'd on other grounds, 237 Ga. 865, 230 S.E.2d 301 (1976).

Proof beyond a reasonable doubt constitutes decisive difference between criminal culpability and civil liability. *Little v. DeFrancis*, 517 F. Supp. 1137 (M.D. Ga. 1981).

Fourteenth amendment requires that state prove every element of a crime beyond a reasonable doubt. *Blankenship v. State*, 247 Ga. 590, 277 S.E.2d 505 (1981), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988), overruled on other grounds, *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993).

The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. Jury instructions that relieve the prosecution of this burden or that shift to the accused the burden of persuasion on one or more elements of the crime are unconstitutional. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118 (1991).

The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact

necessary to constitute the crime with which the accused is charged. *Starr v. State*, 201 Ga. App. 73, 410 S.E.2d 180 (1991).

The trial court's instruction on reasonable doubt did not infringe upon the defendant's constitutionally-guaranteed due process rights by erroneously diminishing the state's burden of proof when it stated that a "doubt of the law" authorizing acquittal of the defendant exists if the jurors' "minds are wavering or unsettled or unsatisfied." *Rucker v. State*, 270 Ga. 431, 510 S.E.2d 816 (1999).

Proof beyond reasonable doubt required in criminal-contempt prosecution. — It is a denial of a defendant's right of due process of law under the federal and state constitutions and O.C.G.A. § 24-4-5 to fail to require proof beyond a reasonable doubt in a criminal-contempt prosecution, because the result of such a conviction is to deny the contemner of liberty and the levy of a penal fine. *In re Crane*, 253 Ga. 667, 324 S.E.2d 443 (1985).

Sanity not element which prosecution has to prove beyond a reasonable doubt. — Sanity has not been treated as critical essential element of offense which prosecution is required to prove beyond a reasonable doubt. *Grace v. Hopper*, 234 Ga. 669, 217 S.E.2d 267 (1975), cert. denied, 423 U.S. 1066, 96 S. Ct. 806, 46 L. Ed. 2d 657 (1976); *State v. Avery*, 237 Ga. 865, 230 S.E.2d 301 (1976).

Burden of proof on state in criminal cases. — The burden of proof, as opposed to the burden of the evidence, is properly on the state in criminal cases; and at the outset of a criminal trial, the state has both burdens upon it. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Burden on government to produce evidence and convince fact finder of guilt. — Due process commands that no person shall lose one's liberty unless the government has borne the burden of producing the evidence and convincing the fact finder of that person's guilt. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Prosecution required to prove elements of crime beyond reasonable doubt. — Prosecu-

Due Process (Cont'd)**10. Criminal Trials (Cont'd)**

tion must carry burden of proving all critical essential elements of crime charged against a defendant in order to comport with due process. *Grace v. Hopper*, 234 Ga. 669, 217 S.E.2d 267 (1975), cert. denied, 423 U.S. 1066, 96 S. Ct. 806, 46 L. Ed. 2d 657 (1976).

The due process clause of U.S. Const., amend. 14 requires that the prosecution prove each and every element of the crime beyond a reasonable doubt; a state, however, may place the burden of proof of an affirmative defense on the defendant. *Holloway v. McElroy*, 474 F. Supp. 1363 (M.D. Ga. 1979), aff'd, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, *Baker v. Montgomery*, 811 F.2d 55 (11th Cir. 1987).

Burden on defendant to disprove elements of crime violates due process. — When the burden of proof or of persuasion is shifted to the defendant to disprove essential elements of a crime, then the due process clause of U.S. Const., amend. 14 has been violated. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Shift in burden of proof of essential element of crime to defendant renders trial fundamentally unfair. *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Shifting of burden of persuasion regarding fact state deems so important it must be proved or presumed is impermissible under the due process clause. *Patterson v. State*, 239 Ga. 409, 238 S.E.2d 2 (1977).

State with burden of proof and accused with presumption of innocence. — The principle that the state has the burden of proof in all criminal cases and that the accused is clothed with the presumption of innocence are an integral part of the concept of due process. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Burden of persuasion on element of intent. — Where an instruction on rebuttal is incorporated into a charge on the conse-

quences presumed to be intended by a person of sound mind, the burden of persuasion on the element of intent is not shifted to the accused in violation of the fourteenth amendment's due process requirement that the state prove every element of a crime beyond a reasonable doubt. *Godfrey v. Francis*, 251 Ga. 652, 308 S.E.2d 806 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), cert. dismissed, 487 U.S. 1264, 109 S. Ct. 27, 101 L. Ed. 2d 977 (1988).

Burden of proof instruction constitutional. — Jury instruction stating that "no person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt and to a moral and reasonable certainty" did not lessen the burden of proof required for conviction in violation of the due process clause. *Starr v. State*, 201 Ga. App. 73, 410 S.E.2d 180 (1991); *Bradford v. State*, 261 Ga. 833, 412 S.E.2d 534 (1992).

Presumption-of-intent instruction unconstitutional. — In criminal prosecution in which intent was an element of the crime charged and the only contested issue at trial, jury instructions that included the sentences "The acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted" and "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted" violated U.S. Const., amend. 14's requirement that the state prove every element of a criminal offense beyond a reasonable doubt. *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

In a prosecution for malice murder, of which intent was an essential element, and in which the defendant claimed the shooting of the victim had been an accident, the jury instruction on intent, which contained the following language, was unconstitutional: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend [sic] the natural and probable consequences of his act. But, these presumptions may be rebutted." *Carter v. Montgomery*, 769 F.2d 1537 (11th Cir. 1985).

The following charge to the jury unconsti-

tutionally shifted the burden of persuasion on intent: “The acts of a person of sound mind and discretion are presumed to be the product of the person’s will, and such person is presumed to intend the natural and probable consequences of his acts, but either of these presumptions may be rebutted.” Because the defendant’s intent to kill was at issue in the trial and was supported by evidence sufficient to create a reasonable doubt concerning intent, the instruction was not harmless error. *Lakes v. Ford*, 779 F.2d 1578 (11th Cir. 1986).

An instruction that shifts the burden of proof from the government to the defendant on the issue of intent (a *Sandstrom* error) cannot be ordinarily harmless error where the insanity defense has been raised, even though the jury has rejected this defense, since such rejection by a jury does not mean it finds the defendant was totally free of mental infirmity or that the defendant’s capacity to formulate a specific intent was the same as that of a normal or average person. The prosecution must still prove beyond a reasonable doubt that the defendant formed the intent necessary to commit murder. *Bowen v. Kemp*, 832 F.2d 546 (11th Cir. 1987), cert. denied, 485 U.S. 940, 108 S. Ct. 1120, 99 L. Ed. 2d 281 (1988), cert. denied, 485 U.S. 970, 108 S. Ct. 1247, 99 L. Ed. 2d 445 (1988).

The trial judge’s error in a trial for murder in compelling the jury to find intent rather than allowing the jury to infer intent in violation of *Sandstrom v. Montana* was not harmless beyond a reasonable doubt. *Brooks v. Kemp*, 809 F.2d 700 (11th Cir.), cert. denied, 483 U.S. 1010, 107 S. Ct. 3240, 97 L. Ed. 2d 744 (1987), cert. denied, 494 U.S. 1018, 110 S. Ct. 1322, 108 L. Ed. 2d 498 (1990).

Identification testimony. — Jury charge that provided that a witness’s level of certainty could be considered in assessing the reliability of identification testimony was harmless error as: (1) the identification witness was not the victim, viewed the crimes in daylight, already knew the defendant, recognized the defendant’s gold teeth, and identified the defendant in a photographic lineup by the defendant’s street name; (2) there was significant corroborating evidence, including a first witness’s testimony that the defendant intended to kill the vic-

tim and the testimony of two other witnesses; and (3) the jury was accurately instructed as to the state’s burden of proving the defendant’s identity and the possibility of mistaken identification. *Woodruff v. State*, 281 Ga. 235, 637 S.E.2d 391 (2006).

Jury charge on intent or criminal negligence. — Where the court charged: “I charge you that intent or criminal negligence to commit the crime charged in the indictment are essential elements the state must prove beyond a reasonable doubt.... A person will not be presumed to act with criminal intention, but the tryor [sic] of facts; that is, the jury, may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted ...,” the charge given was not unconstitutionally burden shifting. *Veit v. State*, 182 Ga. App. 753, 357 S.E.2d 113 (1987).

Jury charge on intent unconstitutionally relieved the state of its burden of persuasion on the intent element of each of the crimes with which the defendant was charged where the charge instructed the jury to presume that the defendant intended “the natural and necessary consequences of” the defendant’s actions. *Gaddis v. Kemp*, 638 F. Supp. 819 (S.D. Ga. 1986).

Jury charge inferring intent to kill. — Although the defendant presented the defense that due to the defendant’s mental condition the defendant could not have formed the criminal intent to kill the defendant’s brother, an essential element of murder, the trial court’s charge, inferring the intent to kill from the use of a deadly weapon, did not unconstitutionally shift to the defendant the burden of proving lack of intent and negate the defendant’s defense, because the jury was told that the decision whether or not to draw an inference was entirely up to them. *Pace v. State*, 258 Ga. 225, 367 S.E.2d 827 (1988).

Instruction on intent held harmless error. — Where the state presented overwhelming evidence of an intentional killing and where the defendant raised a defense of non-participation in the crime, effectively conceding the issue of intent, the unconstitutional burden-shifting instruction on intent was harmless beyond a reasonable doubt. *Aldridge v. Montgomery*, 753 F.2d 970 (11th Cir. 1985).

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A jury charge which created an unconstitutional burden-shifting presumption with respect to the element of intent was harmless error, where defendant's defense was alibi and misidentification, and in the alternative, insanity, and such defenses did not put into issue criminal intent. *Williams v. State*, 180 Ga. App. 893, 350 S.E.2d 768 (1986).

Instruction that jury "may find" criminal intent upon a consideration of such circumstances as words, conduct, demeanor, or motive, is in no way unconstitutionally burden-shifting. *Ford v. State*, 256 Ga. 375, 349 S.E.2d 361 (1986).

Instruction that acts of person of sound mind are products of his will. — Instruction that told the jury, at the defendant's trial for felony-murder based upon the commission of armed robbery, that the acts of a person of sound mind and discretion are presumed to be the product of the person's will was reversible error, because it removed the presumption of innocence and relieved the state of the burden of proving beyond a reasonable doubt that the defendant intentionally committed the felony of armed robbery because the jury was instructed to presume that the defendant intended to perform the defendant's actions. *Hall v. Kelso*, 892 F.2d 1541 (11th Cir. 1990).

Instruction as to presumption that actions are a person's will. — Instructions charging that the acts of a person of sound mind and discretion are presumed to be a product of a person's will, but such presumption may be rebutted, and that a person of sound mind and discretion is presumed to intend the natural and probable consequences of that person's acts, but the presumption may be rebutted, create an unconstitutional burden-shifting presumption with respect to the element of intent. *Boswell v. State*, 176 Ga. App. 855, 338 S.E.2d 62 (1985).

Improper instruction on presumption of innocence. — Habeas corpus relief was properly granted to an inmate from a malice murder conviction because the inmate's trial counsel provided ineffective assistance by failing to reserve the right to make additional objections to the jury instructions or to object specifically to an instruction that

the presumption of innocence was for the protection of the innocent and was not intended to be a cloak behind which guilty persons might hide; trial counsel's failure fell below an objective standard of reasonableness and constituted deficient performance because the instruction interfered with the right to a fair trial under the fourteenth amendment by permitting the jury to determine guilt from factors other than the proof adduced at trial, and a reasonable probability existed that, if not for trial counsel's deficient performance, the outcome of the trial would have been different. *Tillman v. Massey*, 281 Ga. 291, 637 S.E.2d 720 (2006).

Instruction that defendant may rebut presumption concerning consequences of actions disapproved. — A charge that "the acts of a person of sound mind and discretion may be inferred to be the product of that person's will, and it may be inferred that a person of sound mind and discretion intends the natural and probable consequences of their [sic] acts, but, of course, both of these inferences may be rebutted, and in any event the burden never shifts to the defendant," is not an unconstitutionally burden-shifting instruction, but has potential to confuse the jury as to how much evidence the defendant must produce to rebut the inference if the jury chooses to draw it, and such rebuttal language should not be used. *Noggle v. State*, 256 Ga. 383, 349 S.E.2d 175 (1986).

Jury instruction to conform to indictment. — Giving instruction on an entire Code section that defined a crime in two ways, when the indictment alleged that defendant committed the crime in only one way, was misleading and violated due process without a limiting instruction directing the jury to consider only whether defendant committed the crime as charged in the indictment. *Dukes v. State*, 265 Ga. 422, 457 S.E.2d 556 (1995).

Statutory presumptions of intoxication not unconstitutional. — A charge on driving under the influence of alcohol does not impermissibly direct the return of a verdict of guilty on the basis of the statutory presumptions of intoxication where the jury is instructed that the statutory presumptions are rebuttable. *Clark v. State*, 169 Ga. App. 535, 313 S.E.2d 748 (1984).

Charge that burden was on the defendant to show the defendant's authority to possess heroin did not deny the defendant due process and equal protection because the state established a prima-facie case and the defendant presented no evidence. *Montford v. State*, 168 Ga. App. 394, 309 S.E.2d 650 (1983).

Charge on inference of guilt from possession of recently stolen property constitutional. — Instructing the jury that they might infer the defendant committed the crime upon proof that the defendant was in possession of the stolen goods in question recently after the commission of the crime, "unless . . . the defendant should make an explanation of the defendant's possession of the stolen property consistent with the defendant's pleas of innocence" does not unconstitutionally shift the burden of persuasion to the defendant. *Clark v. State*, 166 Ga. App. 366, 304 S.E.2d 494 (1983).

Trial court's instruction to the jury on the inference which may arise from proof of possession of goods recently stolen in a burglary was not burden-shifting. *Myles v. State*, 186 Ga. App. 817, 368 S.E.2d 574 (1988).

Burden of proving defendant's presence is on state throughout trial, and evidence of his absence tends merely to weaken or disprove the testimony of the state's witnesses on this point. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

State must prove defendant's presence at commission of offense beyond a reasonable doubt since it is an essential element of the crime. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Burden to contradict state's evidence of the defendant's presence cannot require quantum of proof. — Where the state presents evidence of the defendant's presence, the burden of going forward with evidence to contradict the state's evidence may shift to the defendant but it must not carry with it the requirement that the defendant establish the defendant's evidence by any quantum of proof. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

It is impermissible to require defendant to prove nonpresence by definite quantum of proof. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Charge shifting burden of persuasion to defendant on issue of self-defense unconstitutional and not harmless error. — The trial court's charge in a homicide case shifted the burden of persuasion to the defendant on the issue of self-defense in violation of the due process clause of U.S. Const., amend. 14, and this unconstitutional shift was not harmless error. *Tennon v. Ricketts*, 642 F.2d 161 (5th Cir. 1981).

If a state includes unlawfulness within its murder and manslaughter laws as an element of those crimes, while at the same time state courts require the defendant to prove lawfulness by virtue of self-defense, that construction makes the statutes' operation run contrary to the Constitution in violation of due process. *Tennon v. Ricketts*, 642 F.2d 161 (5th Cir. 1981).

No denial of due process where defendant allowed to admit some essential criminal elements to put justification of self-defense into issue. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1983).

Party seeking to prove unconstitutionally discriminatory enforcement of law has burden of presenting sufficient evidence to establish the existence of intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classifications. *State v. Causey*, 246 Ga. 735, 273 S.E.2d 6 (1980), cert. denied, 451 U.S. 1019, 101 S. Ct. 3009, 69 L. Ed. 2d 391 (1981).

Shifting burden of proof of alibi to accused is violation of U.S. Const., amend. 14. *Trimble v. Stynchcombe*, 481 F.2d 1175 (5th Cir. 1973).

Placing burden of proof or persuasion on defendant is unconstitutionally impermissible in cases involving alibi defense regardless of quantum of proof required. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Burden of proving alibi on defendant violates due process. — Due process is vio-

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lated by charge that burden is upon defendant to prove alibi by preponderance of the evidence. *Parham v. State*, 120 Ga. App. 723, 171 S.E.2d 911 (1969).

The phrase, "Alibi as a defense must be established to the reasonable satisfaction of the jury," where included in jury charges, places the burden of proving the defendant's alibi on the defendant, and thus violates the due process clause of U.S. Const., amend. 14. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), *aff'd*, 454 F.2d 572 (5th Cir. 1971), *cert. denied*, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Charge to jury that alibi must be established by defendant to reasonable satisfaction of jury is error for the reason that it shatters the presumption of innocence, creates confusion in the minds of the jury, shifts the burden of persuasion to the defendant on the issue of the defendant's presence at the crime and requires the defendant to establish the defendant's innocence, is inconsistent with the principle that the state must prove the defendant's guilt beyond a reasonable doubt, and thereby violates fundamental rights incorporated in the due process clause of U.S. Const., amend. 14 of the United States Constitution. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), *aff'd*, 454 F.2d 572 (5th Cir. 1971), *cert. denied*, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972); *Patterson v. State*, 233 Ga. 724, 213 S.E.2d 612 (1975).

Charge to jury that "alibi ... must be established to reasonable satisfaction of jury ..." violates due process guarantees since it removes the state's burden of proving the accused's presence at the scene of the crime beyond a reasonable doubt and imposes the burden of proving the accused's absence on the accused when the accused offers evidence to that effect. *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), *cert. denied*, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Charge shifting burden of proving alibi to defendant to "reasonable satisfaction of the jury" is violative of due process. *Ward v. State*, 234 Ga. 882, 218 S.E.2d 591 (1975).

State's characterization of its laws not to functionally operate to place burden of persuasion on defendant. — In determining

whether a state has met demands of procedural due process, federal courts must satisfy themselves that a state's characterization of its laws does not functionally operate to place the burden of persuasion of an essential element upon the defendant. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

Despite a state's characterization of an issue as being an "affirmative defense," the state may not place the burden of persuasion on that issue upon the defendant if the truth of the "defense" would necessarily negate an essential element of the crime charged. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

Where absence of self-defense is an essential element of the crime of voluntary manslaughter, and the trial court's charge operated to place the burden of persuasion on defendant on this issue, the defendant's conviction violated the defendant's due process rights under the United States Constitution. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981).

Where evidence overwhelming, shifting burden of proof harmless. — Where the evidence of guilt is overwhelming, a jury instruction which shifts the burden of proof constitutes harmless error. *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983), *cert. denied*, 478 U.S. 1022, 106 S. Ct. 3337, 92 L. Ed. 2d 742 (1986) *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *aff'd in part and rev'd in part sub nom.*, 478 U.S. 1016, 106 S. Ct. 3325, 92 L. Ed. 2d 732 (1986), judgment vacated, remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

Where in a murder trial the jury was instructed as follows, "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted..." the trial court's instruction was harmless beyond a reasonable doubt because the evidence of defendant's guilt was overwhelming. This evidence overwhelmingly indicated that whoever killed victim intended to do so. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), *cert. dismissed*, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d

931, cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 103 L. Ed. 2d 931 (1989).

Where codefendant presents no defense, no prejudice. — Where a defendant, to obtain a new trial for the denial of severance, must show prejudice and a denial of due process, but where the defendant argues that the defendant was prejudiced in that the defendant's defense was inconsistent with that of the codefendant, the codefendant's defense cannot be inconsistent with the defendant's where the codefendant presents no evidence. *Ramsey v. State*, 166 Ga. App. 521, 304 S.E.2d 574 (1983).

Error harmless where self-defense claim rejected. — In a trial for murder, the charge that, "The law presumes that a person intends to accomplish the natural and probable consequences of his acts. If a person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill," must be held to have impermissibly shifted the burden of proof on the essential element of intent to kill, but the error was harmless beyond a reasonable doubt as the jury could not have entertained a reasonable doubt concerning the defendant's intent to kill, given its rejection of the defendant's claim of self-defense. *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

Where presumptions of malice and intent in homicide prosecution not violative of due process. — Charges in homicide prosecution that malice is presumed from an intentional killing and that intent is presumed from use of a deadly weapon did not violate due process because there is a rational connection between the facts proved and the facts presumed. *Patterson v. State*, 239 Ga. 409, 238 S.E.2d 2 (1977).

Charges in homicide prosecution that malice is presumed from an intentional killing and that intent is presumed from use of a deadly weapon were not unconstitutionally burden-shifting because they did not shift any burden of proof or persuasion to defendant. *Patterson v. State*, 239 Ga. 409, 238 S.E.2d 2 (1977).

Where jury was charged on both malice murder and felony murder and returned a general "guilty" verdict, the conviction re-

quired reversal where the indictment did not allege facts that would put the defendant on notice that the defendant would be required to defend against the felony-murder charge at trial. *Crawford v. State*, 254 Ga. 435, 330 S.E.2d 567 (1985), cert. denied, 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989).

If a case has been submitted to the jury on several alternative theories, one of which is unconstitutional, a general verdict of guilty which does not indicate it was based upon one of the constitutional theories must be set aside. *Crawford v. State*, 254 Ga. 435, 330 S.E.2d 567 (1985), cert. denied, 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989).

"Malice aforethought" not self-explanatory. — The defendant, who was illiterate and possessed minimal mental capacity, was inadequately informed of the elements of malice murder before he pled guilty. The prosecutor's note reading of the indictment did not suffice, as the term "malice aforethought," as it appeared in the indictment, was not self-explanatory and was incomprehensible to a layman, particularly one of limited mental capacity, without further explanation. *Gaddy v. Linahan*, 780 F.2d 935 (11th Cir. 1986).

Supreme Court of Georgia disapproves the use of the phrase "the law presumes" in a deadly weapon charge, and has approved instead a charge authorizing the jury to "infer the intent to kill" from the intentional and unjustified use of a deadly weapon. *Wilson v. Jones*, 251 Ga. 23, 302 S.E.2d 546 (1983).

Use of "the law presumes" not reversible error. — Where the trial court gave the following charge: "... where one shoots another with a pistol and hits them [sic] the law presumes prima facie that he did it with malice, and that this presumption is not rebutted by proof that the parties had been good friends or that the defendant immediately after the shooting regrets the act," the charge when considered with other instructions did not suggest to a reasonable juror that the defendant was required to disprove criminal intent, nor did it remove from the state its burden of proving criminal intent beyond a reasonable doubt. *Wilson v. Jones*, 251 Ga. 23, 302 S.E.2d 546 (1983).

Due process requires that guilty plea must be knowingly, intelligently and voluntarily

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made and that the court make a determination to this effect before accepting the plea. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979).

Prosecutor's disclosure of nolle prosequi agreement with defendant satisfied due process. — Where the jury was made aware of a nolle prosequi agreement between defendant and the prosecutor by the prosecutor's disclosure of the agreement, the requirements of due process were satisfied. *Williams v. State*, 151 Ga. App. 683, 261 S.E.2d 430 (1979).

When confessions can be introduced in evidence against defendant. — Where evidence shows that confessions were voluntarily made and were not induced by another by hope of award or fear of punishment, or where it is an issue of fact as to whether the confessions were properly obtained, defendant is not denied due process of law, as guaranteed by the state and federal Constitutions, by their introduction in evidence against him. *Claybourn v. State*, 190 Ga. 861, 11 S.E.2d 23 (1940).

Admission of confession in state criminal proceedings forbidden only when involuntary. — The United States Constitution forbids the admission of a confession in state criminal proceedings only when the confession is involuntary, and the legality, duration and conditions of detention is one factor relevant to the question whether the confession is voluntary. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, *cert. denied*, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Determination of voluntariness of confession. — Defendant's constitutional rights are violated when challenged confession introduced without determination by trial judge of voluntariness after an adequate hearing. *Clark v. Smith*, 224 Ga. 766, 164 S.E.2d 790 (1968), *rev'd on other grounds*, 403 U.S. 946, 91 S. Ct. 2279, 29 L. Ed. 2d 859 (1971).

Where: (1) the defendant in a criminal case contends that a confession sought to be introduced in evidence by the state was obtained as a result of coercion; (2) the testimony on the point is in conflict; and (3) the judge leaves the question of voluntariness or coercion to the jury without making

a preliminary finding that the confession was in fact voluntary, the defendant's rights under U.S. Const., amend. 14 have been violated. *Schneider v. State*, 130 Ga. App. 3, 202 S.E.2d 238 (1973).

Defendant is entitled to a fair hearing and a reliable determination on the issue of the voluntariness of statements made by defendant; although a judge need not make formal findings of fact or write an opinion, the judge's conclusion that a confession is voluntary must appear from the record with unmistakable clarity. When a Jackson-Denno hearing is held and defendant is offered the opportunity to present evidence contradictory to the state's *prima facie* case of voluntariness, the trial court must rule the confession either in or out of evidence; but if the opportunity is offered and no evidence attacking the veracity of the confession is produced, it is properly admitted. Defendant's claim that the trial court made no finding that defendant's custodial statement was voluntary lacked merit even though the trial court stated that the jury would decide the issue of voluntariness because the trial court held a Jackson-Denno hearing in which defendant was given an opportunity to present evidence that the confession was not voluntary, defendant made no claim that the confession was not in fact voluntary, and the trial court's subsequent ruling that the statement was admissible under such circumstances amounted "with unmistakable clarity" to a showing that the trial court had concluded that the confession was voluntary. *Thomas v. State*, 264 Ga. App. 389, 590 S.E.2d 778 (2003).

Where prima facie as to voluntariness of confession made. — Although the facts in evidence will be examined to determine whether or not they show a conviction by use of a coerced confession in violation of the due process clause of U.S. Const., amend. 14 or the provision in the state Constitution against self-incrimination, when such a question has been properly raised and presented, yet, where a *prima facie* case as to the voluntary character of the confession has been made, it is not within the power of this court to usurp the function of the jury in passing upon an issue, and to override their verdict supported by legal evidence and upheld by the judge in refusing a new trial, or to reverse a ruling admitting the confession

in evidence, unless the evidence requires but one rational inference, that the confession was unlawfully obtained. Under this and the preceding rulings, the judge did not err in refusing to exclude from evidence the alleged illegal confessions and incriminatory statements of the defendant. *Bryant v. State*, 191 Ga. 686, 13 S.E.2d 820 (1941).

Holding hearing in presence of jury to determine voluntariness of confession violates due process clause; such a hearing outside of jury's presence is not per se reversible error. *State v. Peabody*, 247 Ga. 580, 277 S.E.2d 668 (1981).

Admission of interlocking confessions with proper limiting instructions conforms to requirements of U.S. Const., Amendments 6 and 14. *Tatum v. State*, 249 Ga. 422, 291 S.E.2d 701 (1982).

Showing that confessor may have suffered from mental disability not sufficient to exclude statement. — A mere showing that one who confessed to a crime may have suffered from some mental disability is not a sufficient basis upon which to exclude his statement. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

One who suffers some mental or emotional impairment can give valid confession. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

There is no per se rule holding inadmissible confessions given by individuals suffering severe psychotic conditions. A confession, however, is inadmissible if it would not have been obtained but for the effects of the confessor's psychosis. *Gibbs v. Warden of Ga. State Penitentiary*, 450 F. Supp. 242 (M.D. Ga. 1978), aff'd, 589 F.2d 1113 (5th Cir. 1979).

Admissions of psychotic individual may be used where giving of admissions not substantially related to effects of psychosis. *Gibbs v. Warden of Ga. State Penitentiary*, 450 F. Supp. 242 (M.D. Ga. 1978), aff'd, 589 F.2d 1113 (5th Cir. 1979).

Confession inadmissible where affected by accused's psychosis. — A confession is inadmissible if it appears that the accused's psychosis rendered the accused incapable of understanding the meaning and effect of the accused's confession or caused the accused to be indifferent to protecting the

accused or left the accused with little determination so that the accused's will might be easily overborne by questions and suggestions. *Gibbs v. Warden of Ga. State Penitentiary*, 450 F. Supp. 242 (M.D. Ga. 1978), aff'd, 589 F.2d 1113 (5th Cir. 1979).

Where accused is substantially subnormal mentally. — Mental ability and unfamiliarity with criminal process weigh heavily against voluntariness of confession. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972).

That an accused possesses a substantially subnormal mentality is a fact indicating, but not establishing, that his confession was involuntary. *Gibbs v. Warden of Ga. State Penitentiary*, 450 F. Supp. 242 (M.D. Ga. 1978), aff'd, 589 F.2d 1113 (5th Cir. 1979).

Confession is inadmissible where probably not obtained but for confessor's insanity or mental incompetence despite proper police behavior and the apparent trustworthiness of the resulting confession. *Gibbs v. Warden of Ga. State Penitentiary*, 450 F. Supp. 242 (M.D. Ga. 1978), aff'd, 589 F.2d 1113 (5th Cir. 1979).

Confessions given under influence of drugs or alcohol. — No per se rule that all confessions given while under influence of drugs or alcohol are inadmissible. *Gibbs v. Warden of Ga. State Penitentiary*, 450 F. Supp. 242 (M.D. Ga. 1978), aff'd, 589 F.2d 1113 (5th Cir. 1979).

Use of threats or promises to coerce criminal defendant to make statement is contrary to state and federal constitutional law. *Young v. State*, 243 Ga. 546, 255 S.E.2d 20 (1979).

Detective's promise to a witness to "speak a word" in the witness's behalf in the witness's own case did not constitute a promise of favorable treatment required to be disclosed by the prosecution. *Depree v. Thomas*, 946 F.2d 784 (11th Cir. 1991).

Investigator's services properly denied. — Where the defendant did not show that due to lack of an investigator the defendant was deprived of interviewing witnesses, trial court's motion denial did not deny the defendant federally guaranteed due process of law. *Jones v. State*, 207 Ga. App. 46, 427 S.E.2d 40 (1993).

Confessions are not generally rendered inadmissible merely because obtained by fraud, deception, or trickery practiced upon the accused, provided the means employed are not calculated to procure an untrue

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statement and the confession is otherwise freely and voluntarily made. *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975).

When giving suspect false information insufficient to render confession inadmissible.

— In questioning a mature criminal suspect of normal intelligence, who has been fully advised of the suspect's constitutional rights, falsely advising the suspect that the murder weapon has been found is insufficient in and of itself to render the suspect's otherwise free and voluntary confession inadmissible. *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975).

The fact that state police falsely told the defendant, a mature individual of normal intelligence, during questioning of short duration that the defendant's associate had confessed, while relevant, was insufficient to make an otherwise voluntary confession inadmissible. *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975).

Voluntary confession obtained during unlawful detention.

— Admissibility of voluntary confession obtained during unlawful detention in state judicial proceedings remains matter for state determination. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, *cert. denied*, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Confession admissible where defendant waived right to counsel and showed no lack of understanding of rights.

— Where due process and fair trial standards are otherwise met, admission of the confession of a 16-year-old defendant to various felony offenses in evidence is not cause for new trial where the defendant both orally and in writing waived the right to counsel during interrogation, never attempted to withdraw the waiver, and made no showing that the refusal of counsel at certain pretrial investigative interrogations was due to any lack of understanding on the defendant's part of the defendant's rights or of the issues involved. *Jones v. State*, 119 Ga. App. 105, 166 S.E.2d 617 (1969).

Proof of venue is essential element in proving guilt in criminal case. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Venue in conspiracy prosecution is properly laid either in the jurisdiction where the conspiracy was formed or in any jurisdiction wherein a conspirator committed an overt act in furtherance of the conspiracy. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

It is essential in conspiracy prosecution that jury be properly instructed as to venue where overt acts are alleged to have been committed in more than one jurisdiction. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Right under U.S. Const., amend. 6, of an accused to confront witnesses against the accused is fundamental right made obligatory on states by U.S. Const., amend. 14. *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970); *Lingerfelt v. State*, 235 Ga. 139, 218 S.E.2d 752 (1975); *Park v. Huff*, 506 F.2d 849 (5th Cir.), *cert. denied*, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *Jeffries v. Georgia Residential Fin. Auth.*, 503 F. Supp. 610 (N.D. Ga. 1980), *aff'd*, 678 F.2d 919 (11th Cir.), *cert. denied*, 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982).

Witnesses' statements provided to counsel prior to testimony.

— Where the defendant enumerated as error the state's failing to provide the defendant with copies of statements of witnesses, prior to trial, in which the driver of the car departing the burglary site was described as having "sandy-blonde" hair, whereas one witness described the defendant's hair color as "light brown," but the statements were provided to the defendant's counsel prior to the beginning of the testimony, but after the jury had been impaneled and counsel was offered the opportunity to examine the witnesses before they testified and accepted, the defendant's motion for mistrial was properly denied. *Masters v. State*, 186 Ga. App. 795, 368 S.E.2d 557 (1988).

Standard for evaluation of evidence in state criminal trial that of sufficiency of evidence.

— The standard by which the court must evaluate the evidence in a state criminal trial to determine whether the petitioner has been accorded constitutional due process was recently reformulated by

the Supreme Court of the United States; instead of determining whether or not there is “any evidence” to support petitioner’s conviction, the court must now go further and satisfy itself that the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt; the question therefore is not a question of the presence of evidence in the record but of the sufficiency of that evidence. *Holloway v. McElroy*, 474 F. Supp. 1363 (M.D. Ga. 1979), *aff’d*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398 (1981), overruled on other grounds, *Baker v. Montgomery*, 811 F.2d 55 (11th Cir. 1987).

One on one confrontations between witness and suspect. — As general rule “one on one” confrontations between eyewitness and suspect have been condemned. *Sell v. State*, 156 Ga. App. 333, 274 S.E.2d 723 (1980).

Claimed violation of due process of law in conduct of confrontation depends on totality of circumstances. *Sell v. State*, 156 Ga. App. 333, 274 S.E.2d 723 (1980).

Lineup identification, or identification from group of photographs, is not prerequisite to every in-court identification. *Moye v. State*, 122 Ga. App. 14, 176 S.E.2d 180 (1970); *Clark v. State*, 156 Ga. App. 326, 274 S.E.2d 718 (1980).

A line-up identification, or identification from group of photographs, is not a prerequisite to every in-court identification. The test is whether identification confrontation staged by the law enforcement authorities, judged by the “totality of the circumstances surrounding it,” is “so unnecessarily suggestive and conducive to irreparable mistaken identification” as to constitute a denial of due process of law. *Clark v. State*, 156 Ga. App. 326, 274 S.E.2d 718 (1980).

Defendant’s motion to suppress two photographic identifications was properly denied as the defendant did not make a sufficient showing as to how the differences in the defendant’s photos would have rendered the lineups or procedures suggestive. *Waters v. State*, 281 Ga. 119, 636 S.E.2d 538 (2006).

Admission of evidence derived from suggestive identification procedures falls within scope of the due process protection of U.S. Const., amend. 14 to the United States Constitution as U.S. Const., amend. 14 is a prohibition against deprivation of rights by

state action, and not by the individual or personal acts of a private citizen. *Riden v. State*, 151 Ga. App. 654, 261 S.E.2d 409 (1979).

Under totality of circumstances, identification may be reliable even though confrontation procedure was suggestive. When the particular factors pointing to suggestiveness are considered, if the identifications were not all but inevitable under the circumstances, they will not violate due process. *Barron v. State*, 157 Ga. App. 186, 276 S.E.2d 868 (1981).

It is likelihood of misidentification which offends due process. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, and the level of certainty demonstrated by the witness at the confrontation. *Hill v. State*, 144 Ga. App. 259, 241 S.E.2d 44 (1977).

In-court identification is not constitutionally inadmissible if it has independent origin even if pretrial identification is tainted. *Moye v. State*, 122 Ga. App. 14, 176 S.E.2d 180 (1970); *Perkins v. State*, 216 Ga. App. 118, 453 S.E.2d 135 (1995).

When conviction based on in-court identification following pretrial identification set aside. — In-court identification of a defendant is tainted by earlier photographic identification procedure only if it can be shown that the procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *United States v. Ervin*, 436 F.2d 1331 (5th Cir. 1971); *United States v. Elliott*, 437 F.2d 1253 (5th Cir. 1971).

Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Redd v. State*, 154 Ga. App. 373, 268 S.E.2d 423 (1980).

No state action violative of defendant’s rights where victim not shown photograph of defendant by police. — Where the victim was shown a single photograph of the defendant, not provided by a police officer nor by

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an individual established as acting in concert or at the request of the police, there was insufficient nexus to establish "state action" in violation of the defendant's constitutional rights. *Riden v. State*, 151 Ga. App. 654, 261 S.E.2d 409 (1979).

An impermissibly suggestive identification procedure conducted by the police (the state) will taint an in-court identification procedure which is not independent of the tainted procedure. *Riden v. State*, 151 Ga. App. 654, 261 S.E.2d 409 (1979).

When in-court identification by witness viewing line-up excluded from evidence where accused denied counsel at line-up. — If the accused has been denied counsel at the line-up, the result is only that an in-court identification by a witness viewing the line-up will be excluded from evidence, if the court should find that the state has not shown that the in-court identification was based upon observations of the suspect other than the line-up identification. *Mitchell v. Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972).

Admission of a booking photograph was not irrelevant or so impermissibly suggestive that there was a substantial likelihood of mistaken identification in violation of the due process clause of U.S. Const., amend. 14 or Ga. Const. 1983, Art. I, Sec. I since the witness testified that the witness could not identify the defendant in court as the defendant had grown a beard, grown a long ponytail, and was heavier than at the time of the incident, but the witness was able to identify the person in the booking photograph; thus, the photograph was relevant to identify the defendant, and to show how the defendant appeared at the time of the crime. *Horner v. State*, 257 Ga. App. 12, 570 S.E.2d 94 (2002).

Hearing on motion to suppress identification testimony need not always be outside jury's presence. — Due process clause does not require state trial court to conduct hearing outside jury's presence on motion to suppress identification testimony in every case. *State v. Peabody*, 247 Ga. 580, 277 S.E.2d 668 (1981).

Factors weighed as to revealing informer's identity. — When an informer's identity is

sought to be revealed by the defendant, the trial court must weigh the materiality of the informer's identity to the defense against the state's privilege not to disclose his name. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977).

When absolute privilege against informer's identity impermissible. — Absolute privilege against disclosure in every case involving informer is impermissible where *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1962) motion is made. *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980).

An absolute privilege against disclosure of the identity of every informer who supplies the information upon which an arrest is based is impermissible where a motion is made to disclose information favorable to the defendant. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977).

Error to refuse to consider appellants' motion for disclosure of informer's identity on its merits. — The trial judge erred in refusing to consider appellants' *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1962), motion for disclosure of the identity of the informer on its merits and in denying the motion solely on the theory that the identity was absolutely privileged. This error, however, can be cured by a post-trial hearing before the judge in the trial court. *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980).

Where informer is tipster, identity immaterial because evidence is inadmissible hearsay. — If the state proves to the court's satisfaction that an informer is a pure tipster, who has neither participated in nor witnessed the offense, any evidence he might offer would be hearsay and inadmissible. Thus the tipster's identity could not be material to the guilt or innocence of the defendant or be relevant and helpful to the defense. The public policy of the state toward nondisclosure would not be overcome and the state may rely on its privilege. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977).

Trial court's comment on jurors' notes did not affect an inmate's right to an impartial jury. — Trial court did not express an opinion in violation of O.C.G.A. § 17-8-57 or of an inmate's rights to confrontation or a fair and impartial jury when it explained to those in the courtroom during jury deliber-

ations in the inmate's trial on drug and weapons offenses that it had received two notes from the jury describing a communication received by a juror that offered the juror a bribe in exchange for changing the juror's vote to not guilty; the trial court's comment did not suggest that the inmate had directed the bribery attempt because it merely reviewed the jurors' notes and did not go beyond them, and it added nothing to that which the jurors already knew. *Greer v. Thompson*, 281 Ga. 419, 637 S.E.2d 698 (2006).

When alleged accomplice's statement admissible. — Even though an alleged accomplice does not appear at the defendant's trial, his statement can be placed before the jury under former Code 1933, § 38-306 (see O.C.G.A. § 24-3-5) without violating the due process or confrontation clauses, if the statement meets certain indicia of reliability, including the fact that it was offered spontaneously and was against the accomplice's penal interest. *Spivey v. State*, 138 Ga. App. 298, 226 S.E.2d 104, cert. denied, 429 U.S. 921, 97 S. Ct. 317, 50 L. Ed. 2d 288 (1976).

Due process violated by State's suppression of evidence favorable to accused. — Suppression by prosecution of evidence favorable to accused when requested violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution; but there must be evidence that such information existed and was actually withheld. *Eades v. State*, 232 Ga. 735, 208 S.E.2d 791 (1974); *Clark v. State*, 144 Ga. App. 69, 240 S.E.2d 270 (1977).

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Lundy v. State*, 139 Ga. App. 536, 228 S.E.2d 717 (1976).

Due process requires there be no suppression by state of evidence in its files favorable to accused, though there is no statutory method of discovery in criminal cases in Georgia. *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976); *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evi-

dence is material either to guilt or to punishment. The evidence is material if it is of sufficient significance to result in the denial of the defendant's right to a fair trial if not disclosed. *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980).

Withholding or suppression by prosecution of evidence material to guilt or punishment is violative of due process. *United States v. D'Antignac*, 628 F.2d 428 (5th Cir. 1980), cert. denied, *D'Antignac v. United States*, 450 U.S. 967, 101 S. Ct. 1485, 67 L. Ed. 2d 617 (1981).

Prosecution's suppression of favorable material evidence requested is reversible error. — The prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment, is reversible error. *Rini v. State*, 235 Ga. 60, 218 S.E.2d 811 (1975), cert. denied, 429 U.S. 924, 97 S. Ct. 326, 50 L. Ed. 2d 293 (1976).

Affirmative duty on prosecution to produce evidence favorable to accused. *Brady vs. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, (1963), imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is favorable to the accused either as direct or impeaching evidence. The accused need not show that the evidence demanded is favorable to the defense. *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968), cert. denied, 393 U.S. 1105, 89 S. Ct. 908, 21 L. Ed. 2d 799 (1969), later appeal, 431 F.2d 70 (5th Cir. 1970), vacated on other grounds, 408 U.S. 938, 92 S. Ct. 2867, 33 L. Ed. 2d 758 (1972).

Duty is on state to disclose evidence exculpatory or material noncumulative and favorable to defense, even in the absence of request. *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

Constitutional requirement of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), is that the state produce exculpatory evidence in its files, not that the state affirmatively seek out exculpatory evidence, even though that evidence may be more accessible to the state than the defense. *Plemons v. State*, 155 Ga. App. 447, 270 S.E.2d 836 (1980).

Prosecutor may not suppress material evidence favorable to the accused, whether or not a request for such information is made

Due Process (Cont'd)**10. Criminal Trials (Cont'd)**

or an in-camera inspection conducted. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983).

Assistance to criminal defendant to procure reasonably obtainable evidence for defense. — It is not inconceivable that the idea embodied in the Constitutions, that every defendant shall stand equal before the law, might be held to require, and would certainly permit, that a criminal defendant be furnished assistance to procure evidence reasonably obtainable for the defense, including, when needed, an examination by a competent and disinterested expert qualified to give testimony. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

No burden on state to open its file for general inspection by the defendant; an in camera inspection of the prosecution file by the judge is sufficient, and the defendant has the burden of showing how the case has been materially prejudiced. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

Exculpatory evidence delayed. — Defendant's fifth amendment rights were not violated when the defendant did not receive a copy of an exculpatory witness's statement until after indictment and following the defendant's second attorney's discovery motion. Defendant failed to prove how the outcome of the case would have been any different if defendant had been supplied the exculpatory statement at an earlier date. *Rock v. Lowe*, 893 F. Supp. 1573 (S.D. Ga. 1995), aff'd without op., 79 F.3d 1161 (11th Cir. 1996).

Only material which creates a reasonable doubt as to guilt must be disclosed under a general request for anything exculpatory. *Radford v. State*, 251 Ga. 50, 302 S.E.2d 555 (1983).

Not every nondisclosure of exculpatory information is error; rather, where the omitted evidence was not specifically requested, nondisclosure is error only if the omitted evidence creates a reasonable doubt that did not otherwise exist. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983).

Where the state fails to disclose substantive evidence favorable to a defendant for

which there was no specific request, the failure to disclose violates due process only if the omitted evidence creates a reasonable doubt that did not otherwise exist. *Maddox v. Montgomery*, 718 F.2d 1033 (11th Cir. 1983).

Where none of materials sought for inspection were exculpatory in nature, trial court does not err in refusing to compel discovery pursuant to defendant's notices to produce and subpoenas. *Jones v. State*, 135 Ga. App. 893, 219 S.E.2d 585 (1975).

Defendant's failure to identify exculpatory evidence. — Defendant was not denied defendant's constitutional right to due process by the state's failure to secure exculpatory evidence where defendant failed to identify any potential evidence that was not investigated or developed by the state; mere speculation that there may be exculpatory evidence was insufficient to show a due process violation. *Cameron v. State*, 262 Ga. App. 296, 585 S.E.2d 209 (2003).

Trial judge must conduct hearing on merits of Brady v. Maryland motion and if the judge finds the evidence material under Brady weigh it against the state's privilege under *Roviaro v. United States*, 3 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1956). *Davidson v. State*, 156 Ga. App. 457, 274 S.E.2d 807 (1980).

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), is not violated when the Brady material is available to defendants during trial. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983).

Brady question raised on appeal. — When a question concerning compliance with the mandate of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) is raised on appeal, the appellant has the burden of showing how the case has been materially prejudiced. If the evidence not furnished the defendant has been ruled cumulative, the defendant has not shown any prejudice the defendant has suffered. *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

Defendant was not denied due process rights because the trial court instructed an interpreter to translate only a witness's testimony for the benefit of the jury, and not to otherwise interpret peripheral proceedings for the witness that were unrelated to the content of the witness's testimony; the defen-

dant failed to show how the defendant was denied the right to participate in a meaningful way in the proceedings. *Puga-Cerantes v. State*, 281 Ga. 78, 635 S.E.2d 118 (2006).

Defendant failed to prove the prejudice prong of the defendant's *Brady* claim as the defendant merely speculated that an expert might have been able to show that the defendant was not traveling at 60-70 miles per hour in a stolen vehicle; such speculation did not establish a reasonable probability that the outcome of the trial would have been different if the defendant had been provided with a copy of a videotape of a police officer's high-speed chase of the stolen vehicle before trial. *Ferguson v. State*, 280 Ga. 893, 635 S.E.2d 144 (2006).

Defendant must show favorable information improperly withheld by state, denying the defendant a fair trial. — In a criminal case, in order to establish a due process violation based on denial of a *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) motion for discovery of exculpatory material, the defendant has the burden of showing that any of the information allegedly withheld improperly was favorable to the defendant, and that the withholding in any way denied the defendant a fair trial. *Lewis v. State*, 166 Ga. App. 428, 304 S.E.2d 531 (1983).

After hearing, defendants must show materiality and favorable nature of evidence. — Witness statements have never been subject to a notice to produce, although exculpatory witness statements are subject to disclosure, where requested, under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), but where in compliance with *Brady* supra and its progeny, the trial court has made an in-camera inspection of the requested statements and found no exculpatory information, the defendant then has the burden of showing both the materiality and the favorable nature of the evidence sought. *Welch v. State*, 251 Ga. 197, 304 S.E.2d 391 (1983).

Victim's failure to identify codefendant not exculpatory evidence requiring disclosure. — Since the failure of the victim to identify another party to the assault does not create a reasonable doubt as to the guilt of defendant, whom the victim positively identified in a photographic lineup and again at trial, the district attorney did not violate

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) in failing to disclose that the victim was unable to identify the other party. *Radford v. State*, 251 Ga. 50, 302 S.E.2d 555 (1983).

Information provided by witness for the first time at trial. — Where a witness stated for the first time during trial that, after the murder, the defendant asked another to burn the defendant's trousers, there was no violation of the constitutional duty to disclose, for the simple reason that the statement was not suppressed. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983).

Failure to provide copy of signature not harmful. — Where a defendant filed a general *Brady* motion with the state, the mere failure of the state to provide the defense with a copy of the signature of the defendant given to police officers, which was not used as a basis for any expert testimony and could have had relevance only to the authenticity of the signature on a pawn ticket, could have neither harmed nor prejudiced the defendant, who admitted under oath that the defendant signed the defendant's name to the pawn ticket. *Barton v. State*, 181 Ga. App. 457, 352 S.E.2d 637 (1987).

Delay in delivering officer's sketches of crime scene. — Where a police identification technician made rough sketches of the crime scene during investigation of the murder, shortly thereafter this technician was sent to the police academy and took the rough sketches with the technician, and one day prior to trial the technician prepared a "final" drawing from the sketches that was immediately given to the defendant, and the defendant moved for a mistrial on the ground that the final sketch should have been both prepared and delivered to the defendant more promptly pursuant to the defendant's motion under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), it was held that the evidence was not suppressed, the defendant had not shown that the final sketch was in any way exculpatory, and the trial court did not abuse its discretion in denying the defendant's motion for mistrial. *Baty v. State*, 257 Ga. 371, 359 S.E.2d 655 (1987).

Defendant entitled to have substance related to charge independently analyzed. — A defendant charged with possession or sale of a prohibited substance has a general right to

Due Process (Cont'd)**10. Criminal Trials** (Cont'd)

have an expert of the defendant's own choosing analyze it independently. If the defendant's conviction or acquittal is dependent upon the identification of the substance as contraband, due process of law requires that analysis of the substance not be left completely within the province of the state. *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233, cert. denied, 431 U.S. 970, 98 S. Ct. 248, 53 L. Ed. 2d 1067 (1977).

Dismissal of drug possession charges against defendant after the state intentionally destroyed defendant's urine sample was proper where the crime lab's positive test results on the sample were the only evidence of defendant's guilt; the sample had initially tested negative for drugs in a field test; and there was an existing court order allowing defendant to independently test the sample. *State v. Blackwell*, 245 Ga. App. 135, 537 S.E.2d 457 (2000).

Destruction of blood sample before defendant could independently test it. — The defendant was not denied the right to due process when the state destroyed defendant's blood sample before defendant had an opportunity to independently test it for alcohol since the evidence was destroyed at the time that crime lab guidelines indicated that it should be destroyed, and the defendant produced no evidence that the crime lab or anyone acting for the state intentionally destroyed the evidence or had the evidence destroyed as a result of improper motive, such as keeping exculpatory evidence from the defendant. *Swanson v. State*, 248 Ga. App. 551, 545 S.E.2d 713 (2001).

No suppression of exculpatory evidence. — Where defendant argued that the trial court erred in denying the defendant's motion to dismiss the indictment due to the state's "failure" to prevent the victim's child from selling the trailer in which the murder took place, maintaining the state's inaction was tantamount to suppressing evidence, as the trailer was obviously critical exculpatory evidence, but the defendant had access to numerous crime scene photographs taken by the police and the defendant made no showing either that exculpatory evidence had been suppressed under *Brady v. Maryland*, or that the police were under a duty to

prevent the victim's child from disposing of the trailer, there was no error. *Baty v. State*, 257 Ga. 371, 359 S.E.2d 655 (1987).

Where a defendant asserted error in the state's "deliberate and willful" suppression of exculpatory evidence, the glass-louvered door through which victim's home was entered unlawfully, but it is clear from such evidence that the state did not willfully and deliberately suppress evidence of the door since it was never in the state's possession, as the missing door had been replaced by the victim with a new door the same day the burglary occurred, there was no showing that defendant was prejudiced by the "loss," and since the door and missing louver were not exculpatory evidence, the court did not err by refusing to dismiss the charge on this ground. *Burson v. State*, 183 Ga. App. 647, 359 S.E.2d 731 (1987), cert. denied, 183 Ga. App. 905, 359 S.E.2d 731 (1987).

No requirement that card from which Miranda rights are read by officers to defendant be introduced in evidence by the state. *James v. State*, 230 Ga. 29, 195 S.E.2d 448 (1973).

Evidence of commission of crime other than one charged is generally not admissible. *Bixby v. State*, 234 Ga. 812, 218 S.E.2d 609 (1975).

Procedure upon defendant's challenge to voluntariness of statement. — Once a defendant raises the issue of voluntariness of a statement the state wishes to use for impeachment purposes, she is entitled to a determination of the issue by the trial court before the statement can be used, although not to a separate "Jackson v. Dennis" hearing. *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Fact that defendant exposes the existence of a statement does not render the substance of the statement immune from the requirement for admissibility that the statement was given voluntarily. *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Use of defendant's involuntary statement prohibited for all purposes. — It is a denial of due process of law for the state to use an involuntary statement against a defendant at trial for any purpose. *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Use of involuntary statements of nondefendants. — The due process reasons for excluding the use of a defendant's invol-

untary statement do not apply with equal force to the use of involuntary statements from nondefendant witnesses. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 246 (1987).

Where a witness was on the witness stand and available to be questioned concerning an allegedly coerced and involuntary statement to the police and because one of the due process principles for excluding involuntary confessions (the defendant's position in the system of justice) does not apply to nondefendant witnesses who take the stand at trial, no due process rights of the defendant were violated by allowing the state to use the witness' prior statement for impeachment purposes. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 246 (1987).

Statement obtained in violation of Miranda admissible for impeachment. — A prior inconsistent statement of a criminal defendant is admissible for the limited purpose of impeaching trial testimony of the defendant even though the prior inconsistent statement would otherwise be inadmissible due to Miranda violations in defendant's trial. *Hicks v. State*, 256 Ga. 266, 347 S.E.2d 589 (1986).

Answers to general questions admissible though no Miranda warnings given. — Miranda warnings do not have to be given in advance to general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process for answers to those questions to be admissible as evidence. *Brown v. State*, 140 Ga. App. 160, 230 S.E.2d 128 (1976), cert. denied, 434 U.S. 819, 98 S. Ct. 58, 54 L. Ed. 2d 75 (1977).

When testimony as to what defendant said to police agent while not in custodial interrogation is admissible. — If a defendant is not under arrest when the defendant's interview with police agent begins and if the facts disclose no "custodial interrogation," testimony elicited by the state upon direct examination in response to a question posed by a district attorney as to what the defendant said to police agent concerning incriminating evidence was not a violation of the defendant's rights under U.S. Const., amend. 14 if the district attorney does not stress the defendant's silence in an attempt

to imply guilt and the jury is never told that the defendant's silence can be used for impeachment purposes, much less evidence of guilt. *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978).

Post-arrest silence. — In the absence of the sort of affirmative assurances embodied in the Miranda warnings, it does not violate due process of law for a state to permit cross-examination as to postarrest silence if a defendant chooses to take the stand; a state is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony. *Hollis v. State*, 174 Ga. App. 627, 330 S.E.2d 817 (1985).

It is fundamentally unfair and a violation of due process of law for the State to permit cross-examination of a defendant as to post-arrest silence if the defendant has been informed of the defendant's Miranda rights. *Chapman v. State*, 263 Ga. 393, 435 S.E.2d 202 (1993).

No rule that reference to accused's silence at arrest requires grant of new trial. — There is not an ironclad rule that any reference (even unwitting or harmless) to an accused's silence at time of arrest requires the grant of a new trial. *Smith v. State*, 140 Ga. App. 385, 231 S.E.2d 83 (1976).

State's use of defendant's post-arrest silence after Miranda warnings for impeachment purposes violates due process. — A state's use, for impeachment purposes, of a defendant's post-arrest silence after the defendant had received the Miranda warnings violates the due process clause of U.S. Const., amend. 14. *Clark v. State*, 237 Ga. 901, 230 S.E.2d 277 (1976); *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976); *United States v. Allston*, 613 F.2d 609 (5th Cir. 1980).

Evidence as to silence on the defendant's part at arrest should be excluded when objected to, for the defendant is then entitled to remain silent, and the prosecution may not use against the defendant the fact that the defendant stood mute or claimed the privilege. *Smith v. State*, 140 Ga. App. 385, 231 S.E.2d 83 (1976).

Use for impeachment purposes at trial of the defendant's post-arrest silence after Miranda warnings violates due process

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clause of U.S. Const., amend. 14. The rule, however, requires a case-by-case application and permits a finding of harmless error. *United States v. Davis*, 546 F.2d 583 (5th Cir.), cert. denied, 431 U.S. 906, 97 S. Ct. 1701, 52 L. Ed. 2d 391 (1977).

Harmless error in admitting statement. — Erroneous admission of a statement obtained in violation of the *Miranda* rule was harmless error, where there were no coercive police tactics inherently offensive to due process and no reasonable chance that the error contributed to the verdict. *Metheny v. State*, 197 Ga. App. 882, 400 S.E.2d 25 (1990).

It was not error to allow the defendant to be cross-examined concerning post-arrest silence where the record disclosed that, before the questioned cross-examination, the defendant was examined by defense counsel and testified that the defendant had made no statement to the police. Having addressed this matter by the defendant's own testimony on direct examination, it was not error to allow cross-examination as to that same subject matter. *Jackson v. State*, 258 Ga. 322, 368 S.E.2d 771 (1988).

Evidence of alibi should come into case like any other evidence and should be submitted to the jury for consideration of whether the evidence as a whole proves defendant's guilt beyond a reasonable doubt. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Testimony as to circumstances connected with arrest is admissible. *Bixby v. State*, 234 Ga. 812, 218 S.E.2d 609 (1975).

Fruits of illegal arrest are not admissible in evidence against a defendant, and a conviction which is based upon evidence thus illegally admitted must be reversed and set aside. *Traylor v. State*, 127 Ga. App. 409, 193 S.E.2d 876 (1972).

Outrageous conduct by police not established. — Even if the state was required to destroy an illegal substance seized as contraband, the state's conduct in failing to meet this obligation and in using the illegal substance in a common reverse-sting operation did not rise to the level of outrageous con-

duct that violated fundamental notions of due process and that prejudiced the defendants. *Gober v. State*, 249 Ga. App. 168, 547 S.E.2d 656 (2001), aff'd, 275 Ga. 356, 566 S.E.2d 317 (2002).

Evidence obtained by illegal search and seizure of defendant inadmissible. — Evidence obtained by illegal seizure and search of the defendant's person, by which the defendant is compelled to criminate the defendant, is inadmissible against a defendant accused of a crime, and the burden devolves upon the state to show that evidence obtained by the search was procured after a legal arrest. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

No fourteenth amendment protection for abandoned property against illegal search and seizure. — The constitutional protection of the fourth and fourteenth amendments does not apply to property that has been abandoned. Thus, if a defendant has abandoned the defendant's property, the defendant is not entitled to protection of that property by the fourth or fourteenth amendments from an illegal search or seizure. *Gresham v. State*, 204 Ga. App. 540, 420 S.E.2d 71 (1992).

When retroactive application of exclusionary rule not required. — If law enforcement officers reasonably believe in good faith that evidence seized is admissible at trial, judicial integrity is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that matter, and when this is shown retroactive application of the new rule is not required. *Lawson v. State*, 143 Ga. App. 776, 240 S.E.2d 188 (1977).

Person aggrieved by search. — If the evidence that the defendant seeks to suppress was obtained during the execution of a search warrant authorizing the search of the defendant's person and automobile, the defendant would be a "person aggrieved" by the search, if it should be held to be unlawful. *Wood v. State*, 224 Ga. 121, 160 S.E.2d 368 (1968).

Admission of evidence gathered from the defendant and automobile without search warrant after defendant's involvement in shooting upheld. — Admission of evidence gathered from the defendant and the defen-

dant's automobile by state officers without a search warrant after the defendant had been involved in a shooting in a trial for violation of statute regulating pawnbrokers would not violate the due process clauses of the state and federal Constitutions, or of the civil rights statute, 42 U.S.C. §§ 1981, 1983. *Atterberry v. State*, 212 Ga. 778, 95 S.E.2d 787 (1956).

Due process denied where conviction procured by testimony known by prosecutor to be perjured. — Where it is shown and not denied that a conviction was procured by perjured testimony, which the state's prosecuting attorney knew to be perjured at the time it was introduced, due process as guaranteed by U.S. Const., amend. 14 is denied, and such testimony is not merely impeaching in character but has probative force. *Burke v. State*, 205 Ga. 656, 54 S.E.2d 350 (1949).

Judgment procured by perjured testimony set aside. — U.S. Const., amend. 14 not only requires the setting aside of a judgment procured by perjured testimony, but prescribes the evidence by which the fact of perjury may be proved, thus affording due process. *Burke v. State*, 205 Ga. 656, 54 S.E.2d 350 (1949).

Knowing use of perjured testimony. — Conviction of a crime following a trial in which perjured testimony on a material point is knowingly used by the prosecution is an infringement on the accused's fifth and fourteenth amendment rights to due process of law. *Kitchens v. State*, 160 Ga. App. 492, 287 S.E.2d 316 (1981).

It is sufficient to show that police officers acting in behalf of the state in connection with the prosecution had knowledge of the perjured character of the testimony given by a witness for the state. *Kitchens v. State*, 160 Ga. App. 492, 287 S.E.2d 316 (1981).

Use of perjured testimony not grounds for reversal. — Conviction did not need to be reversed for use of perjured testimony as inconsistencies and discrepancies were disclosed at trial and available as a basis for attacking the credibility of the state's witnesses. *Cammon v. State*, 269 Ga. 470, 500 S.E.2d 329 (1998).

Opportunity to be heard required where act of criminal contempt not in court's presence. — Where a criminal contempt act is not in the court's immediate presence, due

process requires that the accused be given an opportunity to be heard. *Martin v. Waters*, 151 Ga. App. 149, 259 S.E.2d 153 (1979).

Opportunity to be heard not required where contempt committed in presence of court. — Where a direct contempt is committed in the presence of the court, the offender is not entitled as a matter of right to a hearing before the court; the court may act on its own knowledge of the facts and proceed to impose punishment for the contempt, or the court may in its discretion allow a hearing. The refusal to allow a hearing does not deprive the defendant of the due process of law guaranteed by the state and federal Constitutions. *Martin v. Waters*, 151 Ga. App. 149, 259 S.E.2d 153 (1979).

Due process not offended by trial judge's being accuser and judge in state court contempt proceedings. — In state court contempt proceedings, due process is not offended where the trial judge in the court in which the offense allegedly occurred serves as the accuser as well as the trial judge, hearing the charges preferred by him. *Friedman v. Harbold*, 150 Ga. App. 482, 258 S.E.2d 154 (1979), cert. denied, 445 U.S. 950, 100 S. Ct. 1598, 63 L. Ed. 2d 785 (1979).

Contempt hearing before another judge. — Where an announcement of punishment for contempt is delayed until the conclusion of the trial, and where the allegedly contumacious conduct of an attorney in failing to stand and respond to the court was directed toward the judge and thereafter the judge became involved in this controversy with the attorney, due process requires that the contempt hearing be conducted by another judge. *Dowdy v. Palmour*, 251 Ga. 135, 304 S.E.2d 52 (1983).

Witness cannot claim U.S. Const., amend. 5 privilege if previously tried and convicted for participation in same crime. *Cates v. State*, 245 Ga. 30, 262 S.E.2d 796 (1980).

Prosecution witness' communications during hypnotic treatment subject to disclosure. — Communications made during a hypnotic "age regression" treatment of a prosecution witness were not privileged under former Code 1933, § 84-3118 (see O.C.G.A. § 43-39-16) and were subject to disclosure, since the psychologist conducting the treatment sessions was acting at the behest of, and as a member of, the prosecution, and the treatment was conducted

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not for any therapeutic reasons, but in order to bolster the prosecution's case. *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975).

Waiver of right to test constitutionality of statute making spouse incompetent witness for the other spouse. — Where, in the trial of a criminal case, the defendant offers the defendant's spouse (who was present at the difficulty) as a witness in the defendant's behalf, and on objection by the state the spouse's testimony is rejected on the ground that the spouse is not competent or compellable to testify for or against the defendant; and where thereafter the objection is withdrawn by the state, and the defendant allowed to introduce the defendant's spouse, and the defendant refuses to do so, the defendant will be considered as having waived the right to test the constitutionality of the statute making the defendant's spouse an incompetent witness for the defendant, on the ground that the defendant waived that right by the refusal to use the defendant's spouse as a witness in the defendant's behalf when the defendant was given an opportunity to do so. *Williams v. State*, 69 Ga. App. 863, 27 S.E.2d 54 (1943).

Determination of whether witness should be compelled to travel to trial in foreign jurisdiction. — To meet the demands of due process, former Code 1933, § 38-2001a et seq. (see O.C.G.A. 24-10-90 et seq.) requires the presentation of enough facts to enable both the court in the demanding state and the court in the state to which the requisition is directed to determine whether the witness should be compelled to travel to a trial in a foreign jurisdiction. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Defendant's right to fair trial violated where witness prevented from testifying for defense by threats or coercion. — Where witness is prevented from testifying for defense by threats and coercion, or where it appears probable that failure to testify is result of such treatment, defendant's right to a fair trial has been violated. *Simmons v. State*, 155 Ga. App. 716, 272 S.E.2d 506 (1980).

Burden on party desiring witness to show witness is necessary and material witness. — In order to satisfy the requirements of due

process, it must be shown that the witness sought is a necessary and material witness to the case, and the party desiring the witness must carry the burden of establishing those facts. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979).

Prohibiting cross-examination of key prosecution witness. — Trial court errs in granting motion to prohibit cross-examination of key prosecution witnesses on their motives in testifying. *Owens v. State*, 251 Ga. 313, 305 S.E.2d 102 (1983).

Alford plea. — Although defendant's motion to withdraw defendant's Alford plea to two counts of child molestation was timely because it was filed during the term in which the trial court imposed its sentence, the trial court's judgment denying the motion was upheld because the record did not support defendant's claims that defendant did not understand the nature of an Alford plea, that defendant's plea was not entered voluntarily and intelligently, and that defendant did not receive effective assistance of counsel. *Whitesides v. State*, 266 Ga. App. 181, 596 S.E.2d 706 (2004).

Due process denied where accused denied right to adjudication as to sanity. — The denial to an accused person of the right to an adjudication as to whether the accused was insane at the time of the commission of an offense, or is insane at the time of the trial, is the denial of due process of law under U.S. Const., amend. 14. *Clark v. Smith*, 224 Ga. 766, 164 S.E.2d 790 (1968), rev'd on other grounds, 403 U.S. 946, 91 S. Ct. 2279, 29 L. Ed. 2d 859 (1971).

Where evidence raises doubt as to the defendant's competence to stand trial, the judge must impanel jury and conduct sanity hearing on the judge's own motion. *Jackson v. Caldwell*, 461 F.2d 682 (5th Cir.), cert. denied, 409 U.S. 991, 93 S. Ct. 334, 34 L. Ed. 2d 257 (1972).

Absent special plea of insanity there is no mandatory duty on trial judge to impanel special jury to determine the issue of mental incompetency or insanity under former Code 1933, § 27-1502 (see O.C.G.A. § 17-7-130); however, failure to observe procedures adequate to protect an accused's right not to be tried or convicted while incompetent to stand trial deprives the accused of the due process right to a fair trial. *Ricks v. State*, 240 Ga. 853, 242 S.E.2d 604 (1978).

Insanity is affirmative defense that accused must prove by preponderance of evidence. The Georgia rule suffers from no constitutional infirmity. *Grace v. Hopper*, 566 F.2d 507 (5th Cir.), cert. denied, 439 U.S. 844, 99 S. Ct. 139, 58 L. Ed. 2d 144 (1978).

Harmless error if court required state to prove defendant's sanity. — If the court does charge that the state must prove the defendant's sanity beyond a reasonable doubt, it would be harmless error as such a charge would be beneficial to the defendant. *State v. Avery*, 237 Ga. 865, 230 S.E.2d 301 (1976).

Appointment of psychiatrist to assist in defense. — When a criminal defendant makes an ex parte showing that the defendant's sanity is likely to be a significant factor in the defense, the defendant must be provided with a psychiatrist to assist in the defendant's defense. *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (1985).

Indigent's right to psychiatrist. — The United States Supreme Court has not required that the state provide an independent psychiatrist for an indigent defendant, only that it provide a competent psychiatrist if the defendant demonstrates that the defendant's sanity at the time of the offense is to be a significant factor at trial. *Tucker v. Kemp*, 660 F. Supp. 832 (M.D. Ga. 1987).

Where in a death penalty case the circumstances presented to the trial court did not establish that insanity would be a significant issue at trial, the court did not abuse its discretion by refusing to provide funds for psychiatric assistance. *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Privilege of evaluation made by court-funded psychiatrist. — For interpretation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) regarding procedure to be followed in providing psychiatric assistance to criminal defendants, see *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (1985).

Criminal defendant who requested funds for hiring a psychiatrist was not denied due process where the court granted funds but reserved ruling on the question of whether the evaluation would be privileged, prompting the defendant to hire a psychiatrist out of the defendant's own funds to assure privilege, since the defendant abandoned the

matter by not presenting authority supporting the privilege and by failing to evoke a ruling of law from the court. *Crawford v. State*, 254 Ga. 435, 330 S.E.2d 567 (1985), cert. denied, 489 U.S. 1040, 109 S. Ct. 1098, 103 L. Ed. 2d 239 (1989).

Expert witness appointed by court for sanity examination of defendant is witness for court. — An expert witness appointed by the court for a sanity examination of a defendant may not be regarded as a prosecution witness, but is instead a witness for the court; and the denial of a defendant's request to furnish a psychiatrist at public expense to assist the defense, when the court-appointed doctor has reported the defendant is sane, has been held not to constitute a denial of due process. *Jackson v. State*, 225 Ga. 790, 171 S.E.2d 501 (1969), rev'd on other grounds, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346, vacated in part on other grounds, 229 Ga. 731, 194 S.E.2d 410 (1972).

Trial court may refuse psychiatric evaluation where the defendant fails to raise a bona fide doubt as to the defendant's competency to stand trial by offering either evidence of past behavior, prior medical opinion or by the defendant's behavior before the trial judge. *Bowden v. Francis*, 733 F.2d 740 (11th Cir. 1984).

Where the record discloses no evidence that the defendant's sanity at the time of the offenses charged would be a significant factor at trial nor even that the defendant's mental condition was seriously in question, there was no abuse of discretion in the trial court's denial of the defendant's "motion for psychiatric assistance," and the defendant also suffered no deprivation of effective assistance of counsel resulting from the trial court's denial of the defendant's motion. *Davidson v. State*, 183 Ga. App. 557, 359 S.E.2d 372, cert. denied, 183 Ga. App. 905, 359 S.E.2d 372 (1987).

Where the court ordered a psychiatric examination of the accused and the report found the accused was competent to assist in the accused's defense, that the accused knew the difference between right and wrong, that he was able to understand the legal proceedings the accused faced, that the accused's intellectual capacities were well preserved, and that the accused was aware of the nature and the seriousness of the charges against

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the accused, although the psychiatrist did note the accused's past history of alcohol abuse and recommended treatment, but found no evidence of a mental disorder which would have aggravated the accused's ability to distinguish right from wrong, and no evidence of a delusional compulsion, but the psychiatrist went on to find a stress factor following loss of the accused's job, which precipitated a drinking episode after a long period of abstinence, during which the crimes were committed, in the absence of a finding of any type of insanity which would have been a significant factor in the defendant's defense, the trial court did not err in denying the motion for leave to retain a psychiatrist to aid in the defendant's defense, as the defendant was required to make a showing that the defendant's sanity was likely to be a significant factor at trial. *Robinson v. State*, 186 Ga. App. 767, 368 S.E.2d 533 (1988).

Trial court's refusal to provide accused selected psychiatrist upheld, as hearing on insanity of civil nature. — A hearing upon a special plea of insanity is a proceeding of a civil nature, in which the burden rests on the defendant to produce evidence of insanity. Thus, the refusal of a trial court to provide for examination by and assistance to the accused by a "competent" psychiatrist selected by the accused discloses no violation of due process or error for any other reason. *May v. State*, 146 Ga. App. 416, 246 S.E.2d 432 (1978).

Where no special insanity plea entered, not error for court to deny defendant's motion for psychiatric examination at county expense. — It is not error for a trial court to deny the defendant's motion requesting that the defendant be examined by a psychiatrist at county expense because the defendant had not entered a special plea of insanity at the time of trial. *Huguley v. State*, 120 Ga. App. 332, 170 S.E.2d 450 (1969), cert. denied, 400 U.S. 834, 91 S. Ct. 68, 27 L. Ed. 2d 66 (1970).

Court not required to appoint state-paid psychiatrist even where special insanity plea filed. — Trial court is under no constitutional or statutory duty to appoint state-paid psychiatrist to evaluate defendant even

though special plea of insanity has been filed. *Blankenship v. State*, 247 Ga. 590, 277 S.E.2d 505 (1981), overruled on other grounds, *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993).

Charge to jury putting burden of establishing insanity defense on defendant upheld. — Charge to jury in a murder trial requiring the defendant to produce evidence in support of an insanity defense and to establish it to "the reasonable satisfaction of the jury" does not violate defendant's right to due process. *Grace v. Hopper*, 234 Ga. 669, 217 S.E.2d 267 (1975), cert. denied, 423 U.S. 1066, 96 S. Ct. 806, 46 L. Ed. 2d 657 (1976).

Due process not denied where jury not instructed specifically, absent request, as to burden of proof regarding sanity. — Where the charge of the court includes instruction as to insanity but places the burden of proof as to each essential element of the crime, including intent, upon the state beyond a reasonable doubt, it is not a denial of due process of law for the court not to instruct the jury specifically, absent a request, as to any burden of proof regarding sanity. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), sentence vacated, 243 Ga. 244, 253 S.E.2d 707 (1979).

Guilty-but-mentally-ill verdict not unconstitutional. — The defendant who pleads insanity has placed his mental health in issue and inasmuch as he has presumably introduced evidence of mental illness for the court to charge the jury that it may consider a verdict of guilty but mentally ill does not constitute burden shifting. Also, while the definition of "mentally ill" in O.C.G.A. § 17-7-131 is not a model of specificity, the definition is sufficient to inform the jury of the meaning of a verdict of guilty but mentally ill and is not so vague as to violate due process. *Cooper v. State*, 253 Ga. 736, 325 S.E.2d 137 (1985).

Since the defendant made no showing that sanity at the time of the offense would be a significant factor at trial and no request for a psychiatrist to aid in the presentation of mitigating evidence at sentencing, the court's failure to provide psychiatric assistance in developing an insanity defense or in presenting mitigating evidence was not a denial of due process. *Bowden v. Kemp*, 767 F.2d 761 (11th Cir. 1985).

Failure to order third examination as to competency. — The trial court's failure to order a third examination including an assessment as to defendant's competency at the time of the murder greatly hindered defendant's delusional compulsion defense in violation of due process. *Ford v. Gaither*, 953 F.2d 1296 (11th Cir. 1992).

Subjecting a defendant to trial before a judge with a direct, personal, pecuniary interest in convicting the defendant effects a denial of due process in violation of U.S. Const., amend. 14. *Connally v. Georgia*, 429 U.S. 245, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977).

Failure by a judge to disqualify oneself when it serves to deprive a defendant of an unbiased trier of fact is a denial of due process. *Mendenhall v. Hopper*, 453 F. Supp. 977 (S.D. Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979).

Trial judge's failure to determine nonparticipating alternate's belief against capital punishment not unconstitutional. — A trial judge's failure, during voir dire, to determine whether a prospective juror harbors not only an abstract belief against capital punishment, but also beliefs which would preclude the defendant from voting the death penalty under any circumstances does not violate U.S. Const., amend. 6 or U.S. Const., amend. 14 where the juror is an alternate who never participates in any phase of the trial. *Smith v. Whisman*, 431 F.2d 1051 (5th Cir. 1970).

Replacement of trial judge after jury charged. — A defendant failed to show that due process was violated when, because of an emergency, the trial judge who had heard the case and charged the jury was replaced by a different judge, who accepted the verdict. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Statement of witness that arrest was made under warrant is not proof arrest legal. *Marshall v. State*, 130 Ga. App. 572, 203 S.E.2d 885 (1974).

When reliability of witness may be determinative, nondisclosure affecting credibility violates due process. — When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility violates due process guarantees. *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975).

Admission of child witness' testimony. — Statute allowing a child who did not understand the meaning of an oath to testify in a child molestation case did not violate due process and equal protection principles, where the defendant had the opportunity to cross-examine the child witness and the statute applied equally to all those accused of child molestation. *Sims v. State*, 260 Ga. 782, 399 S.E.2d 924 (1991).

Juries in criminal cases are free to render verdicts that are inconsistent or even result of mistake or compromise. Any apparent inconsistency between verdicts on the two counts of an indictment does not undermine convictions on the count on which defendants were found guilty. Each count is separately considered and, if it is supported by the evidence, may stand. *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir.), *cert. denied*, 447 U.S. 907, 100 S. Ct. 2991, 64 L. Ed. 2d 856 (1980).

Instruction about inference of guilt from possession of unaccounted for property not comment on defendant's failure to testify. — An instruction stating that guilt of the defendant can be inferred from possession of recently stolen property unaccounted for by him cannot properly be construed as a comment on the defendant's failure to testify. *Horton v. State*, 228 Ga. 690, 187 S.E.2d 677 (1972).

Evidence of an understanding or agreement as to the future prosecution of an accomplice on whose testimony the case almost entirely depends is relevant to credibility. The jury is entitled to know of it, the prosecutor has a duty to disclose it, and the failure to make this disclosure violates due process. *Henderson v. State*, 161 Ga. App. 211, 288 S.E.2d 284 (1982).

Jury entitled to know understanding or agreement as to future prosecution of accomplice testifying for state. — Evidence of any understanding or agreement as to future prosecution of an accomplice on whose testimony the state's case almost entirely depends is relevant to the accomplice's credibility. The jury is entitled to know of it, the prosecutor has a duty to disclose it, and the failure to make this disclosure violates due process and requires the reversal of the conviction and a remand for a new trial. *Allen v. State*, 128 Ga. App. 361, 196 S.E.2d 660 (1973); *Dudley v. State*, 148 Ga. App. 560, 251 S.E.2d 815 (1978).

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As the prosecutor has a duty to disclose any understanding concerning the testimony of an accomplice because it is relevant to the accomplice's credibility, failure to do so is a violation of due process. *Adams v. State*, 173 Ga. App. 877, 328 S.E.2d 767 (1985).

Jury must be informed of agreement between prosecutor and alleged accomplice whose testimony is crucial. — Due process mandates that the jury be informed of any understanding or agreement reached between the prosecutor and an alleged accomplice, on whose testimony the state's case depends. *Williams v. State*, 151 Ga. App. 683, 261 S.E.2d 430 (1979).

Defendant has no right to be present while jury in seclusion or deliberation. — Although the presence of the defendant at trial is a condition of due process to the extent that a fair and just hearing would be thwarted by the defendant's absence, where the defendant was absent from the court at the time the jury agreed upon a verdict there was no violation of the defendant's rights if there was no interference with the jury's deliberations, since the defendant had no right to be present while the jury was in seclusion or deliberation. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Defendant not deprived of due process because involuntarily absent during jury deliberation and reaching of verdict. — The verdict and sentence in a murder case was not void upon the ground that the accused was involuntarily absent from the court during deliberations of the jury, and at the time the jury reached their verdict, since the accused was present in the courtroom at the time the verdict was published. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Attempted introduction of testimony not reversible error where aggravating circumstance not dependent on premeditation. — In a rape-murder trial where the jury imposed the death penalty under former Code 1933, § 27-2534.1(b)(2) (see O.C.G.A. § 17-10-30(b)(2)) on the ground that the murder was committed while the offender

was engaged in the commission of another capital felony, rape, the jury's finding of this statutory aggravating circumstance did not depend on any showing of premeditation or deliberation prior to the defendant's arriving at the scene of the crimes; therefore, it can be said beyond a reasonable doubt that the attempted introduction of testimony, regarding premeditation in the context of the entire trial and considering the curative instructions given by the trial judge, does not constitute reversible error. *Gibson v. Ricketts*, 244 Ga. 482, 260 S.E.2d 877 (1979), cert. denied, 445 U.S. 920, 100 S. Ct. 1285, 63 L. Ed. 2d 606 (1980).

Improper use of evidence of prior criminal conduct. — Defendant's conviction for robbery was reversed, and a new trial ordered, in case where the defendant was charged and convicted of robbery and possession of firearm by a convicted felon, and evidence of prior felony convictions of aggravated assault and armed robbery were admitted, over objection, to establish that the defendant was a convicted felon because there were no limiting instructions to relate the prior convictions only to the possession charge, there was no corroborating testimony to back up the victim's testimony that the defendant committed the crime of robbery, and it could not be said with a certainty that the defendant's conviction for robbery was not unduly influenced by evidence of the defendant's prior criminal record. *Head v. State*, 253 Ga. 429, 322 S.E.2d 228 (1984), overruled in part by *Ross v. State*, 279 Ga. 365, 614 S.E.2d 31 (2005).

Defendant is not denied fair trial by impartial jury by listing previous criminal convictions in indictment. *Crocker v. Smith*, 225 Ga. 529, 169 S.E.2d 787 (1969).

Evidence as to parole. — Fact that the defendant was an habitual violator and thus upon conviction would have to serve 20 years without parole did not relate to the defendant's character, his prior record, or circumstances of the defendant's offense; thus policy forbidding argument regarding one's ability or inability to make parole did not run afoul of either U.S. Const., amend. 8 or 14 and trial court did not err in refusing to allow such argument. *Horton v. State*, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188, 103 S. Ct. 837, 74 L. Ed. 2d 1030 (1983).

Admission of decedent's statement. — U.S. Const., amend. 14 does not require the admission of testimony about an out-of-court statement if the out-of-court statement lacks strong indicia of reliability and the declarant is deceased. *Davis v. State*, 194 Ga. App. 482, 391 S.E.2d 124 (1990).

Refusal by state to provide original tape recordings. — Because the defendant claimed that the trial was rendered fundamentally unfair by the state's refusal to provide the defendant with the originals of certain pre-arrest surveillance tape recordings and a post-arrest tape recording for independent scientific examination by an expert of the defendant's choosing, but the defendant did not contend, nor did the record reflect, that the defendant had ever proffered a statement the defendant made or a comment made by the sheriff during the post-arrest interview which was not recorded and thereby made a part of the post-arrest tape, and the record established that the defendant not only had the opportunity to present the defendant's version of the pre-arrest recorded conversations, but in fact testified as to what the defendant meant by certain critical statements the defendant made during those recorded conversations, it was held that a claim of deprivation of due process associated with the denial of expert assistance cannot be predicated upon little more than undeveloped assertions that the requested assistance would be beneficial. *Hardin v. Black*, 845 F.2d 953 (11th Cir. 1988).

Where a defendant was charged with possession of cocaine, and allegedly gave consent to a search of the defendant's vehicle, the failure by the police to produce a tape of the defendant's oral consent did not violate the fourteenth amendment. *Phelps v. State*, 195 Ga. App. 370, 393 S.E.2d 501 (1990).

Relating contents of lost tape to jury. — Allowing an arresting officer to relate to the jury the contents of an electronically monitored conversation which transpired between the defendant and an undercover agent without producing the lost tape recording does not violate due process. *Mitchell v. State*, 184 Ga. App. 181, 361 S.E.2d 51 (1987).

Denial by trial judge of use of recording device. — For the trial judge to arbitrarily deny use by counsel or a party of a

microphonic recording device as a work product for their personal use in a possible retrial or appeal of the case is a denial of due process. *Davey v. City of Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974).

Use of an electronic device is subject to the supervision of the trial judge who may take reasonable measures to assure that the use of the device does not interfere with the dignity, order, and decorum of the court. *Davey v. City of Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974).

No statutory or constitutional violation where police lose scientific reports. A *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) violation occurs only when the state withholds exculpatory information in its possession from the defendant, and where the state does not withhold any information, but the police lose it, there is no error under O.C.G.A. § 17-7-211 (repealed), which requires the state to furnish the defendant copies of scientific reports it possesses. *Dawson v. State*, 166 Ga. App. 515, 304 S.E.2d 570 (1983).

Appointment of criminologist properly denied. — Because the defendant's motion for appointment of a criminologist or other expert to assist the defense, considered in the light of the record before the judge when the judge made a dispositive ruling, failed to create a reasonable probability that expert (nonpsychiatric) assistance was necessary to the defense and that without such assistance the defendant's trial would be rendered unfair, the trial court did not err in denying the defendant's motion. *Moore v. Kemp*, 809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987), aff'd, 972 F.2d 319 (11th Cir. 1992).

No obligation to appoint identical experts for defendant. — Where the prosecution had no witness who had participated in the fatal transaction and necessarily relied upon the opinion testimony of experts, under these circumstances, the state was not required to appoint identical experts, such as a ballistics expert, on behalf of the defendant to even the score. *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L. Ed. 2d 158 (1988).

Blod test fee must be given to indigent in abandonment proceeding. — O.C.G.A. § 19-10-1(f)(2) (abandonment of depen-

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dent child) is violative of the equal protection and due process clauses of U.S. Const., amend. 14 to the extent that persons determined to be indigent are initially responsible for the expense of paternity blood tests they request pursuant to the statute. Therefore, in a prosecution for child abandonment, where the defendant is an indigent, it is error to deny the defendant's motion for funds for a blood test. *Burns v. State*, 252 Ga. 140, 312 S.E.2d 317 (1984). (See also *Peterson v. Moffitt ex rel. Department of Human Resources*, 253 Ga. 253, 319 S.E.2d 449 (1984), annotated under "1. In General" above.).

Indigent defendant was entitled to funds to pay expert to examine dental-impression evidence that was the sole connecting link between defendant and the murder. *Thornton v. State*, 255 Ga. 434, 339 S.E.2d 240 (1986).

Transcription of argument. — Absent a showing of harm, the failure to transcribe such things as argument does not amount to a constitutional violation sufficient to require vacating a death sentence. *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

Transcription of mistrial. — Defendant did not have to show particularized need for transcript of prior mistrial. *Walker v. State*, 156 Ga. App. 478, 274 S.E.2d 680 (1980).

Physical evidence, samples, and tests. — Absent evidence that the state acted in bad faith in failing to preserve potentially exculpatory evidence, and because blood evidence found on a flashlight used by the victim to hit the defendant in the head after being stabbed was not material, but was cumulative of other evidence showing the undisputed fact that the state never denied that the victim hit the defendant in the head with the flashlight, and indeed offered testimony that the victim struck the defendant with enough force to knock the defendant to one knee, the defendant's due process rights were not violated; hence, the trial court did not err in denying a mistrial based on the defendant's allegation that the state failed to preserve potentially exculpatory evidence. *Lonergan v. State*, 281 Ga. 637, 641 S.E.2d 792 (2007).

Denial of use of unofficial court reporter. — Appellant not deprived of fair trial by

denial of use of unofficial court reporter at the appellant's expense. *Estep v. State*, 129 Ga. App. 909, 201 S.E.2d 809 (1973).

Time of arrest is question of fact depending on evaluation of testimony by trial judge. *Franklin v. State*, 143 Ga. App. 3, 237 S.E.2d 425 (1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 799 (1978).

Statutory requirement that trial court give jury statutory instructions in writing does not violate due process and equal protection under U.S. Const., amend. 5 and U.S. Const., amend. 14 and without a concurrent right to send written instructions to the jury as to mitigating circumstances, the aggravating circumstances are not prejudicially emphasized, because the written material furnished to the jury is purely of a procedural nature and amounts to nothing more than a written formulation of the jury's potential verdicts. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993).

Total ignorance of jury not required. — The sixth and fourteenth amendment right to an impartial jury does not require that jurors be wholly ignorant of the case before trial begins. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), aff'd in part, rev'd in part on other grounds, 756 F.2d 1483 (11th Cir. 1985).

Jury charge as to presumptions. — Charge telling jury that they were entitled to make certain presumptions or draw certain inferences from the evidence, not that the law required them to do so, did not violate due process. *Freeman v. State*, 183 Ga. App. 264, 358 S.E.2d 623, cert. denied, 183 Ga. App. 906, 358 S.E.2d 623 (1987).

General jury instructions sufficient. — Defendant was not denied due process where jury was given only general charges on child molestation and aggravated child molestation; the jury instructions, when taken as a whole, properly set forth the basis on which the jury was authorized to convict defendant on each count of the indictment and did not constitute a constructive amendment of the indictment. *Thomas v. State*, 264 Ga. App. 389, 590 S.E.2d 778 (2003).

No hearing in which all parties participated required on improper jury communi-

cations. — After a juror reported that improper jury communications had taken place during an inmate's trial on drug and weapons offenses, the inmate's defense counsel was not ineffective for failing to move for a hearing in which all interested parties were permitted to participate because, to the extent that the federal requirement for such hearings applied in state proceedings, the federal requirement did not address the procedures to be followed by trial judges when a question of jury bias was being investigated during a trial; in such circumstances, federal law left the extent to which the parties could participate in such a hearing to the discretion of the trial court, and the due process clause of the fourteenth amendment could not possibly require more of a state court system. *Greer v. Thompson*, 281 Ga. 419, 637 S.E.2d 698 (2006).

Trial court's failure to give a correct charge on the presumption of innocence resulted in a violation of the defendant's right to a fair trial as guaranteed by the due process clause of U.S. Const., amend. 14. *Blair v. State*, 179 Ga. App. 519, 347 S.E.2d 337 (1986).

Judge need not point out specific mitigating circumstances or use words "mitigating circumstances" in charge. — In making it clear to the jury that mitigating circumstances must be considered, there is no requirement that trial court point out specific mitigating circumstances which may be present in defendant's case and it is also unnecessary to include the magic words "mitigating circumstances" in the charge; where Georgia juries are instructed in sentencing to consider all facts and circumstances which have appeared at both phases of trial, this necessarily includes any mitigating circumstances which defendant has shown, or argued, or both. *Zant v. Gaddis*, 247 Ga. 717, 279 S.E.2d 219, cert. denied, 454 U.S. 1037, 102 S. Ct. 579, 70 L. Ed. 2d 483 (1981).

Duty to instruct jury on mitigating circumstances and option to recommend against death. — Under Georgia's death sentencing scheme the eighth and fourteenth amendments require that the trial judge clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death. Where the instruction, taken as a whole, at best was contradictory

and confusing as to the jury's function if it determined that an aggravating circumstance was present, as the jury was told that upon finding an aggravating circumstance its verdict would be death but it is possible to lift isolated phrases from the jury instruction and find in those phrases an indication that a death sentence need not have inexorably flowed from a finding of an aggravated circumstance, on the whole, the instruction falls far short of providing clear and explicit information to the jury that it had the option not to recommend a sentence of death, and defendant's death sentences must therefore be set aside. *Moore v. Kemp*, 809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987), aff'd, 972 F.2d 319 (11th Cir. 1992).

Jury charge on conspiracy. — It is not inappropriate to charge upon law of conspiracy merely because indictment does not, in terms, allege conspiracy to commit the offense, on trial of one of two or more persons jointly indicted for a crime. *Talley v. State*, 120 Ga. App. 365, 170 S.E.2d 444 (1969).

Charge that witnesses are presumed truthful disapproved but not unconstitutional. — A charge, given in a murder trial, that "when witnesses appear and testify in a case such as this, they are presumed to speak the truth unless they are impeached in some manner provided by law", was not unconstitutional as negating the presumption of innocence and shifting the burden of proof to the defendant, but the charge can be misleading and is of little positive value, so that its use should be discontinued. *Noggle v. State*, 256 Ga. 383, 349 S.E.2d 175 (1986).

Use of peremptory challenges in racially discriminatory manner. — Statistical evidence was sufficiently strong to raise an inference that the prosecutor was exercising peremptory challenges in a racially discriminatory manner. *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992).

Improper excusal of lone juror holding out for acquittal. — The trial judge's failure to make a reliable determination of whether, in the final moments of jury deliberations, the lone juror to reserve a reasonable doubt as to the defendant's guilt, who was reported by the jury foreman to be "extremely nervous," was actually incapacitated, the judge's

Due Process (Cont'd)**10. Criminal Trials (Cont'd)**

failure to ensure that the juror understood the juror's right to adhere to the juror's view that the defendant should be acquitted, and the judge's failure, upon excusing that juror and replacing the juror with an alternate juror, to instruct the reconstituted jury to begin anew deprived the defendant of the defendant's constitutional right to a trial by a fair and impartial jury and deprived the defendant of the defendant's due process right to a fair trial. *Peek v. Kemp*, 746 F.2d 672 (11th Cir. 1984), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986).

Fact that two or more jurors visited the crime scene and related information about their observations to the rest of the jurors during their deliberations did not constitute reversible error where there was nothing to indicate that any of the jurors changed their minds because of the extrarecord information. *Moore v. State*, 179 Ga. App. 125, 345 S.E.2d 631 (1986).

Coercion of jurors. — A trial judge's efforts to coerce reluctant jurors into delivering a verdict may sufficiently invade the province of the jury so as to deny the defendant fundamental fairness. *Scruggs v. Williams*, 903 F.2d 1430 (11th Cir. 1990).

Where the judge asked a juror two leading questions, but they led in different directions: first, "In other words, you're saying that is not your verdict?" and later, "So if that is your verdict . . .," the judge's questioning was not sufficiently coercive to violate due process. *Scruggs v. Williams*, 903 F.2d 1430 (11th Cir. 1990).

Fingerprint evidence alone can be sufficient to sustain a conviction for an offense like burglary against a constitutional attack on the sufficiency of evidence. *Duncan v. Stynchcombe*, 704 F.2d 1213 (11th Cir. 1983).

Under O.C.G.A. § 24-2-2, evidence of prior difficulties between the accused and the victim is admissible to illustrate the accused's motive, intent, or bent of mind toward the victim; therefore, a peace warrant that victim had taken out against the defendant nine months before the victim's death was clearly relevant to show the defendant's motive and "bent of mind" towards the victim, and its admission into evidence did

not violate the defendant's due process rights. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931 (1989).

Photographs of victim's body allowed. — Challenged photographs of the victim's body were not a crucial, highly significant factor in the case against the defendant so as to have denied the defendant a fundamentally fair trial. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931, cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 103 L. Ed. 2d 931 (1989).

Recent unexplained possession of stolen goods is sufficient to support inference of guilt beyond reasonable doubt; there is no need for further proof of guilt. *Evans v. State*, 156 Ga. App. 162, 275 S.E.2d 341 (1980).

Permitting Bible in jury room during deliberations. — It was constitutional error for the court to permit the Christian Bible to go into the jury room at the request of the jurors, apparently for consultation in connection with their deliberations after a murder trial. *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989).

Determination of harmless error. — It is permissible for state to determine for itself what constitutes "harmless" error in conduct of trial. *Pennington v. Stynchcombe*, 428 F.2d 875 (5th Cir. 1970).

Bombastic argument is not unconstitutional. — Prosecutor's bombastic or grandiloquent argument in a criminal prosecution is not unconstitutional. *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984), cert. denied, 469 U.S. 1132, 105 S. Ct. 816, 83 L. Ed. 2d 809 (1985).

A prosecutor is entitled to argue the state's case vigorously, so long as the prosecutor talks about matters the prosecutor is entitled to talk about. *Patillo v. State*, 258 Ga. 255, 368 S.E.2d 493, cert. denied, 488 U.S. 948, 109 S. Ct. 378, 102 L. Ed. 2d 367 (1988).

Unlawful use of racial epithets by defense counsel toward defendants, absent any hint of prohibition by the court, was presumed to have infected the verdict and the "essential demands of fairness" insured by the due process clause required a new trial. *Kornegay v. State*, 174 Ga. App. 279, 329 S.E.2d 601 (1985).

Order of trial judge fixing a new date for execution of sentence after the original date

has passed is not void because the defendant is involuntarily absent and has not waived or authorized any one else to waive the right to be present at the time and place of resentencing, and the passage of such order is not violative of the plaintiff's rights under provisions of the state and federal Constitutions. *McBurnett v. Balkcom*, 207 Ga. 452, 62 S.E.2d 180 (1950).

No due process violation where attack is on order setting new date of execution entered without defendant's presence. — Although it was necessary for the defendant to have been present in court when the original sentence of execution was pronounced, as well as during other proceedings throughout the trial, in the absence of waiver, no violation of due process appears, where the attack is not on the original sentence, but merely on an order fixing a new date of execution, entered without the presence of the defendant at that time, which became necessary after the date fixed in the original sentence had passed by reason of a supersedeas pending the determination of a writ of error in this court. Setting a new date of execution is not a new sentence of defendant, as to which the judge has no discretion, but merely setting the time. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Trial court's order that only one attorney argue for state and one for appellant does not violate rights under U.S. Const., amend. 6 and U.S. Const., amend. 14. *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Exclusionary sperm test not required in rape trial. — In a rape trial, the fact that an exclusionary sperm test (which purportedly classifies sperm into particular blood groupings for identification purposes) was not performed is not grounds for reversal, and due process does not require the performance of the test. *Gray v. State*, 151 Ga. App. 684, 261 S.E.2d 402 (1979).

State's not providing civilian clothes does not amount to compelling accused to stand trial in prison garb, which is proscribed by U.S. Const., amend. 14. *United States v. Casey*, 540 F.2d 811 (5th Cir. 1976).

Wearing of prison-issue shoes at trial. — Because there was nothing about the cloth-

ing and shoes worn by the defendant indicating that the defendant was a prisoner, the defendant's being forced to wear prison-issue shoes at trial was not a denial of the defendant's presumption of innocence. *Lockhart v. State*, 172 Ga. App. 170, 322 S.E.2d 503 (1984).

Notice and evidentiary hearing required upon trial court's decision to revoke appeal bail bond. — Due process requirements of U.S. Const., amend. 5 and U.S. Const., amend. 14 mandate notice and an evidentiary hearing upon the trial court's decision to revoke an appeal bail bond. *Riggins v. State*, 134 Ga. App. 941, 216 S.E.2d 723 (1975).

One at large on bail pending appeal of federal conviction can be extradited by sister state for the purpose of serving sentences imposed by that state. Extradition under such circumstances does not violate due process constitutional rights of the party extradited. *Crane v. State*, 233 Ga. 264, 210 S.E.2d 800 (1974).

Unified appeal procedure under Code 1933, § 27-2538 (see O.C.G.A. § 17-10-36) does not violate due process in that it fails to provide a defendant with reciprocal rights of discovery. *Sliger v. State*, 248 Ga. 316, 282 S.E.2d 291 (1981), cert. denied, 455 U.S. 945, 102 S. Ct. 1442, 71 L. Ed. 2d 657 (1982).

In determining whether an unbiased jury was impaneled, appellate court is obligated to make an independent evaluation of the circumstances involved in the case. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), aff'd in part, rev'd in part on other grounds, 756 F.2d 1483 (11th Cir. 1985).

Cross-examination as to agreement between witness and state. — There was no denial of due process or confrontation rights where the trial court ruled improper a question by defense counsel on cross-examination that presumed the existence of an unprovable "deal" between the state and the witness; the court did not preclude all inquiry on a subject with respect to which the defendant was entitled to reasonable cross-examination. *Watkins v. State*, 264 Ga. 657, 449 S.E.2d 834 (1994).

Prosecution of lesser included offense in a different county. — A prosecution for a lesser included offense, which includes the underlying felony in a felony murder case, after a conviction for the greater offense in a

Due Process (Cont'd)**10. Criminal Trials** (Cont'd)

different county violates O.C.G.A. § 16-1-6, Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, and the fifth and fourteenth amendments to the United States Constitution. *Perkinson v. State*, 273 Ga. 491, 542 S.E.2d 92 (2001).

Statutory aggravators supporting death penalty. — Georgia procedure of listing the statutory aggravators that support a death penalty through means other than the indictment was not unconstitutional under the due process clause; the state was not under a constitutional obligation to place the statutory aggravators in the indictment. *Terrell v. State*, 276 Ga. 34, 572 S.E.2d 595 (2002), cert. denied, 540 U.S. 835, 124 S. Ct. 88, 157 L. Ed. 2d 64 (2003).

Application to juvenile proceedings. — Juvenile court erred in adjudicating the juvenile delinquent on the ground that the juvenile violated the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1, as the state's delinquency petition did not allege an essential element of the offense; namely, the predicate acts upon which the "pattern of criminal gang activity" was based. Accordingly, the juvenile's procedural due process rights were violated when the juvenile court adjudicated the juvenile delinquent based on that offense, as the insufficiency in the state's petition meant the juvenile was denied the juvenile's due process rights because the juvenile was not able to prepare an adequate defense. *In the Interest of E.S.*, 262 Ga. App. 768, 586 S.E.2d 691 (2003).

11. Sentencing

Defendant not denied due process because assigned to formerly appropriate commission, not successor. — Fact that the trial court, in sentencing the defendant, assigned the defendant, or ordered the defendant delivered to the Prison Commission, which has been abolished, instead of assigning the defendant or ordering the defendant delivered to the State Board of Corrections, which succeeded to the powers and duties of the commission, while not technically in the proper form, is not such an irregularity as is hurtful to any right of liberty, nor is it such a defect as to vitiate the sentence and deprive the defendant of due process of law under

either the state or federal Constitutions. *Dixon v. State*, 83 Ga. App. 227, 63 S.E.2d 278 (1951).

Cruel and unusual punishment clause applicable to states. — Cruel and unusual punishment clause of U.S. Const., amend. 8, is made applicable to states through U.S. Const., amend. 14. *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977).

Qualitative differences in meting out punishment permitted. — Mere fact that an indigent in a particular case may be imprisoned for a longer time than a nonindigent convicted of the same offense does not give rise to a violation of the equal protection clause. Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment, and there is no requirement that two persons convicted of the same offense receive identical sentences. *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972).

Regard to past life and habits of particular offender allowed. — The belief no longer prevails that every offense in a like legal category calls for, under this section, an identical punishment without regard to the past life and habits of a particular offender. *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972).

Prosecutorial remarks. — The United States Constitution does not forbid a sentencer to hear argument from counsel on the need for a deterrent sentence and to fashion a sentence to satisfy that need. *Collins v. Francis*, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984).

U.S. Const., amend. 14 does not prevent a prosecutor from commenting during closing argument in the sentencing phase of a defendant's trial on the defendant's silence during the culpability phase of the defendant's capital trial when the defendant has testified only in the sentencing phase; after the defendant has waived the defendant's constitutional privilege by testifying, any expectation of protection from adverse comment also is waived. *Tucker v. Francis*, 723 F.2d 1504 (11th Cir.), vacated in part, 728 F.2d 1358 (11th Cir. 1984), cert. denied, 478 U.S. 1022, 106 S. Ct. 3340, 92 L. Ed. 2d 743 (1986).

The standard to be employed in reviewing a prosecutor's argument is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

Arguments by the prosecutor that the death penalty serves as a deterrent are proper in the sentencing phase of a capital case. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

The prosecutor's arguments seeking to justify the execution of defendant based upon society's legitimate interest of purging itself of this wrong was a permissible argument in the sentencing phase of a capital case. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

The future dangerousness of a defendant is a proper consideration in imposing death, and a legitimate future dangerousness argument is not rendered improper merely because the prosecutor refers to possible victims. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

During the sentencing phase of a capital case, the prosecutor may appropriately analogize the role of the jury and the role of soldiers fighting for their country. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

Where the prosecutor argued that the jurors should find the defendant guilty of both rape and murder in order to preserve their chance to sentence the defendant to death at the sentencing hearing, the prosecutor also argued that the state medical examiner, who testified concerning the evidence suggesting rape, must have believed that the victim was raped or the medical examiner would not have taken the stand, and the prosecutor supported the argument that the jury should convict defendant by suggesting that they imagine looking out their windows and seeing the defendant approach their houses at night, these arguments may well have violated § 5.8 of the ABA Standards on the Administration of Criminal Justice, but the statements did not,

however, render the trial fundamentally unfair. *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1099, 99 L. Ed. 2d 262 (1988).

Prosecutorial arguments made during the sentencing phase of a capital trial will not warrant habeas relief under 28 U.S.C. § 2254 unless the statements render the entire sentencing proceeding fundamentally unfair. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931, cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 103 L. Ed. 2d 931 (1989).

Because a prosecutor read the jury a lengthy and literal quotation from a court opinion that included the statement that the court had "no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime," use of the quote in the prosecutor's closing argument to the jury clearly was highly improper and rendered the sentencing phase of the petitioner's trial fundamentally unfair in violation of the due process clause of the fourteenth amendment. *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992).

Proof of prior guilty pleas for purposes of recidivist sentencing. — Trial court did not deprive the defendant of due process of law by admitting in evidence the defendant's prior guilty plea so as to make the defendant eligible for a recidivist sentence; even though a transcript of the plea proceeding was not available, the validity of the plea was shown by extrinsic evidence. *Nash v. State*, 233 Ga. App. 75, 503 S.E.2d 23 (1998), rev'd on other grounds, 271 Ga. 281, 519 S.E.2d 893 (1999).

Where defendant not informed of conditions of sentence. — There is authority, when there is an error or irregularity in failing to inform the defendant of the conditions of the sentence, for correction by the court by recalling the defendant and sentencing the defendant as provided by law. *Hinton v. State*, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Effect of sentence with condition for obedience of laws only in later order is unconditional discharge. — Where a condition in the sentence for obedience of laws is reflected only in a later written order, knowledge of such condition is not imputable to

Due Process (Cont'd)**11. Sentencing (Cont'd)**

the defendant, and the effect of such a sentence is an unconditional discharge. *Hinton v. State*, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Due process is not abridged where court fails to have jury publish defendant's sentence in open court if defendant has waived right to be present at that time. *Beavers v. State*, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

For those who plead guilty, that fact is consideration in sentencing, a consideration that is not present when one is found guilty by a jury. *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

State may pursue death sentence upon plea withdrawal. — Where the defendant contended that the defendant's death sentence was arbitrarily imposed because the prosecution sought the death penalty after the defendant voluntarily withdrew the defendant's plea agreement in which the defendant would have received 30 years for manslaughter, it was held that by withdrawing the defendant's plea, the defendant and the state were returned to the position they occupied prior to the execution of the plea bargain when the defendant stood charged with the murder of the victim and burglary. Accordingly, the state was free to proceed with its prosecution and to pursue the death sentence. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931, cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 103 L. Ed. 2d 931 (1989).

Discretion of court. — Under the provisions of O.C.G.A. § 17-10-1 as it existed prior to the 1993 amendment, it was within the discretion of the trial court to impose a life sentence for armed robbery; a sentence for a specific number of years was not required. *Null v. State*, 216 Ga. App. 641, 455 S.E.2d 359 (1995).

Court powerless to increase punishment once person enters upon execution of sentence. — While it is true that an oral sentence is not a binding judgment of the court, the law is also clear that once a person has entered upon the execution of that person's sentence, the court is without power to change it by increasing the punishment.

This is considered a violation of the prohibition against double punishment or jeopardy under U.S. Const., amend. 5. *Hinton v. State*, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Fact that person charged with felony is without legal counsel when sentence imposed does not render sentence void as a denial of due process and cause the resulting confinement to be illegal. *Balkcom v. Shores*, 219 Ga. 429, 134 S.E.2d 3 (1963).

Sentence is not necessarily void where counsel for convicted defendant declines to appeal case though requested by the client to do so. *Balkcom v. Roberts*, 221 Ga. 339, 144 S.E.2d 524 (1965); *Bolick v. State*, 127 Ga. App. 542, 194 S.E.2d 302 (1972).

Increased term based upon prior conviction where counsel was unavailable prohibited. — The rule prohibiting consideration of uncounseled convictions as the predicate for an enhanced sentence forbids the sentencing of a defendant to an increased term of incarceration solely upon consideration of a prior conviction obtained in a proceeding for which, due to the indigence of the defendant or some misconduct of the state, counsel was unavailable to the defendant. *Moore v. Jarvis*, 885 F.2d 1565 (11th Cir. 1989).

Indigent defendant's imprisonment not necessary to promote compelling governmental interest. — Imprisonment of an indigent defendant who cannot immediately avail oneself of the fine option in an "alternative sentence" is not necessary to promote a compelling governmental interest. *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972).

Municipal court sentencing cannot require indigent to pay fine or alternatively serve jail sentence. — A municipal court may not constitutionally impose a sentence requiring an indigent defendant to pay a fine or, alternatively, serve a specified number of days in jail. *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972).

Ex post facto provision not violated by individual's being sentenced to penalty less harsh than the one that it appeared the individual would be subjected to, and was given notice of, at the moment of the crime. *Federal Election Comm'n v. Lance*, 617 F.2d 365 (5th Cir. 1980), appeal dismissed, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981).

Extension of noncustodial period of supervision to term within statutory limits does not implicate a liberty interest sufficient to require a preextension hearing as a constitutionally commanded right. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), cert. denied, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Instances where State may execute persons who murder other persons. — Constitutionally and legally, the State of Georgia may execute persons who murder other persons, provided that they have been constitutionally and legally tried and sentenced, and provided further that they have been afforded their constitutional right of access to the courts to assert such procedural and substantive rights as may be available under state and federal law. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

This state's death penalty statute is not subject to attack under U.S. Const., amend. 14. *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974).

Punishment of death does not invariably violate the Constitution. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Exclusion of potential jurors opposed to death penalty. — Defendant was not unconstitutionally denied a fair trial because prospective members of the jury were excluded who were unequivocally opposed to the death penalty. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Death sentence cannot be imposed under sentencing procedures creating substantial risk of infliction in arbitrary, capricious manner. *Goodwin v. Balkcom*, 501 F. Supp. 317 (M.D. Ga. 1980), rev'd on other grounds, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983).

Death sentence based on one valid aggravating circumstance. — Defendant's death sentence was affirmed as the defendant's death sentence was based upon at least one valid statutory aggravating circumstance, even though the notice of the statutory

aggravating circumstances upon which the state intended to rely was not filed until the first day of voir dire; one of the statutory aggravating circumstances relied upon by the state and found by the jury, that the murder was committed while the defendant was engaged in a kidnapping with bodily injury, was alleged in the indictment, and the defendant was on sufficient actual notice for due process purposes of the kidnapping statutory aggravating circumstance. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006).

System of capital punishment not clearly defining standards to guide exercise of sentencing discretion is unconstitutional. *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977).

A jury must be given standards to guide and limit its discretion whether to recommend life imprisonment or death. *Goodwin v. Balkcom*, 501 F. Supp. 317 (M.D. Ga. 1980), rev'd on other grounds, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983).

If a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates standardless sentencing discretion. *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

When states may adopt additional standards governing capital sentencing procedures. — As long as state's capital sentencing procedures meet constitutional requirements, state's courts are free to adopt additional standards governing those sentencing procedures. *Goodwin v. Balkcom*, 501 F. Supp. 317 (M.D. Ga. 1980), rev'd on other grounds, 684 F.2d 794 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983).

Judge's mandatory incarceration policy for certain offense not unconstitutional. — Assuming the state trial judge who sentenced the defendant had a policy of sentencing all persons found guilty of shoplifting to a period of incarceration, the sentencing court may have abused its discretion in following that policy because it does not result in individualized sentencing; but any abuse of discretion was not unconstitu-

Due Process (Cont'd)**11. Sentencing** (Cont'd)

tional. *Nation v. Georgia*, 645 F. Supp. 179 (N.D. Ga. 1986).

Imposition of death sentence not discriminatory. — A statistical study, while showing a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole, did not support a ruling that the system as a whole was arbitrary and capricious, and was insufficient to show that the defendant's death sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), *aff'd*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Imposition of death sentence on minor. — The constitution does not prohibit a state from imposing the death penalty on one who, while 17 years old, has intentionally and viciously taken a life in cold blood. *High v. Kemp*, 819 F.2d 988 (11th Cir. 1987), *cert. granted*, 487 U.S. 1233, 108 S. Ct. 2896, 101 L. Ed. 2d 930 (1988), *cert. denied*, 492 U.S. 926, 109 S. Ct. 3264, 106 L. Ed. 2d 609 (1989) (but see *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (juvenile death penalty declared unconstitutional)).

Sentencer may consider mitigating factors. — United States Const., amend. 8 and U.S. Const., amend. 14 require that the sentencer not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Chenault v. Synchronome*, 581 F.2d 444 (5th Cir. 1978); *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), *cert. denied*, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), *overruled on other grounds*, *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993); *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980), *cert. denied*, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1981); *Goodwin v. Balkcom*, 501 F. Supp. 317 (M.D. Ga. 1980), *rev'd on other grounds*, 684 F.2d 794 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983); *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

Statute providing for death penalty must allow sentencing body discretion to weigh all aspects of defendant's character and record as well as circumstances of the offense. *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980), *cert. denied*, 450 U.S. 936, 101 S. Ct. 1402, 67 L. Ed. 2d 372 (1981).

Mitigating factors may be considered in all but the rarest kind of capital case. — See *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), *cert. denied*, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), *overruled on other grounds*, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993); *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980), *cert. denied*, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1981).

Grandparent's testimony of not wishing to see grandchild die is admissible in mitigation at the sentencing phase of a death penalty case. *Romine v. State*, 251 Ga. 208, 305 S.E.2d 93 (1983), *aff'd*, 256 Ga. 521, 350 S.E.2d 446 (1986), *cert. denied*, 481 U.S. 1024, 107 S. Ct. 1912, 95 L. Ed. 2d 517 (1987).

Instructions must explain role of mitigation. — Where the defendant contends that the jury instructions given during the sentencing phase of the trial failed to apprise the jury of the nature and function of mitigating circumstances, the standard of review is whether any reasonable juror could have failed to understand the challenged instructions and the role of mitigation. The challenged instructions need not include any particular words or phrases to define the concept of mitigation or of the function of mitigating circumstances. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), *cert. dismissed*, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931, *cert. denied*, 494 U.S. 1090, 110 S. Ct. 1836, 103 L. Ed. 2d 931 (1989) (standard met).

When evidence inadmissible under evidentiary rule admissible in capital case in mitigation of punishment. — The Constitution requires that evidence which would be inadmissible under an evidentiary rule must not automatically be excluded if tendered in a capital case in mitigation of punishment; the potentially mitigating influence of the testimony must be weighed against the harm resulting from the violation of the evidentiary rule. In close cases the doubt

should be resolved in favor of admissibility. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993).

Where the defendant could receive any sentence within the statutory limitation upon resentencing, the defendant is entitled to be present at resentencing. *Anthony v. Hopper*, 235 Ga. 336, 219 S.E.2d 413 (1975).

There is no absolute constitutional bar to imposing more severe sentence upon resentencing, but vindictiveness must not be the motivating force behind the increased sentence. *Anthony v. Hopper*, 235 Ga. 336, 219 S.E.2d 413 (1975).

Guarantee against double jeopardy does not restrict length of sentence that may be imposed upon reconviction, and imposition of a more severe sentence upon retrial does not violate the equal protection clause of U.S. Const., amend. 14. *Chaffin v. State*, 227 Ga. 327, 180 S.E.2d 741 (1971); *Rozier v. State*, 126 Ga. App. 336, 190 S.E.2d 627 (1972).

Imposition of more severe sentence upon defendant's reconviction not barred. — Neither the double jeopardy clause nor the equal protection clause bars imposition of a more severe sentence upon retrial. *Chaffin v. State*, 227 Ga. 327, 180 S.E.2d 741 (1971); *Stuckey v. Stynchcombe*, 614 F.2d 75 (5th Cir. 1980).

Imposition of heavier sentence to punish defendant for having successfully appealed first conviction is denial of due process. *Stuckey v. Stynchcombe*, 614 F.2d 75 (5th Cir. 1980).

When the sentencing phase of a death penalty case is retried by a jury other than the one which determined guilt, evidence presented by the defense, as well as evidence presented by the state, may not be excluded on the ground that it would only go to the guilt or innocence of the defendant. Although a resentencing trial will have no effect on any previous convictions, the parties are entitled to offer evidence relating to circumstances of the crime. *Blankenship v. State*, 251 Ga. 621, 308 S.E.2d 369 (1983), aff'd, 258 Ga. 43, 365 S.E.2d 265, cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988).

Sentencing after new trial not to be affected by vindictiveness. — Vindictiveness against a defendant for having successfully attacked the defendant's first conviction must play no part in the sentence the defendant receives after a new trial. *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978); *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Imposition of higher sentence by jury on retrial not violative of due process unless product of vindictiveness. — The imposition of a higher sentence by a jury upon retrial does not violate the Constitution unless the increased punishment can be shown to be the product of vindictiveness. *Grace v. Caldwell*, 231 Ga. 407, 202 S.E.2d 49 (1973).

When defendant's receiving greater sentence on retrial not violative of constitutional rights. — The imposition of a higher sentence on a defendant being retried for a crime does not violate due process or constitute double jeopardy so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973); *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975).

When a jury imposes a higher sentence on reconviction, this is not a violation of due process so long as the jury was not informed of the prior sentence. *Shields v. State*, 147 Ga. App. 96, 248 S.E.2d 171 (1978).

Without affirmative showing in record to justify increased sentence, court is limited upon resentencing to the sentence initially imposed. *Anthony v. Hopper*, 235 Ga. 336, 219 S.E.2d 413 (1975).

Judge's imposition of more severe sentence after new trial. — Whenever judge imposes more severe sentence upon defendant after new trial, reasons for doing so must affirmatively appear. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

Imposition of death sentence following deadlocked first trial. — Double jeopardy clause did not bar defendant's death penalty sentence even though defendant's first trial resulted in a deadlocked jury; the first jury did not adjudicate defendant's sentence. *Terrell v. State*, 276 Ga. 34, 572 S.E.2d 595 (2002), cert. denied, 540 U.S. 835, 124 S. Ct. 88, 157 L. Ed. 2d 64 (2003).

Due Process (Cont'd)**11. Sentencing** (Cont'd)

Based on objective information about defendant's identifiable conduct after original proceeding. — Due process of law requires that vindictiveness against a defendant for having successfully attacked the defendant's first conviction must play no part in the sentence the defendant receives after a new trial. Where the judge imposes a more severe sentence on the second trial the reasons for the judge's doing so must be made a part of the record, and those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. *Hewell v. State*, 238 Ga. 578, 234 S.E.2d 497 (1977); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978).

Court must include in record affirmative statement of reasons underlying decision to increase punishment upon resentencing, whether the resentencing is after a successful collateral attack upon multiple sentences or after a successful direct appeal, since the rationale to prevent the imposition of harsher penalties as a means of punishing a defendant for attacking the conviction is equally applicable to either situation. *Anthony v. Hopper*, 235 Ga. 336, 219 S.E.2d 413 (1975); *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Failure to disclose deal with state's witness at sentencing phase not reversible error. — See *Patillo v. State*, 258 Ga. 255, 368 S.E.2d 493, cert. denied, 488 U.S. 948, 109 S. Ct. 378, 102 L. Ed. 2d 367 (1988).

Resentencing from concurrent sentences including death to consecutive life sentences. — Where the state trial court originally sentenced defendant to death for kidnapping and to life imprisonment for armed robbery, presumably to run concurrently, but the death sentence was set aside on direct appeal, and the case was remanded to the trial court for resentencing on the kidnapping count, and, upon resentencing, the trial court imposed a second life sentence for the kidnapping, specifically directing that it was to run consecutively to the original life sentence for the armed robbery, the trial court did not impose a harsher sen-

tence after remand than that originally imposed, in violation of the eighth and fourteenth amendments, since a death sentence, even when imposed concurrently with a life sentence, is more severe than two life sentences, whether imposed concurrently or consecutively to each other. *Thomas v. Newsome*, 821 F.2d 1550 (11th Cir.), cert. denied, 484 U.S. 967, 108 S. Ct. 461, 98 L. Ed. 2d 401 (1987).

O.C.G.A. § 17-10-30 (death penalty aggravating circumstances) cannot be applied in constitutionally vague manner. — The jury instruction and its application are not vague where, although the jury returns a finding using language not given in the original charge, the finding is based on the statute. *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983) *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), aff'd in part and rev'd in part sub nom., 478 U.S. 1016, 106 S. Ct. 3325, 92 L. Ed. 2d 732 (1986), judgment vacated, remanded for further consideration in light of *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), cert. denied, 478 U.S. 1022, 106 S. Ct. 3337, 92 L. Ed. 2d 742 (1986).

Instructions as to presumption of innocence of aggravating circumstances. — The trial court did not err in refusing to instruct the jury at the sentencing phase of a capital offense trial that a defendant is presumed innocent of aggravating circumstances. *Green v. Zant*, 738 F.2d 1529 (11th Cir.), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L. Ed. 2d 716 (1984).

Where a defendant challenged as constitutionally insufficient only one of two aggravating circumstances found by the jury, even if it were concluded that the claim was valid, the defendant's sentence was still constitutionally valid. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931, cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 103 L. Ed. 2d 931 (1989).

Unclear capital sentencing instructions violate due process. — Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose violate the eighth amendment and U.S. Const., amend. 14. *Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. de-

nied, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Electrocution does not inflict unnecessary torture and torment constituting cruel and unusual punishment in violation of the eighth and fourteenth amendments. *McCorquodale v. Balkcom*, 525 F. Supp. 408 (N.D. Ga. 1981), *aff'd in part, rev'd in part*, 705 F.2d 1553 (11th Cir. 1983), *cert. denied*, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984); *Felker v. Turpin*, 101 F.3d 95 (11th Cir. 1996).

Mandatory life imprisonment sentence found in O.C.G.A. § 16-13-30(d) of the controlled substances law does not unconstitutionally deprive a defendant of due process of law. *Tillman v. State*, 260 Ga. 801, 400 S.E.2d 632 (1991).

O.C.G.A. § 16-13-30(d), which mandates a sentence of life imprisonment upon a second conviction for selling cocaine, does not violate due process or equal protection and does not violate state or federal constitutional guarantees against cruel and unusual punishment. *Isom v. State*, 261 Ga. 596, 408 S.E.2d 701 (1991); *Crutchfield v. State*, 218 Ga. App. 360, 461 S.E.2d 555 (1995).

Mandatory life sentence not cruel and unusual punishment. — A mandatory life sentence imposed upon a defendant convicted of a second offense of selling cocaine under O.C.G.A. § 16-13-30 does not constitute cruel and unusual punishment under the eighth and fourteenth amendments. *Rucks v. State*, 201 Ga. App. 142, 410 S.E.2d 206 (1991).

O.C.G.A. § 16-13-30, providing mandatory life imprisonment for a second drug conviction, does not violate due process or equal protection based on statistical evidence as to the high percentage of African-Americans serving life sentences for drug offenses, nor because it creates an irrational sentencing scheme. *Stephens v. State*, 265 Ga. 356, 456 S.E.2d 560, *cert. denied*, 516 U.S. 849, 116 S. Ct. 144, 133 L. Ed. 2d 90 (1995).

Life sentence neither discriminatory nor disproportionate. — Mandatory life sentence for second violation of O.C.G.A. § 16-13-30 did not violate the defendant's equal protection or due process rights, nor was it disproportionate. *Jackson v. State*, 223 Ga. App. 471, 477 S.E.2d 893 (1996).

Penalty under O.C.G.A. § 16-13-30.1 upheld. — O.C.G.A. § 16-13-30.1, which subjects a defendant to a greater penalty for the sale of a non-controlled substance than for the sale of some controlled substances, does not violate due process. *Thompson v. State*, 254 Ga. 393, 330 S.E.2d 348 (1985).

Penalty under O.C.G.A. § 17-10-7 upheld. — No violation of due process found for the imposition of the maximum of life sentence as prescribed by the general recidivist statute, O.C.G.A. § 17-10-7. *Getty v. State*, 207 Ga. App. 736, 429 S.E.2d 100 (1993).

12. Appeals and Habeas Corpus

U.S. Const., amend. 14 does not contemplate right to appeal. — Where such right of appeal is given, the state may prescribe the conditions and procedure to be followed. *Alexander v. Blackmon*, 129 Ga. App. 214, 199 S.E.2d 376 (1973).

For proper procedure for appellate review of in camera inspections of state's files where defendant's counsel is not granted opportunity to review files, see *Plemons v. State*, 155 Ga. App. 447, 270 S.E.2d 836 (1980).

Due process under U.S. Const., amend. 14 does not require that states provide appellate review of criminal convictions. In re *Stoner*, 507 F. Supp. 490 (N.D. Ga. 1981).

Delay in filing transcript not prejudicial. — Defendant was not deprived of defendant's due process rights by a seven-month delay in the filing of the transcript as defendant did not show that the delay impacted defendant's ability to adequately present defendant's appeal or impaired any defense that defendant might have had. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Defendant's state and federal due process rights were not violated by the lack of a speedy appeal as: (1) there was no evidence that the eight-year delay in filing the notice of appeal was due to the state or to defendant's counsel; (2) since the post-motion for new trial filings were pro se, the inference was that defendant desired to proceed without counsel and without appealing; (3) defendant failed to show prejudiced by the delay as the appeal was without merit; and (4) defendant's attempt to show prejudice based on the death of trial counsel was rejected as trial counsel testified at the new

Due Process (Cont'd)**12. Appeals and Habeas Corpus** (Cont'd)

trial hearing. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Where defendant deprived of right of appeal. — Where there is no evidence that a convicted defendant was ever advised of the defendant's right to appeal the defendant's conviction or that the defendant's attorneys ever consulted with the defendant or obtained the defendant's consent before allowing the time for a direct appeal to lapse, the defendant is deprived of the defendant's right of appeal under U.S. Const., amend. 6. *Gregory v. United States*, 446 F.2d 498 (5th Cir. 1971).

Standard of materiality that evidence not disclosed to defense must satisfy to warrant new trial is relaxed in cases where the suppression is found to be deliberate or where the substantial value of the evidence to the defense could not have escaped the prosecutor's attention. *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975).

Omitted evidence must create reasonable doubt of guilt not otherwise existing in order to justify new trial. *United States v. D'Antignac*, 628 F.2d 428 (5th Cir. 1980), cert. denied, *D'Antignac v. United States*, 450 U.S. 967, 101 S. Ct. 1485, 67 L. Ed. 2d 617 (1981).

Person convicted of crime has right to transcript of trial for use on appeal. *Wilson v. State*, 246 Ga. 672, 273 S.E.2d 9 (1980).

Adequate and effective appellate review for indigent defendant. — Equal protection and due process require that an indigent defendant, unable to pay the cost of recording and transcribing the proceedings, may not be denied adequate and effective appellate review accorded to all who have the money to pay these costs. *Sales v. State*, 152 Ga. App. 635, 263 S.E.2d 519 (1979).

State to provide trial records and counsel to indigent inmates for meaningful appeal. — Because adequate and effective appellate review is impossible without a trial transcript or adequate substitute, states must provide trial records to inmates unable to buy them. Similarly, counsel must be appointed to give indigent inmates a meaningful appeal from their convictions. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert.

denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

Though purchase of complete court reporter's transcript for indigent defendants is not required in all instances. — The burden which rests upon the state is to afford the indigent defendant a record of sufficient completeness to permit proper consideration of his contentions of error. *Sales v. State*, 152 Ga. App. 635, 263 S.E.2d 519 (1979).

Harm to indigent defendant. — Harm arises when, due to the absence of a transcript or an effective alternative, an enumeration of error raised by an indigent defendant cannot be adequately and effectively reviewed by the appellate courts. *Sales v. State*, 152 Ga. App. 635, 263 S.E.2d 519 (1979).

Indigent criminal defendant was entitled under U.S. Const., amend. 14 to trial transcript at public expense. *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972).

Provisions for transcript from recollection or by stipulation not denial of due process. — The provisions of Code 1933, § 6-805(g), (i) (see O.C.G.A. § 5-6-41(g),(i)), relating to the preparation of a transcript of proceedings from recollection or by stipulation, do not deny due process of the law. *Wall v. Citizens & S. Bank*, 247 Ga. 216, 274 S.E.2d 486 (1981).

Indigent is entitled to copy of trial transcript for direct appeal of conviction, but such is not the case in collateral post-conviction proceedings, and there is no due process or equal protection right to a free copy of one's court records absent a showing of necessity or justification. *McDowell v. Balkcom*, 246 Ga. 611, 272 S.E.2d 280 (1980).

No absolute right to free transcript. — While there is a basic right to a free transcript to perfect a timely direct appeal, there is no absolute right to a free transcript just so the prisoner may have it. Some justification for use in a habeas corpus or related proceeding must be shown in order to be entitled to such records in a collateral attack on the sentence. *Wilson v. Downie*, 228 Ga. 656, 187 S.E.2d 293, cert. denied, 409 U.S. 1037, 93 S. Ct. 533, 34 L. Ed. 2d 486 (1972).

Mere request for transcript by indigent defendant imposes no constitutional duty on trial court to order it prepared; only "differ-

ences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.” *United States v. Smith*, 605 F.2d 839 (5th Cir. 1979).

Once appeal dismissed, defendant no longer has right to trial transcript at state expense. *Yates v. Brown*, 235 Ga. 391, 219 S.E.2d 729 (1975).

Defendant’s knowing decision not to appeal not required in record before preclusion from appellate review. — It is not required that the record reflect that the defendant made a knowing and intelligent decision not to appeal before the defendant can be precluded from appellate review. *Murphy v. Balkcom*, 245 Ga. 13, 262 S.E.2d 784 (1980).

Failure to inform defendant of right to attend jury view of scene of offense did not violate due process rights under U.S. Const., amend. 14. *Harwell v. England*, 234 Ga. 640, 217 S.E.2d 154 (1975).

Due process not violated because defendant not present for order fixing new date of execution. — Assuming that it was necessary for the defendant to have been present in court when the original sentence of execution was pronounced, as well as during other proceedings throughout the trial, in the absence of waiver no violation of the due process clause of U.S. Const., amend. 14 appears where the attack is not on the original sentence, but merely on an order fixing a new date of execution entered without the presence of the defendant, which became necessary after the date fixed in the original sentence had passed by reason of supersedeas pending the determination of a writ of error in this court. *Smith v. Henderson*, 190 Ga. 886, 10 S.E.2d 921 (1940), cert. denied, 312 U.S. 698, 61 S. Ct. 737, 85 L. Ed. 1132 (1941); *Smith v. Ricketts*, 234 Ga. 245, 215 S.E.2d 249 (1975).

Though if violative of rights, no discharge on petition for habeas corpus, but, remand for resentencing in defendant’s presence. — Even if the absence of the defendant at the time of fixing a new date of execution could be taken as violative of the defendant’s constitutional rights, this would in no event have entitled the defendant to a discharge on the defendant’s petition for habeas corpus, but only to a remand to the trial court for resentencing during the defendant’s presence

in court. *Smith v. Henderson*, 190 Ga. 886, 10 S.E.2d 921 (1940), cert. denied, 312 U.S. 698, 61 S. Ct. 737, 85 L. Ed. 1132 (1941).

Defendant denied fair trial where victim’s mother repeatedly disrupted trial. — Where during the entire trial the victim’s mother repeatedly disrupted the courtroom proceedings with emotional outbursts and other interruptions, and where the defendant repeatedly and unsuccessfully moved for a mistrial, defendant was denied a fair trial. *Price v. State*, 149 Ga. App. 397, 254 S.E.2d 512 (1979).

Criminal conviction based on known perjured testimony or uncorrected false evidence violative of due process. — A criminal conviction obtained by the use of perjured testimony known by the prosecution to be perjured and knowingly used by them in order to procure the conviction, is without due process of law and in violation of U.S. Const., amend. 14. The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears. *Smith v. State*, 153 Ga. App. 862, 267 S.E.2d 289 (1980).

Showing fair trial prevented by pretrial publicity. — Under the decisions of the Supreme Court of the United States where pretrial publicity is at issue to find that the defendant did not receive a fair trial, the defendant must show: (1) that the setting of the trial was inherently prejudicial, or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), sentence vacated, 243 Ga. 244, 253 S.E.2d 707 (1979); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

Jury viewing restraints on accused. — State death row inmate’s federal habeas corpus petition was denied since the fourteenth amendment right to a fair trial by an impartial jury was not violated by the jury’s briefly seeing the inmate in handcuffs in a parking lot during a lunch break. *Ford v. Schofield*, F. Supp. 2d , 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

Trial court’s finding on pretrial publicity not set aside unless error “manifest.” — A trial court’s finding as to a prospective ju-

Due Process (Cont'd)**12. Appeals and Habeas Corpus (Cont'd)**

ror's ability to lay aside an opinion about the case arising from pretrial publicity should not be set aside unless the error is "manifest." *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), *aff'd in part, rev'd in part* on other grounds, 756 F.2d 1483 (11th Cir. 1985), *overruled on other grounds*, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Free transcript of habeas corpus trial furnished to indigent defendants if they request it for appeal. *Harper v. State*, 229 Ga. 843, 195 S.E.2d 26 (1972).

Appointment of mental health expert by court. — State death row inmate's federal habeas corpus petition was denied where the trial court did not violate fourteenth amendment due process by appointing a mental health expert to examine defendant on the condition that the expert disclose the expert's findings to the prosecution or by refusing to permit defendant to challenge the expert's competency. *Ford v. Schofield*,

F. Supp. 2d _____, 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

Drawing of jurors in open court not deprivation of due process or equal protection. — Petitioner in a habeas corpus hearing is not deprived of due process of law or equal protection of the laws simply because jurors must be drawn in open court. *Hill v. Stynchcombe*, 225 Ga. 122, 166 S.E.2d 729 (1969).

Petitioner for writ of habeas corpus based on denial of constitutional rights in criminal prosecution must show not only that the petitioner has been denied the petitioner's rights, but also that either the petitioner has exhausted all the corrective processes of the state or that such processes are inadequate for his protection. *Melton v. Beard*, 15 F. Supp. 980 (M.D. Ga. 1936).

Writ of habeas corpus cannot be used merely as substitute for writ of error or other remedial procedure to correct errors of law, of which the defendant had opportunity to avail himself; and no question as to guilt or innocence or as to any irregularity can be so raised, unless it was such as to render the judgment wholly void. *Sanders v. Aldredge*, 189 Ga. 69, 5 S.E.2d 371 (1939);

White v. George, 195 Ga. 465, 24 S.E.2d 787 (1943).

Remedy of writ of habeas corpus when defendant denied due process in trial. — Writ of habeas corpus is the appropriate remedy only when the court was without jurisdiction in the premises, or when it exceeded its jurisdiction in passing sentence by virtue of which the party is imprisoned, or where the defendant in the trial was denied due process of law, in violation of U.S. Const., amend. 14 and Ga. Const. 1983, Art. I, Sec. I, Para. I. *Balkcom v. Parris*, 215 Ga. 122, 109 S.E.2d 48 (1959).

Writ of habeas corpus was properly denied where the contention that the plaintiff in error was denied certain constitutional rights, including due process of law, because the refusal to continue the case was decided on the motion for new trial, adversely to the contentions of the plaintiff in error. *Starr v. Balkcom*, 209 Ga. 680, 75 S.E.2d 5 (1953).

Mere error by competent court regarding plea of former jeopardy gives no right to habeas corpus. — A mere error as to the applicability or inapplicability of plea of former jeopardy in a particular case by a court of competent jurisdiction would not give the right to habeas corpus under U.S. Const., amend. 14. *Hall v. Scoggins*, 202 Ga. 198, 42 S.E.2d 763 (1947).

Petitioner for habeas corpus may be relieved from waiver of constitutional rights if the petitioner can demonstrate that the failure to object was "for cause." *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

Showing of actual prejudice will allow petitioner for habeas corpus to avoid bar raised by state procedural timeliness rule concerning the waiver of federal constitutional rights. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

Actual prejudice must be extraneous influence moving tribunal to decide case on improper basis, commonly, though not always, an emotional one. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

No federal claim for habeas relief stated by alleging that state habeas court failed to apply state law properly. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

Writs of habeas corpus should issue where retarded petitioners' waiver of constitutional rights not knowing. — Where uncontroverted evidence was that petitioners for writs

of habeas corpus were 15 and 16 years of age, with I.Q.'s estimated between 60 and 68, and had not more than second-grade reading levels, any waiver of constitutional rights by them was not knowing and intelligent, and the writs should issue. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972).

Where court has jurisdiction, rulings and judgment not subject to collateral attack by habeas corpus. — Where both the trial court and Court of Appeals have jurisdiction to deal with a plea of former jeopardy, it necessarily follows that, whether the rulings and judgment against the plea were correct or incorrect, they were not absolutely void so as to render them subject to collateral attack by habeas corpus. This is true regardless of whether the right to assert the defense of former jeopardy in a state court is one that comes within the due process clause of U.S. Const., amend. 14 and the case is not altered by the fact that a petition for certiorari was denied. *Hall v. Scoggins*, 202 Ga. 198, 42 S.E.2d 763 (1947).

If state deliberately conceals eyewitness to crime, due process has been violated and habeas must be granted if, in the context of the entire trial, the missing witness' testimony was such as might have created a reasonable doubt which would not otherwise have existed. *Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013, 100 S. Ct. 661, 62 L. Ed. 2d 641 (1980).

Investigating police officer's willful, intentional concealment of material information imputed to state. — When an investigating police officer willfully and intentionally conceals material information, regardless of the officer's motivation and the otherwise proper conduct of the state attorney, the police officer's conduct must be imputed to the state as part of the prosecution team. *Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013, 100 S. Ct. 661, 62 L. Ed. 2d 641 (1980).

Habeas corpus will not lie to challenge jury charge in absence of clear denial of due process so as to render the trial fundamentally unfair. *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

Habeas corpus will not lie to set aside conviction on basis of improper jury instructions. — Habeas corpus does not lie to set

aside a conviction on the basis of improper jury instructions unless the impropriety is a clear denial of due process so as to render the trial fundamentally unfair. *Smith v. Smith*, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971), cert. denied, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972).

In habeas corpus proceeding, the burden is on petitioner to establish denial of benefit of counsel by proof, and it was not error to deny the petitioner's release on this ground. *Plocar v. Foster*, 211 Ga. 153, 84 S.E.2d 360 (1954), cert. denied, 349 U.S. 962, 75 S. Ct. 893, 99 L. Ed. 1284 (1955).

Expert witness fees award not necessary. — The refusal of a state habeas corpus judge to allocate funds to the petitioner to secure expert testimony does not infringe on the petitioner's constitutional right to a full and fair hearing on his petition in the Georgia courts. *Morgan v. Zant*, 582 F. Supp. 1026 (S.D. Ga.), aff'd in part, rev'd in part on other grounds, 743 F.2d 775 (11th Cir. 1984), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986), 486 U.S. 1009, 108 S. Ct. 1739, 100 L. Ed. 2d 202 (1988).

In federal habeas corpus court, test of legality of state arrest is "federal probable cause." *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).

Discharge under writ of habeas corpus, after conviction, cannot be granted unless judgment is absolutely void, as where the convicting court was without jurisdiction, or where the defendant in the trial was denied due process of law in violation of U.S. Const., amend. 14, and Ga. Const. 1877, Art. I, Sec. I, Para. V. (See Ga. Const. 1983, Art. I, Sec. I, Para. XIV.) *Aldredge v. Williams*, 188 Ga. 607, 4 S.E.2d 469 (1939), cert. denied, 309 U.S. 661, 60 S. Ct. 512, 84 L. Ed. 1009 (1940); *Sanders v. Aldredge*, 189 Ga. 69, 5 S.E.2d 371 (1939); *White v. George*, 195 Ga. 465, 24 S.E.2d 787 (1943).

Dismissal of appeal of denial of habeas corpus because prisoner escaped is not ground for habeas corpus relief. *Yates v. Brown*, 235 Ga. 391, 219 S.E.2d 729 (1975).

Habeas petitioner must show prejudice. — A habeas petitioner must show an actual or identifiable prejudice on the part of the jury resulting from publicity, community

Due Process (Cont'd)**12. Appeals and Habeas Corpus (Cont'd)**

prejudice actually infecting the jury box, or pretrial publicity so inflammatory and prejudicial and so pervasive or saturating the community as to render virtually impossible a fair trial by an impartial jury, thus raising a presumption of prejudice. *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), *aff'd in part, rev'd in part* on other grounds, 756 F.2d 1483 (11th Cir. 1985), *overruled on other grounds*, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479 U.S. 939, 107 S. Ct. 421, 90 L. Ed. 2d 371 (1986).

Scope of federal habeas corpus review of sentencing. — If a federal habeas court concludes that the Georgia Supreme Court's determination following its "proportionality" review of a death sentence under O.C.G.A. § 17-10-35 "shocks the conscience," it is required to remand the case to allow the state court to resentence the petitioner. A federal habeas court may not conduct a *de novo* proportionality review and thereby inject itself into the state sentencing procedure. Its review remains confined to whether the state sentencing procedure both on its face and as applied violates the eighth and fourteenth amendments. *Moore v. Balkcom*, 716 F.2d 1511 (11th Cir.), *modified*, 722 F.2d 629 (11th Cir. 1983), *cert. denied*, 465 U.S. 1084, 104 S. Ct. 1456, 79 L. Ed. 2d 773 (1984).

Unconstitutional to dismiss appeal due to counsel's failure to file. — Dismissal of a criminal defendant's appeal because of counsel's failure to timely file an appeal is a violation of due process because the defendant is thereby deprived of the effective assistance of counsel. *Campbell v. State*, 178 Ga. App. 814, 344 S.E.2d 745 (1986).

Effect of media coverage. — State death row inmate's federal habeas corpus petition was denied; the inmate's right to be tried by an impartial jury was not compromised by the trial court's failure to excuse a number of allegedly biased jurors, including prospective jurors who were exposed to pretrial publicity, a prospective juror who was a local attorney, and a prospective juror who had once been the defendant in a debt collection action by filed the law firm of which the inmate's counsel was a member. *Ford v. Schofield*, F. Supp. 2d , 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

State death row inmate's federal habeas corpus petition was denied; although the prosecutor improperly referred in closing argument to the biblical condemnation of the crime of murder, the comment's inflammatory nature did not prejudice the jury because defense counsel responded in kind by referencing the biblical quality of mercy. *Ford v. Schofield*, F. Supp. 2d , 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

Appeal bond denial upheld. — The provision in O.C.G.A. § 17-6-1(g) denying appeal bonds to persons convicted of "murder, rape . . . and who have been sentenced to serve a period of seven years or more" does not violate either the due process or equal protection clause. *Hall v. State*, 254 Ga. 507, 330 S.E.2d 878 (1985).

Guilty plea waives suppression issue on appeal. — Because defendant pled guilty to the charges of possession of a firearm by a convicted felon, defendant waived any claim that the trial court erred in denying defendant's motion to suppress evidence of said firearm found in defendant's residence. *Stuart v. State*, 267 Ga. App. 463, 600 S.E.2d 629 (2004).

On appeal of a denial of a motion to suppress, the evidence is to be construed most favorably to the upholding of the findings and judgment made. The trial court's findings must be adopted unless determined to be clearly erroneous. *Dennis v. State*, 166 Ga. App. 715, 305 S.E.2d 443 (1983).

Exculpatory materials disclosure request first made on appeal. — Where defendant filed no Brady motion for disclosure of exculpatory materials, the Court of Appeals held it could not consider matters raised for the first time on appeal. *Halsell v. State*, 183 Ga. App. 549, 359 S.E.2d 393 (1987).

Enumerations of error are abandoned on appeal where there is no citation to authority or argument to support them other than a general reference to the due process requirements of the Constitution. *Jacobs v. State*, 167 Ga. App. 454, 306 S.E.2d 717 (1983).

13. Probation and Parole

Entitlement to parole. — A convicted person does not have a constitutional or inherent right to be conditionally released before expiration of a valid sentence. A state may,

however, create a legitimate claim of entitlement to parole through statutory language creating a protectable expectation of release. *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir.), cert. denied, 459 U.S. 1043, 103 S. Ct. 462, 74 L. Ed. 2d 612 (1982).

Where a prisoner argued that the prisoner had a liberty interest in parole consideration and that the prisoner could, therefore, invoke the due process clause in a claim against the defendants, it was held that no entitlement or liberty interest in parole was created by Georgia statute. *Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307 (11th Cir. 1988).

No protected liberty interest in parole is created by the Georgia parole system. To give rise to a liberty interest in parole, the statutes and regulations must meaningfully limit the discretion of state officials, and, in Georgia, the substantial discretion reserved by the Board of Pardon and Paroles belies any claim to reasonable expectation of parole. Indeed, the system contains a statutory presumption against parole, O.C.G.A. § 42-9-42, and an explicit reservation of authority to depart from the grid recommendation, negating any reasonable claim of an entitlement to parole. *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), cert. denied, 513 U.S. 1191, 115 S. Ct. 1254, 131 L. Ed. 2d 134 (1995).

A retroactive change in the method for calculating the tentative parole month of certain crime severity level offenders under the parole decision guidelines did not violate due process as the prisoners affected did not have a derivative due process right to be sentenced in reliance on an expectation of parole. *Jones v. Georgia State Bd. of Pardons & Paroles*, 59 F.3d 1145 (11th Cir. 1995).

The exceptional parole process governed by O.C.G.A. § 42-9-45 did not create a constitutionally protected liberty interest in parole. *Worley v. Georgia Bd. of Pardons & Paroles*, 932 F. Supp. 1466 (N.D. Ga. 1996).

Defendant to be given notice and opportunity to be heard regarding violation of rules of suspended or probated sentence. — To deprive a defendant of the defendant's liberty upon the theory that the defendant violated any of the rules and regulations prescribed in a suspended or probated sentence without giving the defendant a notice

and opportunity to be heard upon the question of whether or not the defendant violated such rules and regulations, would be to violate one of the fundamentals of our system of jurisprudence that a person shall not be deprived of one's liberty without due process of law, which includes notice and an opportunity to be heard. *Lester v. Foster*, 207 Ga. 596, 63 S.E.2d 402 (1951).

When revocation of suspended sentence not denial of due process. — Where it appears that full notice and hearing were afforded and that the defendant was represented by counsel both in the original trials and the subsequent revocation proceedings, the revocation of a suspended sentence is not a denial of due process. *Cross v. State*, 128 Ga. App. 774, 197 S.E.2d 853 (1973).

Judge authorized to revoke suspension or probation when defendant has violated court-prescribed rules. — The judge only has authority to revoke the suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court. *Hinton v. State*, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Last sentence of O.C.G.A. § 42-8-36(a), which allows the court to revoke probation without notice to the probationer under certain circumstances, constitutes a denial of due process. *Hughes v. Hinks*, 249 Ga. 416, 291 S.E.2d 545 (1982).

Defendant denied due process by deprivation of liberty because of rule violations where none imposed in sentence. — To deprive a defendant of the defendant's liberty upon the theory that the defendant has violated rules and regulations prescribed in the defendant's sentence, when no rules, regulations, conditions, limitations, or restrictions were imposed by such sentence, would deprive the defendant of "due process of law." *Hinton v. State*, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Suspension of sentence conditioned on defendant's obeying all laws is enforceable. — The condition for suspension of a sentence that the defendant obey all state, federal, and municipal laws is not so vague, indefinite, ambiguous, and uncertain as to be unenforceable. *Hinton v. State*, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Defendant must be made aware of payment of fine as condition precedent to beginning probation. — While a court may

Due Process (Cont'd)**13. Probation and Parole (Cont'd)**

lawfully require the payment of a fine as a condition precedent to beginning a probationary period, due process demands that the defendant be made aware that the condition is in fact a condition precedent. *Huff v. McLarty*, 241 Ga. 442, 246 S.E.2d 302 (1978).

Condition of probation invading right to self-expression and not directly related to rehabilitation unreasonable. — A condition of probation that invades a person's constitutionally protected right to personal self-expression and that is not related directly to the person's rehabilitation cannot meet the test of reasonableness. *Inman v. State*, 124 Ga. App. 190, 183 S.E.2d 413 (1971).

Condition precluding contact between perpetrator of sexual crime and victim. — Imposition as a condition of probation that the defendant, who was convicted of aggravated child molestation, have no direct or indirect contact with the defendant's seven-year-old child until the child reached the age of majority was within the discretion of the court, and was not a violation of the defendant's constitutional rights. *Tuttle v. State*, 215 Ga. App. 396, 450 S.E.2d 863 (1994).

Requiring the defendant to wear short haircut as condition of probation is violative of U.S. Const., amend. 14. *Inman v. State*, 124 Ga. App. 190, 183 S.E.2d 413 (1971).

Where restitution court-ordered out of probationer's weekly salary on penalty of imprisonment. — Prior notice and an opportunity to be heard are prerequisite where restitution is ordered by a court to be paid out of a probationer's weekly salary, and the penalty for failure to pay is imprisonment. *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1973).

Fixing amount of restitution to be paid without notice and opportunity for hearing violative of due process. — Fixing the amount of restitution required to be paid under Code 1933, § 27-2711 (see O.C.G.A. § 42-8-35), without notice to the probationer and without any opportunity for the probationer to question or appeal the amount, especially where criminal sanctions may be involved, violates U.S. Const.,

amend. 14, since due process requires notice and an opportunity for hearing appropriate to the nature of the case when the state seeks to deprive a person of property or liberty. *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1973).

Due process right to revocation hearing does not attach until execution of violator warrant, so delay in granting such a hearing while the warrant is held in abeyance does not offend rights under U.S. Const., amend. 14 absent an affirmative showing of prejudice. *Gray v. Hogan*, 388 F. Supp. 476 (N.D. Ga. 1975), *aff'd sub nom*, *Gray v. Sigler*, 532 F.2d 1008 (5th Cir. 1976), *cert. denied*, 429 U.S. 981, 97 S. Ct. 495, 50 L. Ed. 2d 591 (1976).

Guarantee of due process applies to revocations of probation, since revocation of probation results in the same loss of liberty. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), *cert. denied*, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Probationer is entitled to notice and hearing when petition is filed to revoke probation. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), *cert. denied*, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Due process requires that a hearing be held before decision to revoke probation is made. *Hughes v. Hinks*, 249 Ga. 416, 291 S.E.2d 545 (1982).

Notice and hearing procedure can be consolidated. — Failure of the trial court to afford a preliminary hearing to establish probable cause to conduct a revocation of probation hearing followed by an evidentiary show cause hearing, rather than consolidating the procedure into one hearing, does not violate due process. *Wilson v. State*, 152 Ga. App. 695, 263 S.E.2d 691 (1979), *cert. denied*, 449 U.S. 847, 101 S. Ct. 133, 66 L. Ed. 2d 57 (1980).

District courts shall provide notice to probationers of proposed extensions and advise right to hearing before the court acts. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), *cert. denied*, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Explanation for departure from parole guidelines. — The plaintiff had no constitutional right to procedural due process protections, and, therefore, had no right to an explanation for departure from parole guidelines. *O'Kelley v. Snow*, 53 F.3d 319 (11th Cir. 1995).

Proceeding to revoke probated sentence is not criminal proceeding. — The prohibition against putting any person twice in jeopardy of life or limb applies only to twice subjecting an individual to criminal processes for the same offense against the same sovereign; there is no bar to the state's imposing both a civil and a criminal penalty for the same act. A proceeding to revoke a probated sentence is not a criminal proceeding. *Johnson v. State*, 142 Ga. App. 124, 235 S.E.2d 550 (1977), *aff'd*, 240 Ga. 526, 242 S.E.2d 53, cert. denied, 439 U.S. 881, 99 S. Ct. 221, 58 L. Ed. 2d 194 (1978).

Evidence required to revoke suspension is evidence defendant has violated conditions of probation which satisfies the trial court in the exercise of a very wide discretion; it is not necessary to show that the defendant has been convicted of the act constituting the violation of the probation. *Hinton v. State*, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

Revocation of probation, under "slight" evidence test, the standard by which the sufficiency of the evidence is determined, is not violative of due process in that it is less than that necessary to sustain a conviction. *King v. State*, 154 Ga. App. 549, 269 S.E.2d 55 (1980).

Application of "slight evidence" rule did not deny defendant due process in probation revocation. — Because the defendant received written notice of the claimed violation of probation, the disclosure of the evidence against the defendant, an opportunity to be heard in person, to present witnesses and document evidence, and the right to confront and cross-examine adverse witnesses, heard by a neutral and detached judicial officer with a written statement by the fact-finder as to the evidence relied on and reasons for revoking probation, application of the "slight evidence" rule did not deny the defendant due process and equal protection. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Revocation of probation based, at least in part, upon alleged commission of crime for which a party has not yet stood trial and been found guilty does not contravene principles of due process and fundamental fairness. *King v. State*, 154 Ga. App. 549, 269 S.E.2d 55 (1980).

Establishment of defendant's guilt beyond reasonable doubt not necessary for revoca-

tion of probation. — The benefit and protection afforded under the due process and equal protection clauses of the state and federal Constitutions have not in anywise been violated in that the establishment of a defendant's guilt beyond a reasonable doubt is not necessary to justify the revocation of a sentence of probation. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Even if grand jury entered a "No Bill" as to charge against the defendant for criminal damage to property in the second degree and the trial judge in the hearing concerning revocation of probation found "criminal trespass," there was no violation of the due process guarantee bestowed upon defendant by U.S. Const., amend. 5 and U.S. Const., amend. 14 and the Constitution of this state. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Revocation of probation, premised upon failure to timely pay court-ordered restitution upheld as not violating due process and equal protection. *Wilson v. State*, 155 Ga. App. 825, 273 S.E.2d 210 (1980).

Same minimum due process requirements in parole revocation cases apply to revocation of probation proceedings. *Tucker v. State*, 157 Ga. App. 202, 276 S.E.2d 842 (1981).

Due process clause requires that individual on parole be afforded hearing before parole is revoked. *United States v. Cornwell*, 625 F.2d 686 (5th Cir.), cert. denied, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 610 (1980).

Parole revocation not part of criminal prosecution. — Supreme Court of Georgia in *Johnson v. State*, 240 Ga. 526, 242 S.E.2d 53 (1978), in affirming *Johnson v. State*, 142 Ga. App. 124, 235 S.E.2d 550 (1977), adopted the language of the Supreme Court of the United States in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) which is as follows: "The revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty property dependent on observance of special parole restrictions." *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980); *Christian v.*

Due Process (Cont'd)**13. Probation and Parole (Cont'd)**

State, 164 Ga. App. 612, 298 S.E.2d 325 (1982).

Fact finder in revocation of parole hearing must make written statement of evidence relied on and reasons for revoking parole. Tucker v. State, 157 Ga. App. 202, 276 S.E.2d 842 (1981).

Hearing officer in revocation of parole hearing must make summary, or digest, of what occurs in terms of responses of the parolee, and the substance of documents or evidence given in support of parole revocation and of the parolee's position. Tucker v. State, 157 Ga. App. 202, 276 S.E.2d 842 (1981).

Right to counsel at revocation proceeding. — A probationer has no sixth amendment right to counsel at a revocation proceeding, but has only a more limited due process right to counsel under the fourteenth amendment. Vaughn v. Rutledge, 265 Ga. 773, 462 S.E.2d 132 (1995).

Under the due process clause, a probationer in a revocation proceeding has no inflexible constitutional right to have counsel appointed; thus, a habeas court erred in predicated the grant of a petition upon a finding that the trial court's failure to inform probationer of a right to appointed counsel was a constitutional violation. Vaughn v. Rutledge, 265 Ga. 773, 462 S.E.2d 132 (1995).

Trial court's failure to inform a probationer of the probationer's right to request counsel at a revocation proceeding did not necessarily mandate the grant of the probationer's petition for habeas relief; thus, the order granting the petition was reversed and the case remanded for the court to determine whether the appointment of counsel would have been mandated had the probationer requested legal representation. Vaughn v. Rutledge, 265 Ga. 773, 462 S.E.2d 132 (1995).

A probationer has only a more limited due process right to counsel under the due process clause of U.S. Const., amend. 14, and whether the probationer is entitled to counsel must be determined on a case-by-case basis. Kitchens v. State, 234 Ga. App. 785, 508 S.E.2d 176 (1998).

Since a probationer has no inflexible right

to appointed counsel under the due process clause of U.S. Const., amend. 14, there is no absolute requirement that the probationer be informed of that right, so a probationer is entitled to be informed only of his or her right to request counsel. Kitchens v. State, 234 Ga. App. 785, 508 S.E.2d 176 (1998).

Probationer had no U.S. Const., amend. 6 right to counsel at a revocation proceeding because it was not a stage of a criminal prosecution, and only had a more limited due process right to counsel under U.S. Const., amend. 14; trial court's flawed reasoning for refusing to appoint counsel for the defendant in a probation revocation proceeding was harmless because the defendant admitted to having committed another crime, did not claim any reasons justifying or mitigating the defendant's violations, capably spoke, and failed to show a lack of fundamental fairness. Banks v. State, 275 Ga. App. 326, 620 S.E.2d 581 (2005).

Waiver of right not shown. — Because the defendant was not notified that by failing to report to the defendant's probation supervisor or by changing the defendant's place of abode without permission, the defendant's probation could be revoked without notice and hearing under O.C.G.A. § 42-8-36, the defendant's act of moving from county without permission of probation officer did not constitute knowing waiver of right to notice and hearing prior to probation revocation. Hughes v. Hinks, 249 Ga. 416, 291 S.E.2d 545 (1982).

14. Prisoners

Eighth amendment protection excludes claim under due process. — Since the eighth amendment provides explicit protection to prisoners against cruel and unusual punishment, a prisoner could not bring a separate civil rights claim for the same behavior based on substantive due process under the fourteenth amendment. Lee v. Sikes, 870 F. Supp. 1096 (S.D. Ga. 1994).

Procedural due process requires, as minimum, that notice be given of rules prisoners are required to follow. Hardwick v. Ault, 447 F. Supp. 116 (M.D. Ga. 1978).

Disciplinary proceedings. — Where disciplinary actions are taken against prisoner, Constitution requires only that hearing be held before final disciplinary action taken and final forfeiture occurs. Story v. Ault, 238

Ga. 69, 230 S.E.2d 875 (1976).

Due process claim on improper disciplinary hearing. — Summary judgment on an inmate's procedural due process claim for prison officials' denying the inmate witnesses at the inmate's disciplinary proceedings was properly denied as genuine issue of material fact existed, and damages claim was ordered remanded for further proceedings. *Harper v. Thomas*, 988 F.2d 101 (11th Cir. 1993).

Pretrial detainees. — Whether a pretrial detainee may press a claim of excessive force under the fourth amendment remains open. It is clear, however, that the due process clause protects a pretrial detainee from the use of excessive force that amounts to punishment. *Wright v. Whiddon*, 951 F.2d 297 (11th Cir. 1992).

Prisoner has right to hearing before being placed in solitary confinement. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Prison inmates are afforded no due process constitutional protection against imposition of solitary confinement in the absence of some liberty interest created by the state. *Dudley v. Stewart*, 724 F.2d 1493 (11th Cir. 1984).

Where inmate's good time is forfeited constitutionally minimum procedures required are: (1) a hearing; (2) written notice of the charges served at least 24 hours in advance of the hearing; (3) a written report of the hearing setting out the reasons for the action taken and the evidence relied on. The prisoner may be permitted to call witnesses and present evidence consistent with the needs of the institution. There is no constitutional right to confrontation, cross-examination, or counsel. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976).

Parole board's refusal to allow inmate to examine file not deprivation of constitutional rights. — The refusal of a parole board to allow an inmate to examine the inmate's file does not assume the proportions of a deprivation of the inmate's rights under the Constitution or the laws of the United States. *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979).

Inadequacy of review procedure for transfer from special restrictive prison facility. — See *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Prisoner being disciplined must be given written statement by fact finder as to evi-

dence relied on and reasons. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Hearing is not required to transfer prisoner for disciplinary reasons from the general prison populace of one prison to the general prison populace of another prison with less favorable conditions. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Wrongful beating of prisoner by arresting officer acting under warrant, whether void or valid, is unlawful deprivation of a right of a citizen of the United States which U.S. Const., amend. 14 protects. *Screws v. United States*, 140 F.2d 662 (5th Cir. 1944), rev'd on other grounds, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).

Use of undue force by prison guard is actionable as deprivation of due process rights, even though violation of U.S. Const., amend. 8, may not be established. *George v. Evans*, 633 F.2d 413 (5th Cir. 1980).

Prisoners have constitutional right of access to courts. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

The constitution forbids courts to abridge inmates' rights to have meaningful access to and communications with the courts, and a blanket declaration that all filings would be "null and void by operation of law" was impermissible. *Hooper v. Harris*, 236 Ga. App. 651, 512 S.E.2d 312 (1999).

States must protect every prisoner's constitutional right of access to the courts by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

States must shoulder affirmative obligations to assure all prisoners meaningful access to courts. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

Shaving requirements for death row inmates. — Institutional policy prohibiting inmates from leaving death row unless all shaving requirements are complied with is a permissible restriction on an inmate's access

Due Process (Cont'd)**14. Prisoners (Cont'd)**

to the courts, and enforcement of such a rule does not violate an inmate's constitutional rights. *Solomon v. Zant*, 888 F.2d 1579 (11th Cir. 1989).

Prisoner should always be accorded privilege of conferring freely with counsel at all reasonable times. *Morris v. Peacock*, 202 Ga. 524, 43 S.E.2d 531 (1947).

Prisoner not to be wrongfully deprived of privileges for desire to represent self in appeal. — A prisoner who wishes to represent oneself in a criminal appeal is entitled to be protected from any unconstitutional discrimination or abuse of discretion in the dispensing of those privileges granted to the prison population as a whole. *Lee v. Synchroncombe*, 347 F. Supp. 1076 (N.D. Ga. 1972).

U.S. Const., amend. 14 protects right of prisoners to seek access to courts concerning conditions of incarceration. *Clark v. Hendrix*, 397 F. Supp. 966 (N.D. Ga. 1975).

Prisoners do not have absolute right to file any civil action they desire, and prisons may prohibit the filing of any civil action unrelated to their personal liberty. *Clark v. Hendrix*, 397 F. Supp. 966 (N.D. Ga. 1975).

When prisoner asserts lack of mental competence at trial. — When a prisoner, either state or federal, seeking post-conviction relief, asserts, with substantial facts to back up the prisoner's allegation, that at the time of the trial the prisoner was not mentally competent to stand trial, and that there was no resolution of that precise issue before the prisoner was tried, convicted, and sentenced, U.S. Const., amend. 14 requires that such conviction and sentence be set aside unless upon adequate hearing it is shown that the prisoner was mentally competent to stand trial. *Jackson v. Caldwell*, 461 F.2d 682 (5th Cir.) cert. denied, 409 U.S. 991, 93 S. Ct. 334, 34 L. Ed. 2d 257 (1972).

Prison regulation prohibiting inmate assistance in drafting of pro se legal papers constituted deprivation of due process of law, where no "reasonable alternative" was available to furnish legal advice. *Williams v. United States Dep't of Justice*, 433 F.2d 958 (5th Cir. 1970).

State expenditures for providing indigent inmates' legal rights. — Indigent inmates

must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. States must forego collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial and in appeals as of right. This is not to say that economic factors may not be considered, for example in choosing the methods used to provide meaningful access; but the cost of protecting a constitutional right cannot justify its total denial. Thus, neither the availability of jailhouse lawyers nor the necessity for affirmative state action is dispositive; the inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), vacated on other grounds, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119, 99 S. Ct. 1028, 59 L. Ed. 2d 79 (1979).

Medical needs. — The fourteenth amendment right of pretrial detainees, like the eighth amendment right of convicted prisoners, requires that government officials not be deliberately indifferent to any serious medical needs of the detainee. *McDay ex rel. McDay v. City of Atlanta*, 740 F. Supp. 852 (N.D. Ga. 1990), aff'd, 927 F.2d 614 (11th Cir. 1991).

Deliberate indifference to serious medical needs by governmental custodians violates due process. However, unlike an eighth amendment violation, a due process violation does not require a subjective deliberate indifference; such violation requires action under color-of-law and causation, as in an eighth amendment violation. *Howard v. City of Columbus*, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

Where medical policies were promulgated and carried out under the mandate of O.C.G.A. § 42-5-2, requiring that a county provide adequate medical care for its inmates, and the seriously ill prisoner was seen only by undertrained LPNs, not by a physician, before the inmate died, this was a violation of the inmate's due process and eighth amendment rights. *Howard v. City of*

Columbus, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

Suicide. — In the context of a pretrial detainee's suicide, defendants must have had knowledge that the detainee was a suicide risk before they can be charged with deliberate indifference. *McDay ex rel. McDay v. City of Atlanta*, 740 F. Supp. 852 (N.D. Ga. 1990), aff'd, 927 F.2d 614 (11th Cir. 1991).

Official liability for detainee's suicide. — County commissioners and jail administrators ignorant of a decedent's custody or suicidal threats were not liable under a duty to protect the decedent's liberty interests, but overseeing sheriff was potentially liable as a reasonable person in sheriff's position would have known that providing inadequate psychiatric care to a person in the sheriff's custody could violate that person's due process rights. *Merideth v. Grogan*, 812 F. Supp. 1223 (N.D. Ga. 1992), aff'd, 985 F.2d 579 (11th Cir. 1993).

Health conditions. — If the municipal bureau of corrections persistently maintained conditions in the city jail which did not conform to the city ordinance regulating health and sanitary conditions, but which did amount to a custom of (as opposed to random) deprivation of rights, then the city was subject to liability for the deprivation of the defendant's due process rights. *Lambert v. McFarland*, 612 F. Supp. 1252 (N.D. Ga. 1984).

Because a city was immune from suit in performing the governmental function of maintaining the city jail, it could not be concluded as a matter of law, in a federal civil rights action against the city and its police officers, alleging that the physical conditions in the jail deprived the defendant of due process, that "adequate state remedies" existed. *Lambert v. McFarland*, 612 F. Supp. 1252 (N.D. Ga. 1984).

Substandard sanitation and deficient medical care of inmates at a county jail was unconstitutional, and necessitated releasing some inmates to relieve overcrowding until construction of a new jail was completed. *Fambro v. Fulton County*, 713 F. Supp. 1426 (N.D. Ga. 1989).

O.C.G.A. § 17-10-15(b) does not violate the right to privacy under the due process clause of U.S. Const., amend. 14 or the state

or federal equal protection clauses. *Adams v. State*, 269 Ga. 405, 498 S.E.2d 268 (1998).

Requiring the defendant to serve a sentence in installments because the defendant's premature release was brought about through no fault of the defendant's own, and because reincarceration would be inconsistent with fundamental principles of liberty and justice, was a violation of due process. *Derrer v. Anthony*, 265 Ga. 892, 463 S.E.2d 690 (1995).

Prisoner entitled to protection against cruel and unusual punishment. — Certain constitutional rights follow a person into state prison through U.S. Const., amend. 14 and among these is the protection of U.S. Const., amend. 8, against cruel and unusual punishment. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga.), aff'd, 393 U.S. 266, 89 S. Ct. 477, 21 L. Ed. 2d 425 (1968).

Independent state ground for challenging custodial abuse. — Ga. Const. 1983, Art. I, Sec. I, Para. XVII, which states that no person shall be abused while under arrest, provides an independent state ground for this action, and provides at least as much protection to pretrial detainees under certain circumstances as the fourteenth amendment due process clause. *Long v. Jones*, 208 Ga. App. 798, 432 S.E.2d 593 (1993).

An inmate has right to reasonable protection from constant threat of violence; however, an isolated attack by another inmate does not establish the absence of this protection. *O'Neal v. Evans*, 496 F. Supp. 867 (S.D. Ga. 1980).

Censorship of prisoner mail is justified only where regulation or practice in question furthers important or substantial governmental interest unrelated to the suppression of expression, and the limitation of freedoms under U.S. Const., amend. 1, is no greater than is necessary or essential to the protection of the particular governmental interest involved. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Usually no constitutionally sufficient reason to stop letter. — Unless a letter contains a threat to prison order and security or is in direct violation of law, there is usually no constitutionally sufficient reason to stop it. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Outgoing letters from prisoners may be inspected and, when deemed necessary, read to determine whether they contain escape

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plots, violations of law, or threats to the institution. Letters containing simply profane or obscene language, however, are not the proper subject of direct censorship through either halting the letter or suspending the mailing privilege. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Decision to censor or withhold delivery of particular letter must be accompanied by minimum procedural safeguards, since the interest of prisoners and their correspondents in uncensored communications by letter, grounded as it is in U.S. Const., amend. 1 is plainly a "liberty" interest within the meaning of U.S. Const., amend. 14. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Censorship of prisoner's reading material is allowed only when government shows that censorship furthers important or substantial governmental interest unrelated to the suppression of expression and that the censorship is no greater a limitation on U.S. Const., amend. 1 rights than generally necessary to protect one or more legitimate governmental interests. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Controlling and taking of prisoner's property. — Prison officials may not permanently take property from prisoners once they have been allowed to have property in prison, but controlling how much property prisoners can have with them in the cell is clearly within the discretion of prison officials. *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978).

Freezing prisoner's account. — Prison wardens' conduct in freezing an inmate's account upon receipt of a letter from a judgment creditor's attorney did not involve a federal constitutional deprivation. *Grant v. Newsome*, 201 Ga. App. 710, 411 S.E.2d 796 (1991).

A prison inmate may bring a federal civil rights action against prison officials for negligent deprivation of his personal property done in violation of the inmate's due process rights, where the state provided no adequate post deprivation remedy to the inmate. *Hight v. Burden*, 180 Ga. App. 716, 350 S.E.2d 471 (1986).

Prisoner may be found guilty of escape by department of corrections. — Even though

a prisoner is not tried for the statutory offense of escape in the courts, the prisoner may be found guilty by the Department of Corrections. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976).

Racial segregation for limited purpose of avoiding imminent prison violence is at discretion of prison authorities. *Stroman v. Griffin*, 331 F. Supp. 226 (S.D. Ga. 1971).

Mere assignment of prisoner to one job rather than another does not state constitutional claim absent other allegation, such as racial discrimination. *O'Neal v. Evans*, 496 F. Supp. 867 (S.D. Ga. 1980).

Dismissal of suit for damages and conjugal visits with lawfully imprisoned spouse proper for failure to state claim. — Where plaintiff sued on grounds of U.S. Const., amend. 14 for damages and an order permitting conjugal visits between the plaintiff and the plaintiff's spouse during the time the plaintiff's spouse was lawfully incarcerated, the dismissal of the suit for failure to state a claim upon which relief could be granted was proper. *Polakoff v. Henderson*, 370 F. Supp. 690 (N.D. Ga. 1973), *aff'd*, 488 F.2d 977 (5th Cir. 1974).

15. Election and Voting Rights

First amendment freedoms protected from state impairment by due process clause include political activities. — The "liberty" protected from state impairment by due process clause of fourteenth amendment includes freedoms of speech and association guaranteed by first amendment. These first amendment freedoms extend to political activities such as running for elective office, and state election practices must therefore serve legitimate state interest narrowly and fairly to avoid obstructing and diluting these fundamental liberties. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Right to vote freely for candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

States may determine conditions under which right to vote may be exercised. — A citizen has a constitutionally protected right

to participate in elections on an equal basis with other citizens in the jurisdiction; however, this right is not absolute, for states have power to determine conditions under which right of suffrage may be exercised, absent discrimination which the Constitution condemns. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Although administration of election is generally a state concern, voting rights are federally protected. — Administration of elections is generally a matter of state concern, but United States Supreme Court decisions leave no room for doubt that plaintiffs' voting rights are, at bottom, federally protected. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

United States Constitution protects right to vote once a state has established an electoral system. — Although the United States Constitution confers no right to vote as such, it does guarantee to every citizen the right to participate on a fair and equal basis with all other citizens in the electoral process once a state has chosen to select its public officials by popular vote. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Constitution of the United States protects right to vote in state as well as federal elections. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Constitutional right to vote includes right to have vote counted. — Qualified citizens not only have a constitutionally protected right to vote, but also the right to have their votes counted, a right which can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot box stuffing. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Due process clause prohibits state from unlawfully eliminating right to vote. — Just as the equal protection clause of the fourteenth amendment prohibits state officials from improperly diluting right to vote, the due process clause of the fourteenth amendment forbids state officials from unlawfully eliminating that fundamental right. *Duncan*

v. Poythress, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Due process clause prohibits action by state officials which seriously undermines fundamental fairness of electoral process. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Patent and fundamental unfairness in election process. — If the election process itself reaches point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under 42 U.S.C. § 1983 is therefore in order. Such a situation must go well beyond ordinary dispute over counting and marking of ballots. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

If the right is denied altogether or abridged in a manner which renders the electoral process fundamentally unfair, a violation of due process may be found. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Alleged infringement on right to vote must be carefully and meticulously scrutinized. — Since right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights, any alleged infringement of right of citizens to vote must be carefully and meticulously scrutinized. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Right to vote is clearly fundamental, and is protected by both due process and equal protection guarantees of the fourteenth amendment; in either case, any alleged infringement of right to vote must be carefully and meticulously scrutinized, for a state has precious little leeway in making it difficult for citizens to vote. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Any state encroachment on right to vote must be justified by a compelling state interest. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

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Due process clause offers no guarantee against an unintentional error in supervision of an election which allowed a number of people to cast ballots even though they were unqualified under state law to participate in the election. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

No guarantee against innocent irregularities in administration of state elections. — Fourteenth amendment provides no guarantee against innocent irregularities in administration of state elections. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Ballot language summarizing proposed constitutional amendment. — The ballot language selected by Georgia's General Assembly briefly summarizing a proposed amendment to the state's constitution was not so misleading to voters as to justify a federal court's invalidating the outcome of a state referendum on the amendment. *Burton v. Georgia*, 953 F.2d 1266 (11th Cir. 1992).

At-large election system constitutional. — African-American residents of a city failed to establish that, by retaining an at-large election system for city officials, the city acted with a discriminatory purpose in violation of the federal constitution. *Cofield v. City of LaGrange*, 969 F. Supp. 749 (N.D. Ga. 1997).

Local legislation. — Procedures for enactment of local legislation by the General Assembly do not violate the principle of "one person, one vote" in violation of the fourteenth amendment. *DeJulio v. Georgia*, 127 F. Supp. 2d 1274 (N.D. Ga. 2001).

Judicial appointment to a vacant seat. — Since any appointment for the judicial position would have been made less than six months prior to the election, pursuant to Ga. Const. 1983, Art. VI, Sec. VII, the judge candidate could not show that the candidate was deprived of the candidate's right to vote or participate in the electoral process where the candidate's candidacy was "revoked" by the Secretary of State after the Governor decided to appoint a judge to the vacant seat; thus, the judge candidate failed to state a claim pursuant to 42 U.S.C. § 1983 or U.S.

Const., amend. 14 against the Governor or the Secretary of State. *Hornsby v. Barnes*, F. Supp. 2d , 2002 U.S. Dist. LEXIS 27508 (N.D. Ga. July 22, 2002).

16. Property Rights

Rational relationship test. — Where the statute's classification scheme involves solely economic interests, the proper standard of review is whether the classification bears a rational relationship to a legitimate governmental purpose. *Mixon v. One Newco, Inc.*, 863 F.2d 846 (11th Cir. 1989).

Property interests are created and dimensions defined by existing rules or understandings that stem from independent source such as state law. *Winkler v. County of DeKalb*, 648 F.2d 411 (5th Cir. 1981). See also *Press v. Board of Regents*, 489 F. Supp. 150 (M.D. Ga. 1980).

Federal constitutional law determines whether state-created interests constitute protected property interests. — Although underlying substantive interest is created by independent source such as state law, federal constitutional law determines whether that interest rises to level of legitimate claim of entitlement protected by due process clause. *Winkler v. County of DeKalb*, 648 F.2d 411 (5th Cir. 1981).

State cannot declare long-established property right to be nonproperty. — Although primary source of property rights is state law, the state may not magically declare an interest to be nonproperty after the fact for fourteenth amendment purposes if, for example, a long-standing pattern of practice has established an individual's entitlement to a particular governmental benefit. *Winkler v. County of DeKalb*, 648 F.2d 411 (5th Cir. 1981).

Person must have legitimate claim of entitlement to have property interest in benefit. — To have property interest in a benefit, one clearly must have more than a unilateral expectation of it. One must, instead, have a legitimate claim of entitlement to it. *Williams v. Housing Auth.*, 158 Ga. App. 734, 282 S.E.2d 141 (1981).

While a unilateral expectation of a benefit does not rise to level of a protected interest, a mutually recognized entitlement will receive constitutional protection. *Winkler v. County of DeKalb*, 648 F.2d 411 (5th Cir. 1981).

Mutually recognizable entitlement will receive constitutional protection. — An interest attains the status of “property” by virtue of the fact that it has been initially recognized and protected by federal or state rules of law. *Brown v. Ledbetter*, 569 F. Supp. 170 (N.D. Ga. 1983).

Legitimate claim of entitlement required. — In order to acquire a fourteenth amendment property interest with accompanying procedural due process, a person must have more than a unilateral expectation; the individual must possess a legitimate claim of entitlement. *Adams v. Bainbridge-Decatur County Hosp. Auth.*, 888 F.2d 1356 (11th Cir. 1989).

Constitutional protection inapplicable to abandoned property. — The constitutional protection of the fourth and fourteenth amendments does not apply to property which has been abandoned. *Cooper v. State*, 186 Ga. App. 154, 366 S.E.2d 815 (1988).

Arbitrary and capricious deprivation of a state-created property right through the action of a county executive did not violate substantive due process under the fourteenth amendment. *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956 (11th Cir. 1997), cert. denied, 522 U.S. 861, 118 S. Ct. 163, 139 L. Ed. 2d 107 (1997).

Person receiving benefits under statutory and administrative standards defining “eligibility” for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *City of Athens v. McGahee*, 178 Ga. App. 76, 341 S.E.2d 855 (1986).

No property right against social security diminution. — Recipients have no constitutionally protected property interest against a direct or an indirect diminution by Congress of their old age, survivors, and disability benefits under the Social Security Act. *Oliver v. Ledbetter*, 821 F.2d 1507 (11th Cir. 1987).

Subsequent hearing curing earlier deprivation. — Because the plaintiff had a property right and liberty interest in continued employment with the sheriff’s department, the plaintiff must be afforded due process, including notice and an opportunity to be heard. However, the state may cure any procedural deprivation by providing a later procedural remedy; therefore, any error resulting from insufficient notice of the first pre-termination hearing is remedied by the

second hearing. *Smith v. Upson County*, 859 F. Supp. 1504 (M.D. Ga. 1994), aff’d, 56 F.3d 1392 (11th Cir. 1995).

To be entitled to bring a claim of due process violations following termination, an employee must show that the employee has a property interest in continued employment. *Abernathy v. City of Cartersville*, 642 F. Supp. 529 (N.D. Ga. 1986).

A property interest in public employment arises whenever the public employee can be terminated only for cause. *Barnett v. Housing Auth.*, 707 F.2d 1571 (11th Cir. 1983), overruled on other grounds, 20 F.3d 1550 (11th Cir. 1994), cert. denied, *McKinney v. Osceola County Bd. of County Comm’rs*, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995); *Hudgins v. City of Ashburn*, 890 F.2d 396 (11th Cir. 1989).

Where, after a hearing required by procedural due process, a hearing tribunal of the professional practice commission declined to revoke the plaintiff’s teaching certificate, there was no deprivation of any property interest. *Brewer v. Schacht*, 235 Ga. App. 313, 509 S.E.2d 378 (1998).

Right to continued public employment may arise where there is a guarantee of employment for a fixed term or where the employment allows termination only for cause. *Moore v. Tri-City Hosp. Auth.*, 696 F. Supp. 1496 (N.D. Ga. 1988).

No right to continued public employment or pay raises. — The fact that most of a public employee’s previous contracts have been for a certain length of time and have contained pay raises may lead to an expectation of receiving these terms, but it does not evidence an entitlement to them, where there is no statute, rule, regulation, policy, or contractual term that reasonably could be read as providing him with an entitlement to these benefits. *Cook v. Ashmore*, 579 F. Supp. 78 (N.D. Ga. 1984).

No property interest in promotion. — Municipal fire fighter had no protected property interest in a promotion to fire engineer, and the firefighter’s demotion from that position did not constitute a deprivation of the firefighter’s property interest without due process of law. *Hunter v. City of Warner Robins*, 842 F. Supp. 1460 (M.D. Ga. 1994).

Public employee governed by Georgia Merit Systems Act and State Board Person-

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nel Rules has a property interest in the employee's job entitling the employee to the protections of due process. *Brown v. Georgia Dep't of Revenue*, 881 F.2d 1018 (11th Cir. 1989).

State law determines the legitimacy of a claim of entitlement to continued employment. *Barnett v. Housing Auth.*, 707 F.2d 1571 (11th Cir. 1983), overruled on other grounds, 20 F.3d 1550 (11th Cir. 1994), cert. denied, *McKinney v. Osceola County Bd. of County Comm'rs*, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995).

Person's entitlement to continued employment is a constitutionally protectable property interest if there are rules or mutually explicit understandings that support his claim. *Lovell v. Floyd County*, 710 F. Supp. 1364 (N.D. Ga. 1989).

Refusal to reinstate exonerated hospital paramedic unconstitutional. — A hospital's refusal to reinstate a paramedic, who had been exonerated of misconduct by an employee grievance committee, because of a subsequent accusation that the paramedic lacked a physician's sponsorship was a deprivation of the paramedic's constitutionally protected interest in continued employment. *Baxter v. Fulton-DeKalb Hosp. Auth.*, 764 F. Supp. 1510 (N.D. Ga. 1991).

Employee does not have a property interest in a particular position within the employing organization. Unless the aggrieved employee has suffered a dismissal from employment, demotion, disciplinary reduction in salary, or suspension without pay, the employee has not suffered an "adverse action" nor been deprived of any property interest. *Horlock v. Georgia Dep't of Human Resources*, 890 F.2d 388 (11th Cir. 1989).

City police officers were not entitled to substantive due process protection in regard to their claims that reassignment without cause from a special investigation unit to a regular patrol unit violated charter or ordinance provisions allowing demotions only for cause and violated their due process rights. *Angell v. Hart*, 232 Ga. App. 222, 501 S.E.2d 594 (1998).

Termination of employment only for cause implies property interest. — An at-will public employee typically does not have a

reasonable expectation of continued employment sufficient to form a protectable property interest. However, a property interest does arise whenever a public employee can be terminated only for cause. *Wofford v. Glynn Brunswick Mem. Hosp.*, 864 F.2d 117 (11th Cir. 1989); *Nolin v. Douglas County*, 903 F.2d 1546 (11th Cir. 1990), overruled on other grounds, 32 F.3d 1521 (11th Cir. 1994), overruled in part on other grounds, *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), cert. denied, *McKinney v. Osceola County Bd. of County Comm'rs*, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995).

In Georgia, generally, no one in public employment has a vested right to such employment. However, a property interest does arise whenever the public employee can be terminated only for cause. *Payung v. Williamson*, 747 F. Supp. 705 (M.D. Ga. 1990).

County personnel handbook which made numerous distinctions between department heads and rank and file employees — e.g., department heads were given the authority to evaluate rank and file employees, to grant raises, and to hear appeals from employees facing detrimental job actions — supported the conclusion that the county board of commissioners intended to grant a property interest to rank and file employees but not to department heads when it passed the personnel ordinances which make up the handbook. *Warren v. Crawford*, 927 F.2d 559 (11th Cir. 1991).

Scope of rights of tenured teachers. — Where plaintiff clearly qualified as a tenured principal under Georgia law, the plaintiff's rights as a tenured principal extended to not being demoted except by specified procedures and for specified reasons. *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546 (11th Cir. 1987).

Where a tenured teacher held a constitutional property interest in continued comparable employment and was demoted as a result of the elimination of the position, the board of education was not constitutionally required to grant the teacher a hearing at the time the schools were closed and the initial reassignments made. *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546 (11th Cir. 1987).

Once initial reassignments had been

made, displaced teachers who held a constitutional property interest in continued comparable employment that was denied by virtue of their placement in a lesser position were entitled to obtain a hearing regarding any positions that were assigned to individuals who did not hold a property interest in the position. *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546 (11th Cir. 1987).

Nontenured as well as tenured teachers are entitled to due process protections. — Nothing in fourteenth amendment restricts due process protections to tenured teachers; where no formal system of tenure exists, due process may be mandated nonetheless where state rules or understandings between parties support a claim of entitlement to continued employment. *LaPier v. Holliman*, 514 F. Supp. 692 (N.D. Ga. 1980).

Discretionary merit salary increases not protected interests. — Discretionary merit salary increases, designed to serve as a reward for an acceptable teaching performance, are, at best, expectations rather than entitlements, and such expectations are not protected property or liberty interests for due process purposes. *Ballard v. Blount*, 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir.), *cert. denied*, 469 U.S. 1086, 105 S. Ct. 590, 83 L. Ed. 2d 700 (1984).

Termination of benefits under a city pension plan. — A city pension plan which terminated a surviving spouse's benefits upon remarriage, where the employee was not retired at the time of death, did not violate due process as a surviving spouse does not have a property right in post-remarriage benefits. *Strickland v. City of Albany*, 270 Ga. 31, 504 S.E.2d 666 (1998).

Distinction in city pension plan between benefits available to surviving spouses of retired and nonretired employees did not violate equal protection since it arose only as the result of a voluntary election by the employee, rather than a unilateral imperative of the plan. *Strickland v. City of Albany*, 270 Ga. 31, 504 S.E.2d 666 (1998).

Insubordination and willful neglect. — County school board and school administrators did not violate standards of federal due process in failing to renew a school teacher's contract, where they informed the teacher that the reasons for their actions were the teacher's insubordination and willful neglect

of duty, in addition to "other good and sufficient cause." *Suber v. Bulloch County Bd. of Educ.*, 722 F. Supp. 736 (S.D. Ga. 1989).

Placing separation notice in confidential file. — Court clerk's placing of a terminated deputy's separation notice in the confidential files of the Department of Labor did not amount to "stigmatizing" the deputy so as to deprive the terminated deputy of a liberty interest without due process. *Zellner v. Ham*, 735 F. Supp. 1052 (M.D. Ga. 1990).

Effect of city personnel ordinance enactment. — Enactment of city personnel ordinance created in covered employees a present property interest subject to termination only for cause and only after a pre-termination hearing. *Payung v. Williamson*, 747 F. Supp. 705 (M.D. Ga. 1990).

Discharged police officer's property interest in a reinstatement hearing never ripened, where such interest was conditioned upon the occurrence of certain factors expressly identified in a letter creating a claim of entitlement to reinstatement, and those conditions failed to occur. *Dudley v. City of Macon*, 678 F. Supp. 280 (M.D. Ga. 1988).

Presuspension requirements satisfied. — Although a police officer's 10-day suspension without pay affected a limited property interest which could not be characterized as *de minimis*, the officer's meeting with the police chief was sufficient to satisfy the necessary presuspension due process requirements. *Burch v. Rame*, 676 F. Supp. 1218 (S.D. Ga. 1988).

Action under federal Civil Rights Act. — Where a police detective alleged that the detective could be terminated only "for cause" and thus held a constitutionally protected "property" interest in continued employment, the defendants' motion to dismiss the action under the federal Civil Rights Act (42 U.S.C. § 1983) was denied. *Byrd v. City of Atlanta*, 683 F. Supp. 804 (N.D. Ga. 1988).

Terminated city police officer was not entitled to summary judgment on the officer's substantive due process claims, where the officer admitted that the officer used personal funds to obtain cocaine and made no report of the purchase to the police department, and that the officer gave cocaine to an informant and made no report of the incident. *Byrd v. City of Atlanta*, 709 F. Supp. 1148 (N.D. Ga. 1989).

Due Process (Cont'd)**16. Property Rights (Cont'd)**

City police officers had property interests in their employment, and were entitled to a hearing — formal or informal — prior to being discharged. *Duck v. Jacobs*, 739 F. Supp. 1545 (S.D. Ga. 1990).

Police chiefs lacked property interest in continued employment. — City police chiefs who successively served at the will of the mayor and council had no property interest in continued employment. *Duck v. Jacobs*, 739 F. Supp. 1545 (S.D. Ga. 1990).

Racial preferences for police hiring upheld. — City's use of racial preferences in employment decisions, as applied to the police department, is justified by a compelling government interest in remedying past discrimination, where, until the late 1970's, black officers were only allowed to work the night shift, they were only allowed to police black neighborhoods, and they were not authorized to arrest whites. *Fountain v. City of Waycross*, 701 F. Supp. 1570 (S.D. Ga. 1988).

Discharge of police officer for insubordination did not violate the officer's rights to substantive and procedural due process. *Guntharp v. Cobb County*, 723 F. Supp. 771 (N.D. Ga. 1989), *aff'd*, 898 F.2d 159 (11th Cir. 1990).

Termination of plaintiff's position as a parole review officer of the board of pardons and paroles after the plaintiff's election to county and state political party committees did not violate the plaintiff's constitutional rights of due process and equal protection or the plaintiff's constitutionally protected rights of political speech and association. *MacKenzie v. Snow*, 675 F. Supp. 1333 (N.D. Ga. 1987).

Discharged police officer did not possess a constitutionally protected property interest in continued employment and thus was not discharged without due process of law because there was no formal contract of employment; there was no civil service act containing a "for cause" termination requirement; police department regulations did not unambiguously indicate whether a "for cause" termination requirement existed; and because, by a provision of the city charter, the mayor and council had discretionary authority to discharge an employee. *Har-*

rison v. City of Adairsville, 560 F. Supp. 445 (N.D. Ga. 1983).

Human services program manager has protected property interest in his employment. — O.C.G.A. § 45-20-1 and Rules 4 and 14 of the Rules and Regulations of the State Personnel Board create a mutually recognizable entitlement, and one is entitled to a reasonable expectation that where one performs the duties and responsibilities of a human services program manager, one will be classified as such and will receive an increase in benefits and pay in accordance with this classification. *Brown v. Ledbetter*, 569 F. Supp. 170 (N.D. Ga. 1983).

A cause of action is a species of property protected by the due process clause. *Sisson v. Douglas County Sch. Dist.*, 181 Ga. App. 77, 351 S.E.2d 272 (1986).

Hospital staff membership. — Public hospital bylaws excluding nonallopathic physicians, who have not completed allopathic postgraduate training, from the medical staff do not violate the due process clause where the bylaws are rationally related to differences in allopathic and nonallopathic training and promote a legitimate state interest in providing quality health care. *Silverstein v. Gwinnett Hosp. Auth.*, 672 F. Supp. 1444 (N.D. Ga. 1987), *aff'd*, 861 F.2d 1560 (11th Cir. 1988).

Hospital may contract exclusively for radiology services. — A county hospital's exclusive contract for radiological services, in order to reduce the operating losses of its radiology department, is constitutionally valid, as it is rationally related to a legitimate state interest, i.e., financial well-being. *Mays v. Hospital Auth.*, 582 F. Supp. 425 (N.D. Ga. 1984).

At-will hospital employee, who was terminable by the employer at any time with or without cause, was not entitled to procedural due process in connection with the termination. *Adams v. Bainbridge-Decatur County Hosp. Auth.*, 888 F.2d 1356 (11th Cir. 1989).

Hospital's selection of a competing anesthesiology service did not deprive anesthesiologist, where the anesthesiologist continued to have full staff privileges and to receive referrals at the hospital. *Faucher v. Rodziewicz*, 891 F.2d 864 (11th Cir. 1990).

Procreation is a fundamental right. *Motes v. Hall County Dep't of Family & Children Servs.*, 251 Ga. 373, 306 S.E.2d 260 (1983).

“Clear and convincing” evidence required to authorize sterilization. — The seriousness of an individual’s interest at stake in a state initiated sterilization proceeding is such that due process requires “clear and convincing” evidence to authorize the sterilization of an individual. The standard of a “legal preponderance” set by O.C.G.A. § 31-20-3(c)(4) does not meet constitutional requirements. *Motes v. Hall County Dep’t of Family & Children Servs.*, 251 Ga. 373, 306 S.E.2d 260 (1983).

High school football player has no protectible property interest in sports participation. — High school football player has no right to participate in interscholastic sports and has no protectible property interest which would give rise to a due process claim. *Georgia High Sch. Ass’n v. Waddell*, 248 Ga. 542, 285 S.E.2d 7 (1981).

Bar examination as prerequisite to practice law is not deprivation of property right. — Requiring applicant to take bar examination before being permitted to practice law does not deprive the applicant of a property right in violation of due process. *Pace v. Smith*, 248 Ga. 728, 286 S.E.2d 18 (1982).

Compliance with malt beverages statute does not create expectation of licensure. — O.C.G.A. § 3-3-2 does not create the concrete expectation necessary for the creation of a constitutionally protectible property interest because it merely requires the promulgation of standards for the issuance of a malt-beverage license, but does not itself outline standards which, if met, would lead to the issuance of a malt-beverage license. *Scoggins v. Moore*, 579 F. Supp. 1320 (N.D. Ga.), *aff’d*, 747 F.2d 1466 (11th Cir. 1984).

Malicious prosecution resulting in loss of license states claim. — Ordinarily, a claim of malicious prosecution does not constitute a deprivation of life, liberty or property without due process of law and, therefore, is not cognizable under 42 U.S.C. § 1983. Where, however, a prosecution of a pharmacist causes the pharmacist to lose the pharmacist’s license to practice pharmacy, that prosecution deprives the pharmacist of the right to engage in one of the common occupations of life. A claim of malicious prosecution therefore is cognizable under § 1983. *Shepard v. Byrd*, 581 F. Supp. 1374 (N.D. Ga. 1984).

Driver had no property right in plastic license; rather, the right referenced by the

plaintiff was the right to drive, but such right is actually a privilege, which the plaintiff retained by virtue of the officer issuing a traffic citation stating that the plaintiff could continue to drive pending resolution of the case. *McGraw v. State*, 230 Ga. App. 843, 498 S.E.2d 314 (1998).

Procedural due process requirement in the context of beer and wine licensing is two-fold: (1) the licensing authority must give an applicant adequate notice of the standards the applicant must satisfy to obtain a license; and (2) it must accord the applicant due process in the application of those standards through a fair hearing. *McCollum v. City of Powder Springs*, 720 F. Supp. 985 (N.D. Ga. 1989).

Plaintiffs who challenged the standards for the issuance of a malt-beverage license, and not defendant city’s failure to promulgate such standards, possessed a protectable property interest that could be the basis for a due process claim. *McCollum v. City of Powder Springs*, 720 F. Supp. 985 (N.D. Ga. 1989).

Tort victims were not unconstitutionally deprived of property by a grant of immunity to public employees when acting under color of state law, where potential claimants retain the remedy of a tort action for a public employee’s discretionary acts done willfully, maliciously, or corruptly. *Sisson v. Douglas County Sch. Dist.*, 181 Ga. App. 77, 351 S.E.2d 272 (1986).

No right to have lease renewed. — A lessor breached no duty, created by contract, tort, or Georgia property law, to its lessee by failing to renew its lease or purchase its property, and, thus, did not deprive the lessee of a constitutionally protected property interest. *Stone Mt. Game Ranch, Inc. v. Hunt*, 746 F.2d 761 (11th Cir. 1984).

A county’s failure to put leases of county airport space up for competitive bid did not deprive the plaintiff of due process, where the plaintiff was deprived of no property to which it had legitimate claim of entitlement. *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F. Supp. 667 (N.D. Ga. 1982), *aff’d*, 729 F.2d 1467 (11th Cir. 1984).

A business does not have a right under the due process clause to be free from “anticompetitive injury.” *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F. Supp. 667 (N.D. Ga. 1982), *aff’d*, 729 F.2d 1467 (11th Cir. 1984).

Due Process (Cont'd)**16. Property Rights (Cont'd)**

Creation of special districts for implementing hotel/motel tax. — Statute creating special districts for the purpose of implementing a hotel/motel tax did not violate state and federal constitutional due process and equal protection guarantees. *Youngblood v. State*, 259 Ga. 864, 388 S.E.2d 671 (1990).

A blind vendor's state-issued license issued pursuant to federal law is a property right subject to constitutional protection. *Turner v. Giles*, 264 Ga. 812, 450 S.E.2d 421 (1994), cert. denied, 514 U.S. 1108, 115 S. Ct. 1959, 131 L. Ed. 2d 851 (1995).

Notice of foreclosure. — It is not presumed that the General Assembly intended to enable a tax sale purchaser to forego any methods of notice of foreclosure of the right to redeem which might be required by the due process clause, and the words "for any reason" in O.C.G.A. § 48-4-46(c) are construed to mean that notice by publication is permissible only if a sheriff's inability to effect personal service satisfies the constitutional mandate of due process. *Hamilton v. Renewed Hope, Inc.*, 277 Ga. 465, 589 S.E.2d 81 (2003).

Parent's interest in the custody of his or her child is a liberty interest entitled to constitutional protection. *Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D. Ga. 1989), aff'd in part and rev'd in part, 909 F.2d 463 (11th Cir. 1990), cert. denied, 500 U.S. 932, 111 S. Ct. 2053, 114 L. Ed. 2d 459 (1991).

The state must provide a parent an opportunity to be heard prior to the termination of his or her parental rights. Under certain extraordinary circumstances, however, the state may legally move to terminate the parent's custody rights without prior notice or opportunity for hearing, provided a meaningful postdeprivation remedy is made available. *Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D. Ga. 1989), aff'd in part and rev'd in part, 909 F.2d 463 (11th Cir. 1990), cert. denied, 500 U.S. 932, 111 S. Ct. 2053, 114 L. Ed. 2d 459 (1991).

The due process clause requires that before a state may sever the rights of a parent in a natural child, the state must support its allegations of the parent's unfitness "by at least clear and convincing evidence."

Thorne v. Padgett, 259 Ga. 650, 386 S.E.2d 155 (1989).

O.C.G.A. § 19-8-10(b) denies meaningful hearing on failure to provide support. — Because O.C.G.A. § 19-8-10(b) forecloses an inquiry into the reasons for a parent's failure to provide care and support, thus depriving that parent of a meaningful opportunity to be heard, it denies due process of law. *Thorne v. Padgett*, 259 Ga. 650, 386 S.E.2d 155 (1989).

17. Jurisdiction

Long-arm jurisdiction will be exercised to the extent permitted by procedural due process. *Najran Co. v. Fleetwood Enters., Inc.*, 659 F. Supp. 1081 (S.D. Ga. 1986).

Significant relation to state as prerequisite to application of Georgia law. — Even if Georgia choice-of-law rules would require application of its own common-law rules to some claims involving purchases of securities in other states, the law of Georgia could be applied consistent with due process only if the particular transaction had some significant relation to Georgia. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987), cert. denied, 485 U.S. 959, 108 S. Ct. 1220, 99 L. Ed. 2d 421 (1988).

"Minimum contacts" is test for jurisdiction over nonresidents. — Georgia courts may exercise personal jurisdiction over nonresident defendants to the maximum extent permitted by procedural due process and the constitutional touchstone remains whether a nonresident purposefully established "minimum contacts" in the forum state. *W.S. McDuffie & Assocs. v. Owens*, 682 F. Supp. 1226 (N.D. Ga. 1988).

Scope of federal court's jurisdiction over nonresidents. — In a diversity action, a federal court may exercise in personam jurisdiction over a nonresident defendant only to the extent permitted by the long-arm statute of the forum state and by the due process constraints of the fourteenth amendment. *W.S. McDuffie & Assocs. v. Owens*, 682 F. Supp. 1226 (N.D. Ga. 1988).

Limitations of clause do not bind federal court adjudicating federal rights. — A federal court adjudicating federally created rights and exercising the sovereign power of the United States is not bound by limitations developed under the due process clause of the fourteenth amendment, an amendment

which by its terms applies only to the 50 states and not to the federal government. *Wallace v. Milrob Corp.* (In re *Rusco Indus., Inc.*), 104 Bankr. 548 (Bankr. S.D. Ga. 1989).

Garnishment may reach out-of-state wages. — Allowing garnishment of wages earned wholly outside this state is not an unconstitutional extension of the laws of this state to a debt created outside the geographical limits of this state, thus depriving the garnishee of due process. *United Merchants & Mfrs., Inc. v. Citizens & S. Nat'l Bank*, 166 Ga. App. 468, 304 S.E.2d 552 (1983).

Obtaining personal jurisdiction in federal question case. — To apply the test of amenability to personal jurisdiction in a federal question case, the test of constitutionality, the appropriate inquiry lies with the due process of law clause of the fifth amendment. While the limitations imposed in the fifth amendment are similar to those imposed upon the state courts under the fourteenth amendment, they are not necessarily identical. *Vest v. Waring*, 565 F. Supp. 674 (N.D. Ga. 1983).

Nonresident contracting with resident. — Jurisdiction is not conferred upon a nonresident who merely contracts with a Georgia resident. Rather, the nonresident must purposefully do some act or consummate some transaction in Georgia from which the claim arises or to which the claim is related. Further, the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice. *A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys.*, 116 F.R.D. 633 (M.D. Ga. 1987).

Where parties allegedly negotiated at least three times, twice in Atlanta, such negotiations involved discussions as to both the terms of a contract and the modification of these terms, commission rates and sales territories were discussed and agreed upon, and these negotiations and the resulting contract prompted plaintiffs to represent themselves as defendants' agents and as such to consummate substantial sales of defendants' products, but defendants failed to pay commissions allegedly due plaintiffs, defendants purposefully established sufficient minimum contacts with the forum state and the plaintiffs' claim arose from such contacts, thus enabling the court to properly assert in personam jurisdiction over the defendants, including foreign nationals, with-

out offending traditional notions of fair play and substantial justice. *A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys.*, 116 F.R.D. 633 (M.D. Ga. 1987).

Because plaintiff initiated a letter agreement with the nonresident defendant which called for delivery of railcars to defendant outside of Georgia and no representative of defendant visited Georgia in connection with the performance of the agreement, defendant was not subject to personal jurisdiction in Georgia. *Railcar, Ltd. v. Southern Ill. Railcar Co.*, 42 F. Supp. 2d 1369 (N.D. Ga. 1999).

Shipping contract insufficient. — The exercise of specific personal jurisdiction over Danish shipping partnerships violated due process since contracts to deliver cargo to a Georgia port, in and of themselves, did not constitute sufficient minimum contacts with the forum state. *Francosteel Corp. v. M/V Charm*, 19 F.3d 624 (11th Cir. 1994).

No personal jurisdiction over nonresident whose only contact with state is telephone conversations. — A federal court does not have personal jurisdiction over a nonresident defendant whose only significant contacts with the State of Georgia are allegedly defamatory, isolated telephone conversations, none of which were initiated by the defendant, with Georgia residents, one of whom is an alleged co-conspirator. *McDonald v. St. Joseph's Hosp.*, 574 F. Supp. 123 (N.D. Ga. 1983).

Personal jurisdiction not allowed although constitutional minimum contacts in existence. — In a diversity action to collect on accounts receivable obtained from a carpet manufacturer, among which accounts were a nonresident's obligations for carpet purchased, the court dismissed for lack of personal jurisdiction, although constitutional minimum contacts existed, because jurisdiction was not permitted by the long-arm statute (see O.C.G.A. § 9-10-91), the only "contacts" of the defendant consisting of the following: (1) the defendant regularly attended trade fairs in Georgia; (2) it visited a manufacturer's mill in Georgia to determine whether it would buy carpet; (3) the defendant returned to another state and placed orders with the manufacturer; (4) the defendant sent its trucks into Georgia to pick up the carpet; (5) during this trip, the defendant hauled goods for Georgia resi-

Due Process (Cont'd)**17. Jurisdiction (Cont'd)**

dents unrelated to the carpet transaction; and (6) relating to this trucking business, the defendant maintained a certificate of authority and a registered agent. *Brooks v. State*, 140 Ga. App. 371, 231 S.E.2d 138 (1976) (refusing to be bound by *Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375 (5th Cir. 1980)).

Foreign manufacturers. — When a foreign manufacturer sells its product to a United States distributor knowing that its product will be sold in every state, it should reasonably expect to be haled into court in Georgia for an injury caused in this state by that product. *Showa Denko K.K. v. Pangle*, 202 Ga. App. 245, 414 S.E.2d 658 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 658 (1992).

To permit a foreign manufacturer to insulate itself from foreseeable liability by setting up a separate but wholly-owned out-of-state subsidiary for conducting its business in the United States would deny the notion of fair play to Georgia consumers. *Showa Denko K.K. v. Pangle*, 202 Ga. App. 245, 414 S.E.2d 658 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 658 (1992).

Discussion of jurisdiction over a foreign manufacturer and designer of automobiles. See *Vermeulen v. Renault, U.S.A., Inc.*, 965 F.2d 1014 (11th Cir. 1992), modified on other grounds, 985 F.2d 1534 (11th Cir.), cert. denied, 508 U.S. 907, 113 S. Ct. 2334, 124 L. Ed. 2d 246 (1993).

Hazardous product. — When a manufacturer from another state sells its product, particularly one with a hazardous potential, to a wholesaler customer from Florida knowing that its product will ultimately be sold in that customer's wholesale outlets in Georgia, it should reasonably expect to be haled into court in Georgia for an injury caused in the state by that product. *Continental Research Corp. v. Reeves*, 204 Ga. App. 120, 419 S.E.2d 48 (1992).

In product liability suit, Georgia's exercise of personal jurisdiction over French manufacturer of automobiles was consistent with Georgia law and with the due process clause of the fourteenth amendment since the manufacturer designed the car in question for the Georgia market, advertised that car

in Georgia, established channels for customers in Georgia to seek advice about the car, and maintained a distribution network by which the cars were brought to Georgia, thus establishing minimum contracts with Georgia sufficient to satisfy due process requirements; and since Georgia's exercise of jurisdiction over the manufacturer comported with traditional notions of fair play and substantial justice. *Vermeulen v. Renault U.S.A., Inc.*, 975 F.2d 746 (11th Cir. 1992), revised 985 F.2d 1534 (11th Cir. 1993), cert. denied, 508 U.S. 907, 113 S. Ct. 2334, 124 L. Ed. 2d 246 (1993).

Sufficient contacts found where in-state subsidiaries equivalent to divisions of parent corporation. — Allegations of tortious interference with a contract and of unfair competition were sufficient to invoke long-arm jurisdiction over a foreign corporation which exercised pervasive and tight control over its in-state subsidiaries (accomplished primarily through interlocking directorates, commonality of officers, and necessity of parent review and approval of subsidiary actions), rendering these subsidiaries functionally equivalent to departments or divisions of the parent corporation. *Coca-Cola Co. v. Procter & Gamble Co.*, 595 F. Supp. 304 (N.D. Ga. 1983).

Personal jurisdiction allowed in airline passenger's suit for injuries. — The plaintiff's jurisdictional allegations in the complaint, that the plaintiff purchased a ticket for an out-of-state airline flight, aboard a plane owned and operated by a foreign corporation not licensed to do business in Georgia, from an airline corporation with its headquarters in Georgia, at a ticket office of the state corporation in Georgia, and was subsequently injured while deplaning at the conclusion of the out-of-state flight, were sufficient to support an inference that the foreign corporation had subjected itself to the jurisdiction of courts sitting in Georgia and that the defendant had sufficient contacts with Georgia to satisfy all statutory and constitutional requirements for the exercise of long-arm jurisdiction, which allegations were not overcome by proof that the sale of tickets in Georgia was an isolated and individual event. *Bracewell v. Nicholson Air Servs., Inc.*, 748 F.2d 1499 (11th Cir. 1984).

Modification of foreign divorce decree. — Where, although the non-resident spouse

maintained a marital residence in Georgia and the separation occurred there, the divorce decree was actually entered in Arkansas and the non-resident spouse had not been a resident of Georgia for nearly 20 years and thus had not availed oneself of the privileges of the state of Georgia, the connection with the state was sufficiently attenuated under those facts that due process would be offended by the exercise of jurisdiction over the non-resident spouse's person to modify the domesticated Arkansas divorce decree. *Popple v. Popple*, 257 Ga. 98, 355 S.E.2d 657 (1987).

Claim of fraudulent divorce judgment under federal civil rights statute. — A federal district court could not enjoin enforcement of a state court judgment in a divorce proceeding that had been allegedly obtained by fraud and which therefore allegedly deprived the plaintiff of property without due process of law, in that the plaintiff failed to state a claim under the federal civil rights statute, because the existence of adequate review procedures under Georgia law accorded the plaintiff sufficient due process. *Collins v. Collins*, 597 F. Supp. 33 (N.D. Ga. 1984).

Copyright infringement. — By having licensed their song to a distributor, knowing that the distributor distributed or licensed the song nationally, including within the state of Georgia, defendants have established sufficient minimum contacts with Georgia so that plaintiff's copyright infringement action does not violate due process guarantees. *Payne v. Kristofferson*, 631 F. Supp. 39 (N.D. Ga. 1985), But see, *Gust v. Flint*, 257 Ga. 129, 356 S.E.2d 513 (1987).

The following constituted insufficient minimum contacts between an electrical contractor, a foreign state, and the litigation in question (i.e., breach of contract) to satisfy due process: (1) the contractor was a local businessman whose business was confined primarily to Georgia; (2) the contractor had never been to the other state and had never done any business there; (3) the out-of-state plaintiff, who obtained a default judgment against the contractor in the plaintiff's home state, initiated the contract by calling the contractor's name from a Georgia telephone directory; and (4) the contract was to be performed entirely in Georgia. *Bertke v. Cartledge*, 597 F. Supp. 68 (N.D. Ga. 1984).

Procedure for disclosure to court of child abuse records. — Where defendant assigns error to a trial court's failure to direct the Department of Human Resources to disclose any and all reports, etc., used by or prepared by it in investigating an allegation of child abuse, since the records sought by defendant are confidential and access thereto is prohibited except as provided by O.C.G.A. § 49-5-40 et seq., regarding child abuse and deprivation records, the proper procedure for obtaining access to such records in such cases is to petition the trial court to subpoena the records and conduct an in camera inspection as to whether the records are necessary for determination of an issue before the court and are otherwise admissible under the rules of evidence, which procedure comports with the requirements of due process. Defendant's general Brady motion was inadequate to have properly raised this issue in the court below, and the assertion of error in this regard was meritless. *Davidson v. State*, 183 Ga. App. 557, 359 S.E.2d 372, cert. denied, 183 Ga. App. 905, 359 S.E.2d 372 (1987).

Child's social security benefits included in calculation of sibling's welfare benefits. — The regulations and policy requiring that old age, survivors, and disability insurance benefits received by children must be included in calculating their coresident siblings' eligibility for assistance under the aid to families with dependent children program do not deny them substantive due process by imposing a financial burden on a sibling who bears no financial responsibility for the sibling's brothers or sisters, nor by depriving the sibling of property to which the sibling is entitled, without just compensation in violation of the fifth and fourteenth amendments, nor are the siblings deprived of procedural due process when a sibling is denied property to which the sibling is legally entitled without a hearing. *Oliver v. Ledbetter*, 821 F.2d 1507 (11th Cir. 1987).

Right of foster child to sue for deprivation of civil rights. — A child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring an action under the federal Civil Rights Act for violation of fourteenth amendment rights. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791

Due Process (Cont'd)**17. Jurisdiction** (Cont'd)

(11th Cir. 1987), cert. denied, 489 U.S. 1065, 109 S. Ct. 1337, 103 L. Ed. 2d 808 (1989).

The Georgia statutory foster care scheme created in a two-year old child a legitimate and sufficiently vested claim of entitlement such that deprivation of that entitlement without due process of law imposed on the child a grievous loss, supporting an action for injuries under the federal Civil Rights Act. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), cert. denied, 489 U.S. 1065, 109 S. Ct. 1337, 103 L. Ed. 2d 808 (1989).

18. Entrapment

Proof required. — In a prosecution for conspiracy to possess with intent to distribute the cocaine, the defendant was not entitled to have the jury instructed as to the defense of entrapment where the defendant failed to meet the burden of producing evidence to establish government misconduct. *United States v. Lockett*, 867 F. Supp. 1044 (M.D. Ga. 1994), aff'd, 70 F.3d 126 (11th Cir. 1995).

19. Civil Proceedings

State notice provision. O.C.G.A. § 9-10-2, is rationally related to several legitimate governmental interests and does not violate due process. *Georgia Dep't of Medical Assistance v. Columbia Convalescent Ctr.*, 265 Ga. 638, 458 S.E.2d 635 (1995).

Automatic dismissal provision of O.C.G.A. § 9-2-60 is a reasonable procedural rule and does not violate due process. *Georgia Dep't of Medical Assistance v. Columbia Convalescent Ctr.*, 265 Ga. 638, 458 S.E.2d 635 (1995).

Workers' compensation was the exclusive remedy following the on-the-job death of a Metropolitan Atlanta Rapid Transit Authority worker, as there was no independent substantive due process right to a safe working environment separate and beyond the framework of the workers' compensation laws. *Brooks-Powers v. MARTA*, 260 Ga. App. 390, 579 S.E.2d 802, cert. denied, 540 U.S. 1089, 124 S. Ct. 959, 157 L. Ed. 2d 794 (2003).

Punitive damage due process guideposts are based on the principle that a person

receive fair notice not only of the conduct that will subject the person to punishment, but also of the severity of the penalty that a state may impose; O.C.G.A. § 51-12-5.1(f) informs the public that the \$ 250,000 cap on punitive damages in Georgia does not apply to torts where the defendant acted or failed to act while under the influence of alcohol, drugs, or other judgment altering substances. *Craig v. Holsey*, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

Punitive damages awarded in toxic tort case not excessive. — Jury's award of \$17.5 million in punitive damages against a manufacturer of carbon black that permitted its smokestacks to spew an oily substance onto adjacent properties over a course of years with notice but without effectively remedying the problem was not constitutionally excessive; due process concerns were met because such conduct was exceedingly reprehensible, having damaged non-parties' as well as parties' property and health. *Action Marine, Inc. v. Cont'l Carbon, Inc.*, 481 F.3d 1302 (11th Cir. 2007).

Punitive damage jury award of \$17.5 million against a carbon black manufacturer was not excessive under constitutional due process standards even though it exceeded the U.S. Supreme Court's suggested 4:1 ratio for compensatory-to-punitive damages; the manufacturer had been on notice for years that an oily substance that its smoke stacks were spewing on adjacent properties were causing damage and health problems, yet it thwarted local inspection attempts to stop the practice and evinced a specific intent to cause harm, thus presenting a "race exception" to the U.S. Supreme Court's suggested amount of punitive damages. *Action Marine, Inc. v. Cont'l Carbon, Inc.*, 481 F.3d 1302 (11th Cir. 2007).

Action for termination of parental rights. — Parents' were not denied due process where evidence of psychosexual evaluations and allegations of sexual abuse, molestation, and sexual abuse by the children against other children was admitted in a termination of parental rights trial, despite the petition's lack of allegations of sexual misconduct as: (1) the trial court based its findings of parental inability on the parents' failure to comply with the case plan, especially their continued failure to obtain stable employ-

ment and suitable housing; (2) neither parent was accused of sexually abusing the children; (3) evidence of past sexual abuse was relevant to establish the complex psychological problems of the two older children, to demonstrate the special needs of those children, and to expose the danger that reunification would pose; and (4) as some of the children's psychological problems were attributable to their victimization, evidence as to that issue could not have surprised the parents. In the Interest of M.E.S., 263 Ga. App. 132, 587 S.E.2d 282 (2003).

Hearing on motion for summary judgment. — Where a trial court indicated that it sent a notice of a combined rescheduled hearing on a construction manager's motion for summary judgment and a hearing on the issue of unliquidated damages to a condominium owner, it was presumed that such notice was sent and received in compliance with O.C.G.A. §§ 9-11-5(b) and 9-11-6(d), and the owner's mere contention that it did not receive notice of the hearing was not controlling and did not satisfy its burden of showing that notice was in fact not received; accordingly, the owner's claim that it did not appear at the hearing because notice was insufficient lacked merit, due process was met, and the judgment entered from the hearing was affirmed. Blue Stone Lofts, LLC v. D'Amelio, 268 Ga. App. 355, 601 S.E.2d 719 (2004).

Equal Protection

1. In General

No precise definition of equal protection. — U.S. Const., amend. 14 prohibits a state's denying to any citizen the equal protection of the laws. What satisfies this equality has not been, and probably never can be, precisely defined. Generally it has been said that it only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. *Northwestern Mut. Life Ins. Co. v. Suttles*, 201 Ga. 84, 38 S.E.2d 786 (1946), cert. denied, 329 U.S. 801, 67 S. Ct. 490, 91 L. Ed. 685 (1947).

Amendment not source of substantive rights. — The guarantee of equal protection under the fourteenth amendment is not a source of substantive rights or liberties, but

rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. *Rush v. Johnson*, 565 F. Supp. 856 (N.D. Ga. 1983).

Equal protection and due process not always interchangeable. — The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and the two are not always interchangeable phrases. Discrimination may be so unjustifiable as to be violative of due process. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir.), rev'd on other grounds en banc, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

All persons to be treated alike under like circumstances and conditions. — Constitutional guaranty of "equal protection" requires that all persons be treated alike under like circumstances and conditions. *Dorsey v. City of Atlanta*, 216 Ga. 778, 119 S.E.2d 553 (1961); *G.W. v. State*, 233 Ga. 274, 210 S.E.2d 805 (1974).

No one group entitled to extraordinary benefits or burdens. — Equal protection provisions of state and federal Constitutions are intended to prevent extraordinary benefits or burdens from flowing to any one group. *Bickford v. Nolen*, 240 Ga. 255, 240 S.E.2d 24 (1977).

General rules applying evenhandedly to all persons within jurisdiction comply with equal protection clause. — Equal protection clause of the fourteenth amendment announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

"Equal protection of the laws" includes the right to be tried and punished in the same manner as others accused of crime are tried and punished, the right to protection from injury from the officers having them in charge, and the right of protection by the officers from injury third persons seek to inflict upon them as prisoners. It must appear beyond a reasonable doubt that the officer's dereliction of duties, whether of omission or commission, sprang from a willful intent to deprive the prisoner of the rights. *United States v. Lynch*, 94 F. Supp.

Equal Protection (Cont'd)**1. In General (Cont'd)**

1011 (N.D. Ga. 1950), *aff'd*, 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831, 42 S. Ct. 50, 96 L. Ed. 629 (1951).

No equal justice where kind of trial a person gets depends on amount of money the person has. *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972).

Imposition of harsher sentence upon defendant following appeal and award of new trial not violative of equal protection. — It is not a denial of equal protection of law guaranteed by U.S. Const., amend. 14 of the United States Constitution to impose a harsher sentence upon a defendant following a successful appeal and award of a new trial. *Salisbury v. Grimes*, 223 Ga. 776, 158 S.E.2d 412 (1967).

Comparison of state and federal equal protection clauses. — The protection of the equal protection clause in the 1983 Georgia Constitution and the United States Constitution is coextensive; yet this court may interpret the equal protection clause in the Georgia Constitution to offer greater rights than the federal equal protection clause as interpreted by the U.S. Supreme Court. *Grissom v. Gleason*, 262 Ga. 374, 418 S.E.2d 27 (1992).

Standards applicable to states also applicable to federal government. — All standards of equal protection applicable to the states through U.S. Const., amend. 14 are also applicable to the federal government through U.S. Const., amend. 5. *Morris v. Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972), *vacated on other grounds*, 409 U.S. 464, 93 S. Ct. 629, 34 L. Ed. 2d 647 (1973).

Criteria for establishing equal protection violation by state action. — In order to establish a violation of the equal protection clause based upon the *ad hoc* action of state officials, a plaintiff must demonstrate that the action was prompted by some racial, or perhaps otherwise class-based, invidiously discriminatory animus. *Cook v. Ashmore*, 579 F. Supp. 78 (N.D. Ballard v. Blount, 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd*, 734 F.2d 1480 (11th Cir.), *cert. denied*, 469 U.S. 1086, 105 S. Ct. 590, 83 L. Ed. 2d 700 (1984); *Cook v. Ashmore*, 579 F. Supp. 78 (N.D. Ga. 1984).

A plaintiff is not deprived of equal protection of the laws unless a defendant acts in a

way that discriminates against a class or otherwise, through unequal treatment, invidiously discriminates against the plaintiff. *Terrell v. Shope*, 687 F. Supp. 579 (N.D. Ga. 1988), *aff'd*, 911 F.2d 741 (11th Cir. 1990).

Equal protection clause does not require absolute equality. *Breedlove v. Suttles*, 302 U.S. 277, 58 S. Ct. 205, 82 L. Ed. 252 (1937), *overruled on other grounds*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966).

Equal protection does not demand exact equality, in any event. *Savannah Elec. & Power Co. v. Georgia Pub. Serv. Comm'n*, 239 Ga. 156, 236 S.E.2d 87 (1977).

Equal protection applicable to privileges conferred and liabilities imposed. — The guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed. *Chatterton v. Dutton*, 223 Ga. 243, 154 S.E.2d 213, *cert. denied*, 389 U.S. 914, 88 S. Ct. 247, 19 L. Ed. 2d 266 (1967).

No denial of constitutionally guaranteed right where mere privilege involved. — Where no right, but a mere privilege, is involved, one is not in a position to assert the denial of a right guaranteed by the state or federal Constitutions. *Goldberg v. Mulherin*, 226 Ga. 785, 177 S.E.2d 667 (1970).

Private conduct abridging individual rights not concern of equal protection clause. — Private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it. *Walker v. State*, 220 Ga. 415, 139 S.E.2d 278 (1964), *rev'd on other grounds*, 381 U.S. 355, 85 S. Ct. 1557, 14 L. Ed. 2d 681 (1965).

While U.S. Const., amend. 14 guarantees equal protection of the laws, it does not create any new rights in itself. *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd on other grounds*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057, 95 S. Ct. 2680, 45 L. Ed. 2d 709 (1975).

Congressional power to legislate in furtherance of elimination of racial discrimination is derived from U.S. Const., amend. 13, the power over interstate commerce, the power under U.S. Const., amend. 14, and

the power under U.S. Const., amend. 15. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Selective enforcement of statute where discrimination is invidious and purposeful offends equal protection; however, this rule does not ordinarily apply to the enforcement of statutes by administrative agencies. *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973).

Discriminatory application of law fair and impartial on its face constitutes denial of equal justice. — Though a law itself is fair on its face and impartial in appearance, if it is applied and administered by public authority with an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Searcy v. Williams*, 656 F.2d 1003 (5th Cir. 1981), aff'd, 455 U.S. 984, 102 S. Ct. 1605, 71 L. Ed. 2d 844 (1982).

Uneven or erroneous application of an otherwise valid law or regulation constitutes denial of equal protection only if it represents intentional or purposeful discrimination. *Gilbert v. West Ga. Medical Ctr. Auth.*, 629 F. Supp. 738 (N.D. Ga. 1985), aff'd, 784 F.2d 402 (11th Cir. 1986).

A single invidiously discriminatory governmental act is not necessarily immunized by the absence of such discrimination in the making of other comparable decisions. *Bleakley v. Jekyll Island-State Park Auth.*, 536 F. Supp. 236 (S.D. Ga. 1982).

When discriminatory intent inferred from foreseeable discriminatory consequences. — When official actions challenged as discriminatory include acts and decisions that do not have a firm basis in well-accepted and historically sound nondiscriminatory social policy, discriminatory intent may be inferred from fact that those acts had foreseeable discriminatory consequences. *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981).

School did not have duty of protection. — Summer school student's voluntary school attendance did not create a custodial relationship between the student and the school sufficient to give rise to a constitutional duty of protection. *Wright v. Lovin*, 32 F.3d 538 (11th Cir. 1994).

Insufficient evidence to prove disability discrimination. — Since the defendants were not even aware that the plaintiff's eye had been removed until after the plaintiff had been terminated from employment, there is absolutely no evidence from which a jury could find that the defendants intended to discriminate against the plaintiff on the basis of the plaintiff's disability. Thus, plaintiff's equal protection claim failed. *Smith v. Upson County*, 859 F. Supp. 1504 (M.D. Ga. 1994), aff'd, 56 F.3d 1392 (11th Cir. 1995).

Availability to all on equal terms of state or municipal employment opportunities. — Public employment opportunities afforded by state or municipal government must be made available to all on equal terms. *Johnson v. City of Albany*, 413 F. Supp. 782 (M.D. Ga. 1976).

No established right to be free from retaliation. — In an action by a county public services officer against police officials alleging that defendants violated the officer's equal protection rights by discriminating against the officer on the basis of sex and by retaliating against the officer for complaints of discrimination, defendants were entitled to qualified immunity from the latter claim because no established right exists under the equal protection clause to be free from retaliation. *Ratliff v. DeKalb County*, 62 F.3d 338 (11th Cir. 1995).

Immunity granted employers in workers' compensation act does not violate the due process and equal protection provisions of the state and federal constitutions. *Georgia Dep't of Human Resources v. Joseph Campbell Co.*, 261 Ga. 822, 411 S.E.2d 871 (1992).

Georgia "Anti-Mask Act", which proscribes intimidating or threatening mask-wearing behavior, does not violate the constitutional rights of freedom of speech, freedom of association, and equal protection of the law. *State v. Miller*, 260 Ga. 669, 398 S.E.2d 547 (1990).

Provisions of the Tort Reform Act (O.C.G.A. § 51-12-5.1), relating to punitive damages, violated the due process and equal protection clauses of the federal and state constitutions, violated the excessive fines provisions of both constitutions, and violated the double jeopardy provision of the fifth amendment to the federal constitution. *McBride v. GMC*, 737 F. Supp. 1563 (M.D. Ga. 1990).

Equal Protection (Cont'd)**1. In General (Cont'd)**

Olympic Sign Ordinance. — The Olympic Sign Ordinance, which creates a five-member committee charged with recommending "Concentrated Sign Districts" within the City of Atlanta and empowers the committee to grant permits to those desiring to erect signs pursuant to that ordinance, which permits only those signs which in some way promote an Olympic-related event, is unconstitutional in that it violates the first and fourteenth amendments of the U.S. Constitution. *Outdoor Sys. v. City of Atlanta*, 885 F. Supp. 1572 (N.D. Ga. 1995).

1994 Sign Ordinance. — The 1994 Sign Ordinance, a comprehensive regulatory framework for the posting of all signs within the City of Atlanta, does not violate equal protection or free speech. *Outdoor Sys. v. City of Atlanta*, 885 F. Supp. 1572 (N.D. Ga. 1995).

Ordinance prohibiting pinball machine business not violative of equal protection. — Ordinance prohibiting the owning, operating and maintaining of pinball machines and the like was not violative of the equal protection clauses of the federal and state Constitutions, on the grounds that it was discriminatory and not impartial, in that other novelty games and games of skill were not included in said ordinance. *Woodward v. City of Lithonia*, 191 Ga. 234, 11 S.E.2d 476 (1940).

Adult entertainment restricted. — Even though the fundamental right of free expression is involved, a city may classify and regulate adult entertainment establishments differently from other places of entertainment. *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993).

City ordinance prohibiting nude dancing. — Municipal ordinance prohibiting nude dancing in licensed drinking establishments made a constitutionally valid distinction, non-violative of the equal protection clause, between mainstream and non-mainstream performances, which was rationally related to the city's legitimate governmental interest in health, safety and welfare. *Top Shelf, Inc. v. Mayor & Aldermen*, 840 F. Supp. 903 (S.D. Ga. 1993).

Zoning ordinance which changed rear-yard setback for properties zoned for multi-

family use after the date the ordinance was passed, but which retained a prior and more restrictive setback requirement for properties zoned prior to that date, was arbitrary and unreasonable and, thus, violated the equal protection clauses of the United States and Georgia Constitutions. *Bailey Inv. Co. v. Augusta-Richmond County Bd. of Zoning Appeals*, 256 Ga. 186, 345 S.E.2d 596 (1986).

Finality of action required for equal protection challenges. — Landowner's equal protection claims contesting county officials' resolutions in zoning and land use matters were not ripe for review where landowners failed to show that particular decisions being challenged had been finally applied to the property at issue. *James Emory, Inc. v. Twiggs County*, 883 F. Supp. 1546 (M.D. Ga. 1995).

Approval of landfill permit. — Federal district court properly rejected property owners' equal protection claim regarding a landfill permit in an area occupied by 3,367 black residents and 2,149 white residents, where the owners failed to demonstrate any discriminatory intent in approval of the permit. *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989).

An allegation of uneven treatment in a cleanup operation on plaintiff's property was insufficient to constitute an equal protection violation since plaintiffs are not members of a suspect class and Congress has given the Environmental Protection Agency discretionary authority over how to conduct a cleanup operation. *Amtreco, Inc. v. O.H. Materials, Inc.*, 802 F. Supp. 440 (M.D. Ga. 1992).

County nuisance immunity. — The state's decision to protect counties from nuisance claims by virtue of the immunity provision in O.C.G.A. § 36-1-4, while allowing for such claims against municipalities, does not violate the equal protection clause, as the state's protection of counties is rationally related to the legitimate state of purpose of preserving the resources of a division of the state government. *Marion v. DeKalb County*, 821 F. Supp. 685 (N.D. Ga. 1993).

Nonresident motorist may be sued in any county. — It is not violation of equal protection clause to allow nonresident motorist to be sued in any county of the state at the election of the plaintiff. *Lloyd Adams, Inc. v. Liberty Mut. Ins. Co.*, 190 Ga. 633, 10 S.E.2d 46 (1940).

Statute denying membership to county board of education to employees of another county. — Appellant not denied equal protection by statute denying membership to county board of education to employees of another county board of education, but not to employees of the same county board of education, since state's common law rule on conflicts of interest clearly prohibits the latter situation. *Culpepper v. Veal*, 246 Ga. 563, 272 S.E.2d 253 (1980).

City's policies of using wrist and ankle cuffs on pre-trial detainees brought to a hospital for emergency treatment without prior classification has a rational basis. *Young v. City of Atlanta*, 631 F. Supp. 1498 (N.D. Ga. 1986).

Immunity of parole board members. — A prison inmate may challenge the denial of pardon or parole on equal protection grounds and, although the individual members of the parole board are entitled to absolute quasi-judicial immunity from a suit for damages, to the extent that the inmate is seeking declaratory and injunctive relief, the shield of absolute immunity is inapplicable. *Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307 (11th Cir. 1988).

Pension Act providing for forfeiture during certain later employment not violative of equal protection. — Pension Act making no differentiation or distinction as to any employee, but providing that if any employee who has been pensioned accepts employment by a governmental agency, or accepts other employment and receives as compensation an amount equivalent to, or greater than the pensioner's former salary, said pensioner shall forfeit the pension during the time of said employment does not violate the equal protection clauses of the state and federal Constitutions. *Franklin v. Mayor of Savannah*, 199 Ga. 426, 34 S.E.2d 506 (1945).

Public Service Commission order permitting rate increase to be effected on different dates for different customers does not violate equal protection guarantees of the state and federal Constitutions because to apply a new rate at a particular point in time would require the utility to read all its meters at that particular point of time which would be unreasonable, if not impossible, to do, and even if done over a short period of time, would result in some customers' being billed

for power used at a lesser rate than others. *Moore v. Georgia Pub. Serv. Comm'n*, 242 Ga. 182, 249 S.E.2d 549 (1978).

Subsidization of bus passengers not unfairly or illegally discriminatory against county resident, infrequent users, or nonusers. — The subsidization of bus passengers does not unfairly and illegally discriminate against residents of the county who do not regularly, or do not at any time, use the system and who will subsidize the transportation expenses of the remaining residents and nonresidents of the county who use the system through their payment of the sales and use tax. *Camp v. Metropolitan Atlanta Rapid Transit Auth.*, 229 Ga. 35, 189 S.E.2d 56 (1972).

Governing authority's refusal to issue alcoholic beverage license when applicant meets standards denies equal protection. — If the governing authority of the city or county decides to permit the sale of malt beverages or beer, it shall adopt an ordinance setting forth the prescribed standards for the issuance of a license. When an applicant for a license meets these standards, a refusal by the governing authority to issue the license constitutes a denial of equal protection, entitling the applicant to a writ of mandamus. *Grandpa's Store, Inc. v. City of Norcross*, 247 Ga. 350, 275 S.E.2d 59 (1981).

Where denial of application for operator of taxicabs violated equal protection. — Petitioner alleged compliance with all the requirements of city ordinance for the operation of taxicabs and denial of application for permit to operate taxicabs though no objection was made that applicant had not complied with the requirements of the ordinance. Petitioner further alleged that such denial was without legal justification or excuse, was arbitrary, illegal and capricious and an abuse of discretion, depriving the petitioner of the equal protection of the law, and that because of the denial of the permit the petitioner is deprived of the right to pursue the petitioner's chosen livelihood and suffers pecuniary loss for which the petitioner cannot be compensated in damages. This states a cause of action for mandamus to compel city officials to issue permit. *McWhorter v. Settle*, 202 Ga. 334, 43 S.E.2d 247 (1947).

Rape statute (see O.C.G.A. § 16-6-1) is not violative of equal protection clause of

Equal Protection (Cont'd)**1. In General (Cont'd)**

U.S. Const., amend. 14 to the United States Constitution. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979).

Predicate offense allowing for easier conviction does not violate equal protection. — Trial court did not err in denying defendant's motion in arrest of judgment, as the indictment filed against defendant arising out of the offense of first-degree homicide by vehicle, which contained a predicate offense making it easier to convict defendant because defendant was under 21-years-old and had a blood alcohol concentration of .02 or more at the time of the accident that killed defendant's passenger, did not violate defendant's equal protection rights under the state and federal constitutions because the predicate offense did not operate to disadvantage a suspect class or interfere with a fundamental right; rather, it was rationally related to the state's legitimate purpose in deterring younger, more inexperienced drivers from drinking and driving. *David v. State*, 261 Ga. App. 468, 583 S.E.2d 135 (2003).

Charitable immunity doctrine not unconstitutional. — The charitable immunity doctrine does not constitute a violation of the equal protection or due process clauses of the federal or state constitutions. *Ponder v. Fulton-DeKalb Hosp. Auth.*, 256 Ga. 833, 353 S.E.2d 515, cert. denied, 484 U.S. 863, 108 S. Ct. 181, 98 L. Ed. 2d 134 (1987), *aff'd*, 384 S.E.2d 205 (1989).

Objective qualification for officeholder not violative of equal protection. — Former Code 1933, § 24-2111a (see O.C.G.A. § 15-7-21) regarding the legislatively created office of judge and solicitor of state courts of counties states objective qualification that one must have been engaged in the active practice of law for three years before taking office. This does not deny equal protection of law; it simply limits eligibility to hold office to a class of persons with a quantum of experience similar to that required under the state Constitution for the similar position of a district attorney. *Nathan v. Smith*, 230 Ga. 612, 198 S.E.2d 509 (1973).

Imprisonment of indigent for failure to pay fine is unconstitutional, where state legislatively adopted "fines only" policy; the

equal protection clause of U.S. Const., amend. 14 forbids conversion of an indigent's sentence of a fine into a prison term. *Hutchinson v. Jones*, 477 F. Supp. 51 (N.D. Ga. 1979).

Certain class of convicted defendants cannot be imprisoned beyond statutory maximum because indigent. — Though a state has considerable latitude in fixing the punishment for state crimes and may impose alternative sanctions, it may not under the equal protection clause subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency. *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972).

Person who has means to pay fine but refuses or neglects to do so may be jailed, but "it is a denial to equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it." *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972).

Defendant may not be kept in prison longer than statutory maximum simply for failing to pay fine and court costs immediately because this violates the equal protection clause by visiting different consequences on two categories of persons. *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972).

Providing transcript of prior proceedings to indigent defendant. — Indigent defendant must be provided with transcript of prior proceedings when needed for effective defense or appeal, as a matter of equal protection. *Walker v. State*, 156 Ga. App. 478, 274 S.E.2d 680 (1980).

O.C.G.A. § 17-10-15(b) does not violate the right to privacy under the due process clause of U.S. Const., amend. 14 or the state or federal equal protection clauses. *Adams v. State*, 269 Ga. 405, 498 S.E.2d 268 (1998).

Invidious discrimination based on wealth or indigency. — Prohibition of equal protection clause extends to instances of invidious discrimination based upon wealth or indigency. *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972).

Discrimination between rich and poor where merits of indigent's appeal of right decided without counsel. — Where the merits of the one and only appeal an indigent

has as of right are decided without benefit of counsel in a state criminal case, there has been a discrimination between the rich and the poor which violates U.S. Const., amend. 14. *Chenoweth v. Smith*, 225 Ga. 572, 170 S.E.2d 235 (1969).

Providing "adequate substitute" for deprivation based on wealth. — In every case involving discrimination based on wealth, had state provided some "adequate substitute" for the resulting deprivation, there would have been no denial of equal protection. *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979).

Classification by General Assembly of procedural rules based upon amount in controversy does not deny poor persons equal protection of the laws under the Georgia and federal Constitutions. *Sellers v. Home Furnishing Co.*, 235 Ga. 831, 222 S.E.2d 34 (1976).

Vindictive damages provision not violative of equal protection. — Code 1933, § 105-2003 (see O.C.G.A. § 51-12-6) authorizing the jury to consider the "worldly circumstances of the parties" in tort actions where "the entire injury is to the peace, happiness, or feelings of the plaintiff," does not violate the equal protection clause of U.S. Const., amend. 14. *Wilson v. McLendon*, 225 Ga. 119, 166 S.E.2d 345 (1969).

Interspousal and intra-family doctrine of immunity not violative of equal protection or due process. — The interspousal and intra-family doctrine of immunity, which bars tort actions between family members is substantially related to the legitimate state interest of promoting the preservation of the "family unit" for the good of the society in general, does not violate due process and equal protection of the Constitution. *Jones v. Swett*, 244 Ga. 715, 261 S.E.2d 610 (1979).

County board must implement state findings as to handicapped child's education. — A county board of education violates federal law by refusing to act on the findings of a state hearing officer that a handicapped child cannot receive an appropriate education in public school. *Christopher N. v. McDaniel*, 569 F. Supp. 291 (N.D. Ga. 1983).

Former Code 1933, § 74-9902 (see O.C.G.A. § 19-10-1) does not violate equal protection principles. — Former Code 1933, § 74-9902 (see O.C.G.A. § 19-10-1) does not violate the constitutional requirement that

the state's administration of its laws must be impartial and evenhanded. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Enforcement of contractual uninsured motorist provision. — Upholding an uninsured motorist policy exclusion does not deny equal protection under the federal constitution to those injured by self-insureds, where there was not a situation of uneven or unequal application of the Texas statutory scheme of uninsured/underinsured motorist coverage, but rather the enforcement of a contractual provision not shown to be offensive to Texas law. *Nationwide Gen. Ins. Co. v. Parnham*, 182 Ga. App. 823, 357 S.E.2d 139 (1987).

Manner of enforcement of sodomy law. — Where the defendant contended that the defendant had been denied equal protection of the law because officials actually enforce the sodomy law only against offending homosexuals and not against others who violate the sodomy law, the defendant had not proved the contention, as the manner of enforcement of the sodomy law was not established in the record. *Gordon v. State*, 257 Ga. 439, 360 S.E.2d 253 (1987).

Punitive damage awards. — O.C.G.A. § 51-12-5.1(e)(2), requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury, does not violate the equal protection clauses of the United States and Georgia Constitutions. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993); *State v. Moseley*, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994).

Year's support law (see O.C.G.A. § 53-5-1 et seq.) is not unconstitutional, since a 1979 amendment to that chapter removed gender classification for year's support eligibility, and since the year's support statute when first adopted was not violative of the Constitution under court interpretations of that period. *Adams v. Adams*, 249 Ga. 477, 291 S.E.2d 518 (1982).

An award entered after the corrective 1979 amendment to O.C.G.A. § 53-5-1, but from an estate of a decedent who died before the amendment, is valid; because the right was constitutionally vested under the original statute and there is no constitu-

Equal Protection (Cont'd)**1. In General (Cont'd)**

tional bar to the right being pursued under the amended statute. *Lawrence v. Lawrence*, 254 Ga. 692, 333 S.E.2d 610 (1985).

Proceeding to legitimate child. — O.C.G.A. § 19-7-22, which allows fathers, but not mothers, to petition for legitimation of a child born out of wedlock, does not violate constitutional guarantees of due process and equal protection. *Pruitt v. Lindsey*, 261 Ga. 540, 407 S.E.2d 750 (1991).

Nonresident aliens. — The equal protection clause did not extend to nonresident aliens; therefore, the State Board of Workers' Compensation correctly awarded death benefits under former O.C.G.A. § 34-9-265(b)(5), which limited compensation for dependents of nonresident aliens to \$1,000, even though resident survivors would have been treated more favorably. *Barge-Wagener Constr. Co. v. Morales*, 263 Ga. 190, 429 S.E.2d 671 (1993).

Guardianship. — Former O.C.G.A. § 29-6-11(c), prohibiting a guardian appointed to allow a ward to receive Department of Veterans Affairs benefits from receiving a bequest under the ward's will, did not violate the equal protection clause of U.S. Const., amend. 14 because it was rationally related to the legitimate state interest in regulating guardianships created to allow a ward to receive those benefits. *Cross v. Stokes*, 275 Ga. 872, 572 S.E.2d 538 (2002).

Survivors benefits under federal law. — As applied to this case, the incorporation by the federal Social Security Act, 42 U.S.C. § 402(d), of the Georgia intestacy scheme to require a child seeking survivors benefits to establish paternity within two and one-half years violated equal protection. *Daniels ex rel. Daniels v. Sullivan*, 979 F.2d 1516 (11th Cir. 1992).

Wrongful death statute does not violate equal protection clause of U.S. Const., amend. 14 to the Constitution of the United States, because in no action ex delicto in this state, save when predicated on this statute can a plaintiff recover in a case based on simple negligence more than actual compensation. In the exercise of the state's broad police power the Legislature can create a measure of damages for homicides resulting from ordinary negligence, as well

as for homicide resulting from wanton, willful, or criminal negligence. *Western & A.R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932).

Property valuation by method other than standard method. — The uniformity clause of the state constitution and the equal protection clauses of the state and federal Constitutions were not offended by a county's valuation of a motel by a method other than the standard method for motels, where the motel property was not actually being operated as a motel and there was no income stream from which to calculate room revenue for use with the standard gross income multiplier method. *Coastal Equities, Inc. v. Chatham County Bd. of Tax Assessors*, 201 Ga. App. 571, 411 S.E.2d 540, cert. denied, 201 Ga. App. 903, 411 S.E.2d 540 (1991).

Denial of liquor license on arbitrary grounds constitutes violation of equal protection for which a writ of mandamus will lie. *Hernandez v. Board of Comm'rs*, 242 Ga. 76, 247 S.E.2d 870 (1978).

Arbitrary refusal to grant license or permit to group when others obtain permits under similar circumstances constitutes denial of equal protection of the law. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Rogers v. Mayor of Atlanta*, 110 Ga. App. 114, 137 S.E.2d 668 (1964).

Traffic consideration was rational basis for denying conditional use permit. — A city's rationale for granting a conditional use permit to a school, but not allowing it to build a 1500-seat football stadium, did not violate the school's equal protection rights, as evidence that the school's proposed stadium would exacerbate an already existing traffic problem in the area was a rational basis for the denial of that part of the permit; moreover, even if the school had shown it was similarly situated with other property owners whose applications were granted, it failed to show that the city's decision was not rationally related to a legitimate government interest. *City of Roswell v. Fellowship Christian Sch., Inc.*, 281 Ga. 767, 642 S.E.2d 824 (2007).

City ordinance prohibiting the sale of alcohol. — City ordinance prohibiting the sale of alcohol at an erotic dance establishment was constitutional. The adult entertainment establishment ordinance was narrowly drawn to promote the city's interest in combating

the secondary effects of adult entertainment establishments. *Gravelly v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993).

Equal protection denied when liquor license applicant is refused license though meeting prescribed standards. — When an applicant for an alcoholic beverage license has met the prescribed standards for obtaining such a license, a refusal by the municipal authorities to issue the license constitutes a denial of equal protection, entitling the applicant to a writ of mandamus in state court. *City of Atlanta v. Hill*, 238 Ga. 413, 233 S.E.2d 193 (1977); *Hernandez v. Board of Comm'rs*, 242 Ga. 76, 247 S.E.2d 870 (1978).

Fact that County A authorizes sale of liquor while County B does not, does not mean that County B has been denied equal protection of the laws. *Sims v. Town of Baldwin*, 249 Ga. 293, 290 S.E.2d 433, appeal dismissed, 459 U.S. 802, 103 S. Ct. 25, 74 L. Ed. 2d 40 (1982).

Fact that liquor is not sold in unincorporated areas of county does not, without more, illustrate a violation of equal protection where all liquor sold in county will be uniformly taxed under local amendment. *Sims v. Town of Baldwin*, 249 Ga. 293, 290 S.E.2d 433, appeal dismissed, 459 U.S. 802, 103 S. Ct. 25, 74 L. Ed. 2d 40 (1982).

Granting of beer and wine license applications based on public opposition. — Whether pursuant to specific statute or de facto practice, the granting of beer and wine license applications based on public opposition is an unconstitutional due process and equal protection violation. *McCullum v. City of Powder Springs*, 720 F. Supp. 985 (N.D. Ga. 1989).

Former Code 1933, § 79A-811.2 (see O.C.G.A. § 16-13-32.1) is not a bill of attainder and does not deny "head shops" equal protection of the law. *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

Prisoner and similarly situated, classified inmates with no opportunity for conjugal visits not denied equal protection. — A prisoner is not denied the equal protection of the law where the prisoner and other similarly situated and classified inmates have been afforded no opportunity for conjugal visits. *Polakoff v. Henderson*, 370 F. Supp. 690 (N.D. Ga. 1973), *aff'd*, 488 F.2d 977 (5th Cir. 1974).

Probationary guideline departure. — Because plaintiff did not make a statistical

showing sufficient to provide the "exceptionally clear proof" of either racial or gender discrimination that is required to raise an inference of discrimination, summary judgment for defendant state parole board was appropriate in an equal protection claim contesting a guideline departure. *Greene v. Georgia Pardons & Parole Bd.*, 807 F. Supp. 748 (N.D. Ga. 1992).

Prison regulations restricting media access to the prison to responsible persons employed by and responsible to recognized media organizations did not violate the equal protection rights of newsmen not employed by a media organization, since the regulation was rationally related to the need to maintain order and security in the prison. *Jersawitz v. Hanberry*, 783 F.2d 1532 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S. Ct. 272, 93 L. Ed. 2d 249 (1986).

Consumer with standing to challenge rate schedule discriminating against consumer in violation of equal protection. — A consumer has standing to challenge a rate schedule on the ground that the schedule discriminates against the consumer or a class of consumers in violation of the equal protection guarantees of the state and federal Constitutions. *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

Present customers and future customers of a utility do not form discrete classes for purposes of equal protection analysis because customers are a constantly fluctuating group. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

State not prevented from prescribing reasonable, appropriate condition precedent to bring specified kind of suit. — U.S. Const., amend. 14 does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object. *State v. Sanks*, 225 Ga. 88, 166 S.E.2d 19 (1969), appeal dismissed, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 741 (1971).

Burden on party complaining of discrimination to show injury. — Discrimination in the grant of favors is not a denial of the equal protection of the law. In order to attack the constitutionality of a statute under the equal protection clause of U.S. Const.,

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amend. 14 of the Constitution, on the ground of discrimination, the complaining party must show injury by the alleged discrimination. *Mulling v. Houlihan*, 205 Ga. 735, 55 S.E.2d 150 (1949), cert. denied, 338 U.S. 948, 70 S. Ct. 86, 94 L. Ed. 585 (1950).

Requiring graduates of unapproved law schools to pass bar examination within five years in order to be admitted to the state bar, while imposing no similar time limitations on graduates of approved law schools, does not violate the equal protection clause, since the distinction is rationally related to the legitimate goal of ensuring a competent bar. *Cline v. Supreme Court*, 781 F.2d 1541 (11th Cir. 1986).

Specialty training for physicians. — Public hospital bylaw requiring specific postgraduate specialty training or residency in order for physicians to be eligible for admission to the medical staff did not transgress the equal protection or due process rights of osteopathic physicians. *Silverstein v. Gwinnett Hosp. Auth.*, 861 F.2d 1560 (11th Cir. 1988).

City ordinance requiring dress code. — City ordinance imposing dress code on taxicab drivers was rationally related to a legitimate government interest: the need to promote a safe image to visitors from out-of-town. *Bah v. City of Atlanta*, 103 F.3d 964 (11th Cir. 1997).

State's prohibition against medicaid reimbursement for experimental surgery, including transsexual surgery, is rationally related to its legitimate governmental interest in protecting the public health. *Rush v. Johnson*, 565 F. Supp. 856 (N.D. Ga. 1983).

Lack of an opportunity for a defendant to appear before a grand jury does not violate equal protection, even though statutes give certain public officials such right, since there is a rational basis for the distinction. *Lewis v. State*, 255 Ga. 101, 335 S.E.2d 560 (1985).

Federal court cannot review Georgia appellate judgment. — A federal district court is without jurisdiction under 42 U.S.C. § 1983 to review a final judgment of the Georgia Court of Appeals on the ground that it denied the plaintiff equal protection under the law as guaranteed by the fourteenth amendment. *National Carloading*

Corp. v. Shulman, 570 F. Supp. 3 (N.D. Ga. 1983).

Wrongful denial of parole. — Prison inmate's in forma pauperis complaint that the inmate was denied parole because the inmate pursued litigation against prison officers on account of the inmate's sibling's allegedly wrongful death stated an equal protection claim, whether the inmate was the named plaintiff in the litigation or merely enabled others to pursue litigation by the inmate's acts. *Clark v. Georgia Pardons & Paroles Bd.*, 915 F.2d 636 (11th Cir. 1990).

2. Statutory Classifications

State's right and power to classify subjects of legislation. — It is not the purpose of U.S. Const., amend. 14, in the equal protection clause, to take from the states the right and power to classify the subjects of legislation. *McCullers v. Williamson*, 221 Ga. 358, 144 S.E.2d 911 (1965).

Legislation challenged under equal protection clause is subjected to standard of rationality. The state's goal need only be reasonable, and the statute need not be a perfect method to achieve the goal. If the court cannot conceive of a rational viewpoint that justifies the statute, it will stand. When legislation affects certain fundamental liberties and rights, however, it is subjected to a stricter constitutional test: only a compelling state interest will suffice. *Williamson v. Fortson*, 376 F. Supp. 1300 (N.D. Ga. 1974).

Tests for examining state policy or statute. — Any state policy, rule or statute creating a classification which is attacked as violating the equal protection clause must be examined against either of two constitutional tests: (1) that the classification is rationally related to a legitimate state end; or (2) that the classification is justified by a compelling state interest. *Houston v. Prosser*, 361 F. Supp. 295 (N.D. Ga. 1973).

Standing to seek to set aside state statute as unconstitutional. — Where a class including the complaining party is not prejudiced by the alleged discrimination, that person will not be heard to attack the constitutionality of a statute under the "equal protection" clause of U.S. Const., amend. 14 on the ground that it discriminates and denies equal protection between other classes. *Coo-*

per Co. v. State, 187 Ga. 497, 1 S.E.2d 436 (1939).

One who seeks to set aside a state statute as repugnant to the federal Constitution must show that one is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures that person. *Bryant v. Prior Tire Co.*, 230 Ga. 137, 196 S.E.2d 14 (1973).

Standing to challenge administration of municipal programs. — City employees did not have standing to make equal protection challenges against the administration of retirement incentive programs where they retired prior to adoption of the programs or at a time when the administration of a particular program did not affect their rights. *Smith v. City of LaGrange*, 218 Ga. App. 394, 461 S.E.2d 550 (1995).

Legislative classification allowed only classification with direct, real relation to legislative object or purpose. — The equal protection clause allows classification by legislation when and only when the basis of such classification bears a direct and real relation to the object or purpose of the legislation. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

Rational relationship test. — Although classification legislation, per se, does not violate U.S. Const., amend. 14, the line that is drawn must be rational. Furthermore, the distinctions that result from the classification legislation must bear some relevance to the purpose for which the legislation was enacted. *Jinks v. Mays*, 332 F. Supp. 254 (N.D. Ga. 1971), aff'd in part and remanded in part, 464 F.2d 1223 (5th Cir. 1972).

Where there is no suggestion that right asserted is fundamental or that suspect classification exists in the case, the standard of review is that the classification not be arbitrary or unreasonable, and that a fair and substantial relationship exist between the classification and the purpose of the law. *Bickford v. Nolen*, 240 Ga. 255, 240 S.E.2d 24 (1977).

Where no fundamental right is infringed upon or no suspect class is present, the appropriate constitutional test is rational relationship. Under this test, the classification must be examined to determine whether it is rationally related to a legitimate state purpose. *Street v. Cobb County Sch. Dist.*, 520 F. Supp. 1170 (N.D. Ga. 1981).

Only when attempted classification is arbitrary and unreasonable can statute be declared beyond legislative authority. *McCullers v. Williamson*, 221 Ga. 358, 144 S.E.2d 911 (1965).

Importance of service performed by state does not determine whether it must be regarded as fundamental for equal protection purposes. *Chatham v. Jackson*, 613 F.2d 73 (5th Cir. 1980).

Classification where distinction based on valid state interests upheld. — The constitutional guaranty of equal protection requires that all persons shall be treated alike under like circumstances and conditions; however, it does not prevent a reasonable classification relating to the purpose of the legislation. *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

The equal protection clause of U.S. Const., amend. 14 requires that all persons be treated alike under similar circumstances and conditions. It does not, however, prevent classification if the distinction is based on valid state interests. *Quilloin v. Walcott*, 238 Ga. 230, 232 S.E.2d 246 (1977), aff'd, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

Filing a legal malpractice claim. — Trial court did not treat similarly situated individuals differently, based on its application of O.C.G.A. § 9-11-9.1(b) (now (e)), because whether it was a plaintiff filing a legal malpractice claim or, as here, a defendant filing a counterclaim more than ten days before the expiration of the statute of limitations, the party would have been required to file an expert's affidavit contemporaneously with the claim and would not be entitled to the 45-day extension period of O.C.G.A. § 9-11-9.1(b) (now (e)); accordingly, there was no equal protection violation under U.S. Const., amend. 14 in the dismissal of defendant's counterclaim for failure to file the affidavit in a timely manner. *Landau v. Davis Law Group, P.C.*, 269 Ga. App. 904, 605 S.E.2d 461 (2004).

Contract bidding process. — Bidding insurer's summary judgment motion was properly granted as to its equal protection claim against a county as the county did not exercise arbitrary power but acted rationally and reasonably in rejecting all bids across the board after it was discovered that a consultant lacked a counselor's license under

Equal Protection (Cont'd)**2. Statutory Classifications (Cont'd)**

O.C.G.A. §§ 33-23-1.1 and 33-23-4; because of the taint to the process, all bids were rejected, no classification was created at all, and all similarly situated persons were treated alike. *Benefit Support, Inc. v. Hall County*, 281 Ga. App. 825, 637 S.E.2d 763 (2006), cert. denied, 2007 Ga. LEXIS 214 (Ga. 2007).

Application of “compelling state interest” test where impingement of fundamental interest or suspect class. — In determining if a state policy, rule or statute is in violation of this section the “compelling state interest test” is applied where there has been an impingement of a fundamental interest by the rule, policy or statute, or where the state statute, rule or policy creates a classification which is based upon criteria that are inherently “suspect” in a constitutional sense. *Houston v. Prosser*, 361 F. Supp. 295 (N.D. Ga. 1973).

Focus is reasonableness of means used to accomplish objective not whether superior means available. — The focus of the rational relationship test is not whether the state has superior means available to accomplish its objectives, but whether the means it has chosen is a reasonable one. *Davidson v. Georgia*, 622 F.2d 895 (5th Cir. 1980).

Where legislative purpose legitimate and classification with reasonable relation to furthering that purpose, classification is valid. — Classification must be reasonable resting upon some difference having fair and substantial relation to object of legislation, so that all persons similarly circumstanced shall be treated alike. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

In order to be valid statutory classification must reasonably promote some proper object of public welfare or interest, must rest on real and substantial differences, having a natural, reasonable, and substantial relation to the subject of the legislation, and must affect alike all persons or things within a particular class, or similarly situated. *Geele v. State*, 202 Ga. 381, 43 S.E.2d 254 (1947).

Where there is reasonable relation to object within governmental authority, exercise of legislative or municipal discretion is not subject to judicial review. *McCullers v.*

Williamson, 221 Ga. 358, 144 S.E.2d 911 (1965).

Distinguishing classification must be based on reasonable ground and on difference bearing just and proper relation to attempted classification. *Campbell v. J.D. Jewell, Inc.*, 221 Ga. 543, 145 S.E.2d 569 (1965).

In order to withstand equal protection scrutiny statutory scheme must bear reasonable relation to legitimate state purpose. Because the state has broad powers to regulate businesses and professions within its boundaries, especially when the profession deals directly with the health and welfare of the people of the state, the state can exclude from the practice of medicine those whom it finds not to be qualified and can set the standards for qualifications. *Oliver v. Morton*, 361 F. Supp. 1262 (N.D. Ga. 1973).

In order to withstand equal protection scrutiny statutory scheme must bear reasonable relation to legitimate state purpose. *Oliver v. Morton*, 361 F. Supp. 1262 (N.D. Ga. 1973).

Under “traditional” analysis, legislative classification must be sustained, if classification is rationally related to legitimate governmental interest. *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974).

The validity of the state’s classifications does not depend upon their absolute correctness or upon the absence of any under- or over-inclusiveness in the categories drawn, and the court need not necessarily agree with the soundness of the distinction maintained by the statutory scheme. If the legislative purpose is legitimate and the classification drawn has some reasonable relation to furthering that purpose, the classification passes muster. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974).

Burden on party assailing classification to show it to have no reasonable, but essentially arbitrary basis. — A classification having some reasonable basis does not offend equal protection merely because it is not made with mathematical nicety, or because in practice it results in some inequality. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of fact at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the

burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Gibbs v. Milk Control Bd.*, 185 Ga. 844, 196 S.E. 791 (1938); *Anderson v. Little & Davenport Funeral Home*, 242 Ga. 751, 251 S.E.2d 250 (1978).

Clearly foreseeable impact, unexplained by any permissible rationale, as violation of fourteenth amendment. — Foreseeability alone is insufficient to make out a violation of the fourteenth amendment. However, a clearly foreseeable impact which is unexplained by any permissible rationale could support such a finding. Fact of a constitutional violation would then rest — not on fact of foreseeability — but on finding of actual discriminatory purpose reached because circumstances admit no other explanation. *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981).

Concept of equal protection viewed as requiring uniform treatment of persons in same relation to governmental action questioned or challenged. It does not permit legislation that accords different treatment to persons classified on the basis of criteria wholly unrelated to the objective of the statute. *Winningham v. United States Dep't of HUD*, 371 F. Supp. 1140 (S.D. Ga. 1974), aff'd, 512 F.2d 617 (5th Cir. 1975).

Different persons, different circumstances. — Constitution is offended where public law is applied differently to different persons under same or similar circumstances. *Mavor of Savannah v. Savannah Distrib. Co.*, 202 Ga. 559, 43 S.E.2d 704 (1947).

Special or class legislation. — If law operates alike on all members of class, including all persons and property similarly situated, it is not subject to objection that it is special or class legislation. *Blackmon v. Monroe*, 233 Ga. 656, 212 S.E.2d 827 (1975).

Equal protection clause does not require state to treat different groups in same manner. Only unreasonable discriminations are forbidden. *Wall v. American Optometric Ass'n*, 379 F. Supp. 175 (N.D. Ga.), aff'd, 419 U.S. 88, 95 S. Ct. 166, 42 L. Ed. 2d 134 (1974).

Equal protection denied where laws applied differently to different persons under same or similar circumstances. — It is only in cases where laws are applied differently to different persons under the same or similar

circumstances that the equal protection of the law is denied. *Franklin v. Mayor of Savannah*, 199 Ga. 426, 34 S.E.2d 506 (1945); *Ford v. State*, 202 Ga. 599, 44 S.E.2d 263 (1947); *Bennett v. State*, 153 Ga. App. 21, 264 S.E.2d 516 (1980).

States denied power to legislate different treatment according to statutory classification based on criteria unrelated to statutory objective. — The equal protection clause in U.S. Const., amend. 14 of the federal constitution does not deny a state the power to treat different classes of people in different ways, but it does deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974); *Bickford v. Nolen*, 240 Ga. 255, 240 S.E.2d 24 (1977); *Corey v. Jones*, 484 F. Supp. 616 (S.D. Ga. 1980), aff'd in part and rev'd in part on other grounds, 650 F.2d 803 (5th Cir. 1981).

Equal protection clause provides basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Function of equal protection clause is to measure validity of classifications created by state laws. *Parham v. Hughes*, 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979).

Equal protection clause requires uniformity upon all those coming within class. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

Uniformity within classes. — Where proper basis for classification exists law may classify, and uniformity within classes satisfies the Constitution. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

Equal protection requirements as to classifications. — The equal protection clause of U.S. Const., amend. 14 of the United States Constitution does not absolutely deny a state the power to classify groups of persons differently. Equal protection does require that such a classification be rationally related to the object of the legislation so that all persons similarly situated will be treated alike. This "rational relationship" test gives way to

Equal Protection (Cont'd)**2. Statutory Classifications (Cont'd)**

the more stringent test of strict judicial scrutiny only where a "fundamental right" or "suspect classification" is involved. *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979).

An equal protection clause claim need not involve a policy toward an entire class of persons. *Bleakley v. Jekyll Island-State Park Auth.*, 536 F. Supp. 236 (S.D. Ga. 1982).

The fourteenth amendment does not deny to states the power to treat different classes of persons in different ways. An equal protection analysis, therefore, requires as a "preliminary step" a determination of whether persons who are similarly situated are subject to disparate treatment. *Stuart-James Co. v. Tanner*, 259 Ga. 289, 380 S.E.2d 257 (1989).

Initial step in equal protection analysis is to determine nature of interest affected or classification involved. *Street v. Cobb County Sch. Dist.*, 520 F. Supp. 1170 (N.D. Ga. 1981).

Classification not to be held arbitrary because practical and attacking only objects fostering evil on large scale. — A classification is not to be pronounced arbitrary because it goes on practical grounds and attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974).

Equal protection does not require that all evils of same genus be eradicated or none at all. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974).

Abstract approaches to equal protection cases. — The Supreme Court of the United States has taken two abstract approaches to equal protection cases. Under the "traditional" test, a classification is valid under the equal protection clause if it has a reasonable basis. If, however, the classification affects a "fundamental right," the state must have a "compelling" interest in perpetuating the classification. *Davis v. Weir*, 359 F. Supp. 1023 (N.D. Ga. 1973), *aff'd* in part and modified in part on other grounds, 497 F.2d 139 (5th Cir. 1974).

Legislative discrimination not invalid if not so arbitrary as to be unreasonable. — If

the legislature has the power to enact discriminatory legislation, the discrimination is not invalid under the equal protection provision of U.S. Const., amend. 14 if not so arbitrary as to be unreasonable and beyond the wide discretion that a legislature may exercise. *Harrison v. Hartford Steam Boiler Inspection & Ins. Co.*, 183 Ga. 1, 187 S.E. 648 (1936), *rev'd* on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

Statutory discrimination not set aside if any facts reasonably conceived to justify it. — U.S. Const., amend. 14 permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *Spahos v. Mayor of Savannah Beach*, 207 F. Supp. 688 (S.D. Ga.), *aff'd*, 371 U.S. 206, 83 S. Ct. 304, 9 L. Ed. 2d 269 (1962); *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964); *Owens v. Parham*, 350 F. Supp. 598 (N.D. Ga. 1972).

Discrimination not invalid if not so arbitrary to be beyond legislative discretion. — Discrimination is not invalid under the equal protection provision of U.S. Const., amend. 14 if not so arbitrary as to be beyond the wide discretion that a legislature may exercise. *Harrison v. Hartford Steam Boiler Inspection & Ins. Co.*, 183 Ga. 1, 187 S.E. 648 (1936), *rev'd* on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

If state of facts may reasonably be conceived that would sustain classification, it is not violative of equal protection clause of U.S. Const., amend. 14 even though discriminatory. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974); *Citizens & S Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

Discriminatory purpose implies more than acting in spite of adverse effects upon identifiable group. — Discriminatory purpose implies that decision maker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.

Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981).

Three factors in determining whether state action is impermissibly discriminatory. — In determining whether state action is impermissibly discriminatory in violation of the equal protection clause, the court looks to three factors: character of classification in question; individual interests affected by classification; and governmental interests asserted in support of the classification. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Only invidious discrimination is prohibited. — There must be showing of invidious, purposeful discrimination to give rise to relief under equal protection clause. *Bond v. Floyd*, 251 F. Supp. 333 (N.D. Ga.), *rev'd* on other grounds, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

Not all classifications of citizens, however, are proscribed by the fourteenth amendment: only invidious discrimination is prohibited. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

The prohibition of the equal protection clause goes no further than the invidious discrimination. *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987).

Test of whether different treatment is invidious discrimination. — The equal protection clause does not mean that a state may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. *Blackmon v. Monroe*, 233 Ga. 656, 212 S.E.2d 827 (1975); *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir.), *cert. denied*, 449 U.S. 1015, 101 S. Ct. 574, 66 L. Ed. 2d 474 (1980).

Classification with reasonable basis not required to be mathematically or practically perfect. — A classification having some reasonable basis does not offend against the equal protection clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. *McCullers v. Williamson*, 221 Ga. 358, 144 S.E.2d 911 (1965); *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973);

Anderson v. Little & Davenport Funeral Home, 242 Ga. 751, 251 S.E.2d 250 (1978).

State-created classification in practice resulting in some inequality. — State-created classification must have reasonable basis and does not fail because it in practice results in some inequality. If any state of facts reasonably can be conceived that will sustain it, the existence of that state of facts must be assumed. Those who assail the classification must carry the burden of proving that it does not rest upon any reasonable basis, but is essentially arbitrary. *Spahos v. Mayor of Savannah Beach*, 207 F. Supp. 688 (S.D. Ga.), *aff'd*, 371 U.S. 206, 83 S. Ct. 304, 9 L. Ed. 2d 269 (1962).

States with great discretion in making classifications unless based on closely scrutinized criterion or affecting fundamental right. — The Constitution permits states a wide scope of discretion in making classifications, unless the classification is based on some more closely scrutinized criterion, such as race or sex, or unless the classification affects a fundamental right or interest. *Chatham v. Jackson*, 613 F.2d 73 (5th Cir. 1980).

Statute is subject only to minimum scrutiny unless it draws suspect classification or infringes fundamental interest, under usual principles of equal protection analysis. *Belluso v. Poythress*, 485 F. Supp. 904 (N.D. Ga. 1980).

Threshold questions as to strict judicial scrutiny. — Before a state's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, certain threshold questions must be analyzed. One of these threshold questions is "whether the relative — rather than absolute — nature of the asserted deprivation is of significant consequence." *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979).

Strict scrutiny applied to classification based upon inherently suspect criteria. — Where the state rule impinges upon a fundamental right or creates a classification which is based upon inherently suspect criteria, the required standard of review is that of strict scrutiny. Under strict scrutiny it must be shown that the classification furthers a compelling state interest and that the means chosen to effectuate that purpose is the least restrictive alternative available.

Equal Protection (Cont'd)**2. Statutory Classifications (Cont'd)**

Street v. Cobb County Sch. Dist., 520 F. Supp. 1170 (N.D. Ga. 1981).

To survive strict scrutiny, the classification must be reasonably necessary to promote a compelling state interest. *Duncan v. Poynthress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Classification by gender must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Perini v. State*, 245 Ga. 160, 264 S.E.2d 172 (1980).

Gender-based classifications require less than strict scrutiny but more than minimum scrutiny and must serve important governmental objectives and must be substantially related to achievement of those objectives. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

While gender-based classifications are subject to scrutiny under equal protection clause, they are not inherently unconstitutional. *Crist v. Crist*, 460 F. Supp. 891 (N.D. Ga. 1978), *aff'd*, 632 F.2d 1226 (5th Cir. 1980), *cert. denied*, 451 U.S. 986, 101 S. Ct. 2321, 68 L. Ed. 2d 844, 454 U.S. 819, 102 S. Ct. 100, 70 L. Ed. 2d 90 (1981).

Gender-based classification must serve important governmental objectives and must be substantially related to achievement of those to withstand scrutiny under the equal protection clause. *Crist v. Crist*, 460 F. Supp. 891 (N.D. Ga. 1978), *aff'd*, 632 F.2d 1226 (5th Cir. 1980), *cert. denied*, 451 U.S. 986, 101 S. Ct. 2321, 68 L. Ed. 2d 844, 454 U.S. 819, 102 S. Ct. 100, 70 L. Ed. 2d 90 (1981); *Perini v. State*, 245 Ga. 160, 264 S.E.2d 172 (1980).

Treatment of deprived children. — Treating deprived children who were placed in the legal custody of the Department of Families and Children Services because there was no relative committed to the child who was available for immediate placement differently from deprived children who did have a committed parent or guardian available for immediate placement did not violate the equal protection clause or Ga. Const. 1983, Art. I, Sec. I, Para. II as the

classes were not similarly situated and the laws were rationally related to the goal of minimizing government intervention while ensuring that children were reared in a familial environment. *In the Interest of A.N.*, 281 Ga. 58, 636 S.E.2d 496 (2006).

Sodomy. — Claim of defendant that the sodomy statute violates due process and equal protection because it is selectively enforced against unmarried persons, and because "victims" are not prosecuted for engaging in the consensual conduct, failed where defendant did not establish the actual manner of enforcement. *King v. State*, 265 Ga. 440, 458 S.E.2d 98 (1995).

Distinction made between male and female in Georgia's rape statute (see O.C.G.A. § 16-6-1) is reasonable. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, *appeal dismissed*, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979).

Statutory rape. — A juvenile male defendant convicted of statutory rape was not deprived of equal protection, even though the statutory rape law applies only to a male engaging in sexual intercourse with an underage female, since, under the statute on child molestation, a female who engages in sexual intercourse with a male under the age of 14 is subject to the same penalties. *In re B.L.S.*, 264 Ga. 643, 449 S.E.2d 823 (1994).

Psychological reality and public purpose in preventing sexual attacks on women. — The difference between male and female recognized by Georgia's rape statute (see O.C.G.A. § 16-6-1) is a physiological reality, and the objective serves a public purpose in preventing sexual attacks upon women, with the resulting physical injury, psychological trauma and possible pregnancy. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353, *appeal dismissed*, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979).

Statute prohibiting firearm possession by domestic violence offenders. — Federal statute prohibiting anyone convicted of a domestic violence misdemeanor from possessing or receiving a firearm did not violate equal protection. *National Ass'n of Gov't Employees v. Barrett*, 968 F. Supp. 1564 (N.D. Ga. 1997), *aff'd sub nom. Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998).

Incest statute's classification on the basis of step-parent and step-child bears a rational relationship to the governmental interest in

protecting children and family unity and does not violate equal protection guarantees. *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

Compelling governmental interest in terminating parental rights of mentally deficient parents incapable of caring for their children through no fault of their own is the welfare of the children and thus, such parents are not denied constitutional equal protection. *In re J.C.*, 242 Ga. 737, 251 S.E.2d 299 (1978).

Discrimination between legitimate and illegitimate under statute bears no rational connection to purposes of Social Security Act. — A federal Social Security Act statute which allows illegitimate children to receive survivor's benefits only from the residual benefits, if any, remaining after the insured's surviving legitimate children have received their individual maximum shares violates U.S. Const., amend. 5 and U.S. Const., amend. 14 since the discrimination between legitimate and illegitimate children under the statute in question bears no rational connection to the purposes of the Social Security Act. *Morris v. Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972), vacated on other grounds, 409 U.S. 464, 93 S. Ct. 629, 34 L. Ed. 2d 647 (1973).

Right of illegitimate children to sue for wrongful death of fathers. — Henceforth, if there is no widow, Code 1933, § 105-1302 (see O.C.G.A. § 51-4-2(a)) allows recovery for the wrongful death of a father by a child or children, proven to be such, whether legitimate or illegitimate. *Edenfield v. Jackson*, 251 Ga. 491, 306 S.E.2d 911 (1983) (overruling *Brinkley v. Dixie Constr. Co.*, 205 Ga. 415, 54 S.E.2d 267 (1948)).

Statutory scheme protecting children from sexual offenses regardless of offender's gender not violative of equal protection. — Together, Code 1933, §§ 26-2018, 26-2019, and 26-2020 (see O.C.G.A. §§ 16-6-3, 16-6-4 and 16-6-5) provide a general statutory scheme giving protection to both male and female children under the age of 14 (now 16) from sexual offenses, regardless of the offender's gender, and thus are not invalid as depriving this defendant of equal protection of the law. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

Code 1933, § 26-2018 (see O.C.G.A. § 16-6-3), which defines statutory rape, is

substantially related to the legislative objectives of protecting young girls from the unique physical and psychological damage resulting from sexual intercourse with males. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

Statute allowing hearsay evidence by children. — The 1995 amendment of O.C.G.A. § 24-3-16, allowing the admission into evidence of hearsay statements made by a child under the age of 14 years who witnessed an act of physical or sexual abuse inflicted upon another, violates constitutional principles of equal protection. *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896 (1998).

Statutes imposing alimony obligations on husbands but not wives violative of equal protection. — Former Code 1933, §§ 30-201, 30-202, 30-202.1, and 30-203 (see O.C.G.A. §§ 19-6-1, 19-6-2, and 19-6-3) impose alimony obligations on husbands but not wives and violate the equal protection clause of U.S. Const., amend. 14, and are therefore unconstitutional. *Stitt v. Stitt*, 243 Ga. 301, 253 S.E.2d 764 (1979) (decided prior to amendment by Ga. L. 1979, p. 466, §§ 6 through 9).

Statute providing only for modification of alimony awarded to wife violative of equal protection. — Former Code 1933, § 30-220(b) (see O.C.G.A. § 19-6-19(b)) provides only for the modification of alimony awarded to the wife, and this is a classification by gender which violates the equal protection clause of U.S. Const., amend. 14. *Sims v. Sims*, 243 Ga. 275, 253 S.E.2d 762 (1979) (decided prior to amendment by Ga. L. 1979, p. 466, § 27).

Inheritance through out-of-wedlock children. — O.C.G.A. § 53-2-4(b)(2) creates a gender-based classification in violation of the equal protection clauses of both the United States and Georgia constitutions; it provides that a father of a child born out of wedlock cannot inherit from his child if he failed or refused to openly treat the child as his own, but that a mother who acts in the same manner can inherit from the child, and there is no legitimate state interest achieved by not subjecting mothers of illegitimate children to the same standards of conduct. *Rainey v. Chever*, 270 Ga. 519, 510 S.E.2d 823 (1999), cert. denied, 527 U.S. 1044, 119 S. Ct. 2411, 144 L. Ed. 2d 808 (1999).

Equal Protection (Cont'd)**2. Statutory Classifications (Cont'd)**

Treatment as juvenile is not inherent right but one granted by state legislature, and the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved. *In re J.J.S.*, 246 Ga. 617, 272 S.E.2d 294 (1980).

Classification of minors in statute of limitations. — The 1987 amendment which altered tolling provisions otherwise applicable to tort claims by injured minors, in cases in which tort claims arose from health care professionals' malpractice, did not violate brain-damaged child's right to equal protection or right of access to the courts. *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 423 S.E.2d 235 (1992).

Availability of abortions. — Where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the equal protection clause of U.S. Const., amend. 14. *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), modified, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

Age qualifications are not unconstitutional per se, and age may well be a relevant factor in determining a teacher's continued fitness for classroom duties. *Davis v. Griffin-Spalding County Bd. of Educ.*, 445 F. Supp. 1048 (N.D. Ga. 1975).

Age requirement for Lieutenant Governor. — In light of the fact that the Lieutenant Governor may be called upon to exercise the powers of the office of Governor, a similar maturity requirement for the Lieutenant Governor is eminently reasonable, and the mere fact that other state officers, such as the Attorney General, may serve upon reaching 25, does not render the age requirement for Lieutenant Governor a violation of equal protection to candidates for the lieutenant governorship. *Traylor v. Democratic Party*, 241 Ga. 429, 246 S.E.2d 192 (1978).

Mandatory venue provisions constitutional. — The mandatory venue provisions of O.C.G.A. § 46-1-2, applying to personal injury actions against railroad and electric

companies, do not violate the equal protection guarantees of the federal constitution. *Driskell v. Georgia Power Co.*, 260 Ga. 488, 397 S.E.2d 285 (1990).

Judgment of acquittal by reason of insanity provides state rational reason for treating "insanity acquittees" differently from other persons involuntarily committed to state health facilities (see O.C.G.A. § 17-7-131). Specifically, insanity acquittees have no right to be free of the burden of proof in commitment and release hearings. Also, it is not unreasonable to presume continued mental illness based on a judgment of not guilty by reason of insanity. *Benham v. Ledbetter*, 609 F. Supp. 125 (N.D. Ga. 1985), aff'd, 785 F.2d 1480 (11th Cir. 1986).

Improper to charge aliens tuition for public education. — A city's procedure requiring certain nonimmigrant aliens to pay tuition to attend public schools violated the equal protection clause. *Pena v. Board of Educ.*, 620 F. Supp. 293 (N.D. Ga. 1985).

Exemption of libraries from obscenity statute. — Exemption of libraries from a statute prohibiting the sale or display of materials deemed "harmful to minors" was rationally related to making material available in an atmosphere free of commercial pressure and generally available for educational purposes, and therefore did not offend the equal protection clause. *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 941, 111 S. Ct. 2237, 114 L. Ed. 2d 479 (1991).

Federal social welfare legislation carries strong presumption of constitutionality. — In area of economics and social welfare, state does not violate equal protection merely because classifications imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. *Owens v. Parham*, 350 F. Supp. 598 (N.D. Ga. 1972).

Classifications may be illogical, unequal, unscientific and mathematically imperfect and still not deny equal protection in the area of welfare legislation. Equal protection does not place a "straitjacket" on legislatures in dealing with problems of the poor and needy. *Winningham v. United States Dep't of HUD*, 371 F. Supp. 1140 (S.D. Ga. 1974), aff'd, 512 F.2d 617 (5th Cir. 1975).

A statutory classification in the area of social welfare is consistent with the equal protection clause of U.S. Const., amend. 14 if it is "rationally based and free from invidious discrimination." *Winningham v. United States Dep't of HUD*, 371 F. Supp. 1140 (S.D. Ga. 1974), *aff'd*, 512 F.2d 617 (5th Cir. 1975).

Constitutional challenge to United States Congress' social welfare legislation must overcome the strong presumption of constitutionality inherent in such legislation and, such challenge must be assessed under reasonable basis standard governing classifications made by United States Congress' laws. *Burnett v. Schweiker*, 643 F.2d 1168 (5th Cir. 1981).

A zoning ordinance does not offend equal protection if it has some fair and substantial relation to the object of the legislation and furnishes a legitimate ground of differentiation. *Parking Ass'n v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. denied*, 515 U.S. 1116, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995).

Right to housing and to welfare benefits are not so fundamental as to require closest constitutional scrutiny. *Chatham v. Jackson*, 613 F.2d 73 (5th Cir. 1980).

Income benefit limitation in former Code 1933, § 56-3403b(b)(2) and (b)(3) (see O.C.G.A. §§ 33-34-4(a)(2)(B) and (a)(2)(C)) is constitutionally permissible. — Limitation on income benefits in former Code 1933, § 56-3403b(b)(2) and (b)(3) (see O.C.G.A. §§ 33-34-4(a)(2)(B) and (a)(2)(C)), as construed by the Supreme Court and the Court of Appeals, establishes a constitutionally permissible classification reasonably related to purposes of the no-fault Act. *Leonard v. Preferred Risk Mut. Ins. Co.*, 247 Ga. 574, 277 S.E.2d 675 (1981).

County actions against balanced, dispersed public housing violative of equal protection. — Actions of a county taken to resist attempts designed to achieve the national housing policy of balanced and dispersed public housing and failing to assist such attempts violate the equal protection clause of U.S. Const., amend. 14. *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

The policy of the exclusive remedy provision of the workers' compensation law is served equally whether the employee is in-

jured or killed, and such policy does not violate equal protection when applied to wrongful death actions. *Smith v. Gortman*, 261 Ga. 206, 403 S.E.2d 41 (1991).

State's basis of computing worker's compensation does not violate equal protection of U.S. Const., amend. 14 either facially or in the application thereof to blacks or low income segments of the state's employed population. *Massey v. Thiokol Chem. Corp.*, 368 F. Supp. 668 (S.D. Ga. 1973).

Exemption of employers with less than five (now three) employees from provisions of Workers' Compensation Act not denial of equal protection to third-party joint tortfeasors. See *Coleman v. GMC*, 386 F. Supp. 87 (N.D. Ga. 1974).

City's withholding union dues for department requires same application to other department. — Where a city has unions within both fire and police departments, and has agreed to withhold union dues for the firemen who are union members, the city may not, under the equal protection clause, refuse to apply the same rules to its police. *Truck Drivers & Helpers Local 728 v. City of Atlanta*, 468 F. Supp. 620 (N.D. Ga. 1979).

O.C.G.A. § 34-9-285, in authorizing disparate treatment of occupational diseases and other injuries compensable under the Workers' Compensation Act, does not violate constitutional guarantees of equal protection. *Price v. Lithonia Lighting Co.*, 256 Ga. 49, 343 S.E.2d 688 (1986).

O.C.G.A. § 34-9-285, which provides a restrictive rule for determining worker's compensation benefits for persons disabled due to the aggravation of a pre-existing condition by an occupational disease, is rationally related to a legitimate state interest and does not violate the fourteenth amendment's equal protection clause. *Price v. Tanner*, 855 F.2d 820 (11th Cir. 1988), *cert. denied*, 489 U.S. 1081, 109 S. Ct. 1534, 103 L. Ed. 2d 839 (1989).

Distinction among workers' injured while under influence of legal or illegal drugs. — Where an injured worker's claim was denied because the worker tested positive for marijuana and cocaine after the accident and then failed to rebut the presumption found in O.C.G.A. § 34-9-17(b)(2) that the accident was caused by the illegal use of controlled substances, the supreme court held that paragraph (b)(2) does not violate equal

Equal Protection (Cont'd)**2. Statutory Classifications (Cont'd)**

protection by differentiating between legal and illegal drug use. There is a rational basis for distinguishing between workers who are injured while taking prescription medication and those who are injured while taking illegal substances and distinguishing between legal and illegal drug use bears a direct and real relationship to the legitimate government objective of promoting a safe work place. *Kendrix v. Hollingsworth Concrete Prods., Inc.*, 274 Ga. 210, 553 S.E.2d 270 (2001).

Rational relationship test applicable to school tuition policy. — Where a summer session tuition policy contains a waiver policy which waives the tuition fee for students who desire to attend summer school but are financially unable to pay tuition, the strict scrutiny test is not applicable; and the school board need show only that a rational relationship existed between the classifications created by the tuition policy and the object of this legislation. *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979).

School board policy granting maternity leave to tenured teachers, denying maternity leave to untenured teachers, is arbitrary, it has no rational basis, and bears no relevance to the purpose of a Local Teacher Tenure Act or to the purpose of the administrative scheme of the Board of Education. *Jinks v. Mays*, 332 F. Supp. 254 (N.D. Ga. 1971), *aff'd in part and remanded in part*, 464 F.2d 1223 (5th Cir. 1972).

Consecutive years of enrollment eligibility rule for interscholastic sports does not deny student equal protection of the laws. *Smith v. Crim*, 240 Ga. 390, 240 S.E.2d 884 (1977).

Prior service credit for retirement. — The Employee Retirement System classification system, providing differing methods of credit for military service based upon the dates and conditions of service, does not violate equal protection rights. *Horton v. State Employee Retirement Sys.*, 262 Ga. 458, 421 S.E.2d 703 (1992).

Automobile guest passenger rule not violative of equal protection. — The automobile guest passenger rule, distinguishing between paying and nonpaying guests, does not violate the equal protection guarantees of the state and federal Constitutions.

Bickford v. Nolen, 240 Ga. 255, 240 S.E.2d 24 (1977).

Georgia's guest passenger rule, by creating a distinction between paying and nonpaying passengers, does not violate equal protection clause of fourteenth amendment. *Corey v. Jones*, 650 F.2d 803 (5th Cir. 1981).

Adult films may be classed differently from other films and regulated. — A zoning ordinance regulating the location of "adult motion picture theaters" and treating them differently from other motion picture theaters, does not violate U.S. Const., amend. 1 or U.S. Const., amend. 14 because even though a city may not suppress adult films, it may place them in a different classification from other films and regulate them. *Airport Bookstore, Inc. v. Jackson*, 242 Ga. 214, 248 S.E.2d 623 (1978), *cert. denied*, 441 U.S. 952, 99 S. Ct. 2182, 60 L. Ed. 2d 1057 (1979).

Classifying which games are prohibited on Sunday. — No constitutional infirmity necessarily inheres in regulatory scheme because certain games prohibited on Sunday while others are not. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974).

Distinction between business invitee and licensee is permissible classification under equal protection guarantees of the state and federal Constitutions. *Delk v. Sellers*, 149 Ga. App. 439, 254 S.E.2d 446 (1979).

Statutory scheme providing different procedures for handling service upon foreign and domestic corporations does not deny domestic corporations equal protection under the state and federal constitutions. *Ticor Constr. Co. v. Brown*, 255 Ga. 547, 340 S.E.2d 923 (1986).

Driver's license restrictions. — Statutes barring illegal aliens residing in Georgia from obtaining a Georgia driver's license do not deprive them of equal protection of the laws in violation of the fourteenth amendment. *John Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F. Supp. 2d 1369 (N.D. Ga. 2001).

Motorcycle helmet law. — O.C.G.A. § 40-6-315 does not violate the equal protection rights of motorcycle riders under the fourteenth amendment. *ABATE of Ga., Inc. v. Georgia*, 137 F. Supp. 2d 1349 (N.D. Ga. 2001), *aff'd*, 264 F.3d 1315 (11th Cir. 2001).

Power to limit highway usage by carriers for hire justified and is reasonable classification. — The power to select, limit and

prohibit uses of the highways by carriers for hire, which is implied in the requirement of a certificate of public convenience and necessity, is justified both as a regulation of the business, and as a regulation for the protection and safety of the highways. There is thereby no unequal protection of law, but a reasonable classification. *Southern Motorways, Inc. v. Perry*, 39 F.2d 145 (N.D. Ga. 1930).

Certificate and fees legally demandable by state as nondiscriminatory prerequisite to use of highway for carrier purposes. — A certificate of public convenience and necessity, with a reasonable fee therefor, and an annual license fee for the trucks, are legally demandable by a state as a nondiscriminatory prerequisite of the use of the highway for carrier purposes, even though the commerce involved is wholly interstate. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931).

Limited highway weight load exemptions not unconstitutional. — Where a limited exemption to highway weight requirements was granted for certain industries which could not take advantage of other statutory exceptions, there was no arbitrary decision violative of equal protection of those industries which were not granted the same limited exemptions since overall gross weights and axle load requirements still had to be met. *DOT v. Georgia Mining Ass'n*, 252 Ga. 128, 311 S.E.2d 443 (1984).

Exempting public utility employees but requiring examination and licensing of others unreasonable. — There is no reasonable basis for requiring examination and licensing of plumbers and steamfitters who are not employees of public utility corporations, and exempting employees of public utility corporations operating in the territory covered by the act. This is an unjust discrimination between classes of persons, and renders the proviso in Ga. L. 1937, p. 748, § 16-A unconstitutional and void, as a violation of the due process clauses of the state and federal Constitutions, and § 2-203. *Jenkins v. Manry*, 216 Ga. 538, 118 S.E.2d 91 (1961).

O.C.G.A. § 46-2-26.3 does not create an unconstitutional classification although its application is in fact limited to only one power plant, because it is possible to conclude that the section does not confer a special benefit upon the utility. *Lasseter v.*

Georgia Pub. Serv. Comm'n, 253 Ga. 227, 319 S.E.2d 824 (1984).

Classifications for examination for licensing as dental hygienists upheld as constitutional. — Ga. L. 1949, p. 1192 (see O.C.G.A. § 43-11-70 et seq.), regarding licensing dental hygienists, is not violative of the equal protection clauses of the state and federal Constitutions as requiring one kind of examination for one class of applicants and a different kind of examination for another class; and it does not discriminate against either class of applicants, but applies equally to all. The act deprives none of the plaintiffs of any right or property without due process of law. *Lamons v. Yarbrough*, 206 Ga. 50, 55 S.E.2d 551 (1949).

Provisions for certification for plumbing or steamfitting business discriminatory. — The provisions of Ga. L. 1937, p. 748, § 12 are discriminatory against individuals not connected with a partnership or corporation, since the individual would not be allowed to engage in the plumbing or steamfitting business without obtaining the certificate provided for by the act, whereas a partnership or corporation would have the right to engage in either of such businesses if one person holding such a certificate is connected with the partnership or corporation, whether or not that person is supervising the plumbing or steamfitting work done. *Jenkins v. Manry*, 216 Ga. 538, 118 S.E.2d 91 (1961).

Classification based on location of garages not unconstitutional. — Though the General Assembly exempts the business of "garages" for the safekeeping and repair of automobiles which are not located in a city or town having a population of 1,000 or more, and not located within a mile of such municipalities, from the payment of an occupation tax, while imposing a special tax graduated according to population upon the occupation of keeping such garages as are located in such cities or towns and within one mile thereof, such classification is not violative of the state or the federal Constitution. *Milliron v. Harrison*, 175 Ga. 764, 166 S.E. 231 (1932).

Noise abatement program which distinguished between residential and commercial property for the purpose of a city's purchase of property near an airport did not violate equal protection. *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994).

Equal Protection (Cont'd)**2. Statutory Classifications (Cont'd)****Prohibiting chiropractors from prescribing nutritional substances for treatment.** —

Although common merchants are allowed to sell nutritional substances to customers without a prescription, in that the substances do not require medical supervision for use, and in that the substances are not habit-forming, the Georgia Chiropractic Practices Act (O.C.G.A. § 43-9-1 et seq.) does not violate the equal protection clause because it prohibits chiropractors from prescribing or recommending such substances in the treatment of patients. Purchase or sale of such substances is not the vice which is condemned. Rather, the vice condemned, and that which constitutes the unlicensed practice of medicine, is: (1) prescription of nutritional treatment; (2) to cure; (3) an ailment or disease; (4) for compensation. *Foster v. Georgia Bd. of Chiropractic Exmrs.*, 257 Ga. 409, 359 S.E.2d 877 (1987).

Statutory exemption of medical malpractice actions from general statute of limitation provisions, does not violate equal protection when applied to loss-of-consortium actions arising out of medical malpractice. *Perry v. Atlanta Hosp. & Medical Ctr.*, 255 Ga. 431, 339 S.E.2d 264 (1986).

The statute of repose for medical malpractice claims is rationally related to a legitimate legislative attempt to reduce the uncertainties and costs related to malpractice litigation long after the medical services have been rendered and does not violate equal protection guarantees. *Hanflik v. Ratchford*, 848 F. Supp. 1539 (N.D. Ga. 1994), *aff'd*, 56 F.3d 1391 (11th Cir. 1995).

Classification held arbitrary. — Since there is no rational basis for a limitation scheme which permits medical malpractice wrongful death action if patient dies within two years of defendant's negligent act but which bars wrongful death action if patient lives for two years after defendant's negligent act where defendant is a doctor but not in other wrongful death cases, O.C.G.A. § 9-3-71 is unconstitutional as applied to actions for wrongful death. *Clark v. Singer*, 250 Ga. 470, 298 S.E.2d 484 (1983).

Public officers' malpractice statute not unconstitutional. — O.C.G.A. § 45-11-4, by affording only certain enumerated officials

the privilege of appearing before the grand jury prior to indictment for malpractice, does not violate the equal protection clauses of the state and federal constitutions. *State v. Deason*, 259 Ga. 183, 378 S.E.2d 120 (1989).

O.C.G.A. § 35-2-43(a) (repealed) unconstitutional. — O.C.G.A. § 35-2-43(a) (repealed), insofar as it prohibits naturalized citizens of the United States from being eligible for the position of officer or trooper with the uniform division of the Department of Public Safety, is unconstitutional as violative of the equal protection clause of U.S. Const., amend. 14. *Fernandez v. Georgia*, 716 F. Supp. 1475 (M.D. Ga. 1989).

Classification held reasonable. — Separate classification and treatment of architects, engineers, and contractors by O.C.G.A. § 9-3-51 from owners, tenants, and manufacturers is reasonable and not arbitrary. *Mullis v. Southern Co. Servs.*, 250 Ga. 90, 296 S.E.2d 579 (1982).

Preferential treatment of military under drinking law not unconstitutional. — O.C.G.A. § 3-3-23 (purchase of alcoholic beverages) does not violate the equal protection clause of the fourteenth amendment because it treats 18 year old members of the armed forces differently from all other 18 year olds. *Kelley v. State*, 252 Ga. 208, 312 S.E.2d 328 (1984).

The rule that treatment of obese persons with amphetamines constitutes unprofessional conduct does not violate defendant's federal constitutional right to equal protection merely because doctors are allowed to prescribe amphetamines for certain other purposes provided in Rule 360-2.09(h) of the Composite State Board of Medical Examiners. *Jackson v. Composite State Bd. of Medical Exmrs.*, 256 Ga. 264, 347 S.E.2d 581 (1986).

Basis for classification for tax purposes is to be related to the objective of ordinance. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 725, 164 S.E.2d 803 (1968).

No inflexible rule of equality applicable to state taxation. — The equal protection clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. *Ingalls Iron Works Co. v. Chilivis*, 237 Ga. 479, 228 S.E.2d 866 (1976), appeal dismissed, 429 U.S. 1081, 97 S. Ct. 1086, 51 L. Ed. 2d 528 (1977).

It is competent for state to exempt certain kinds of property and tax others, the restraints upon it only being against clear and hostile discriminations against particular persons and classes. *Campbell v. J.D. Jewell, Inc.*, 221 Ga. 543, 145 S.E.2d 569 (1965).

Discriminatory revenue or tax-raising statute not arbitrary if based on reasonable distinction. — The fact that a revenue or tax-raising statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is sounded upon a reasonable distinction. *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933).

Discrimination in taxation which equal protection clauses forbid is the failure of the taxing authorities to tax all like property which is subject to taxation equally or to tax the property of one owner and exempt like property belonging to another owner. *Delta Air Lines v. Coleman*, 219 Ga. 12, 131 S.E.2d 768, cert. denied, 375 U.S. 904, 84 S. Ct. 195, 11 L. Ed. 2d 145 (1963); *Smith v. State*, 222 Ga. 552, 150 S.E.2d 868 (1966).

Classification of tax exempt persons must not be arbitrary and unreasonable. — Law requires that classification of persons who are to be exempt from taxation shall not be arbitrary and unreasonable. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

Different tax rates on intangible personal property and real property. — To provide different rate of taxation on intangible personal property from that on real property does not violate equal protection clause of U.S. Const., amend. 14. *Miller v. Mitchell*, 226 Ga. 892, 178 S.E.2d 175 (1970).

Tax assessors' increasing value of property systematically to raise additional revenue violative of equal protection. — Where tax assessors, without investigation, made a systematic and comprehensive increase in the value of all property returned in the county for taxes, for a particular year, not for the purpose of fixing just and fair values after investigation, or for the purpose of equalizing taxes, but for the sole purpose of raising additional revenue, such assessments were null and void, as they were clearly violative of the uniform taxation clause of state Constitution and the equal protection clauses of state and federal Constitutions. *Hutchins v. Howard*, 211 Ga. 830, 89 S.E.2d 183 (1955).

Ordinance imposing occupational tax upheld. — That a seller, in order to obtain business at a distant city and compete with its local laundries, subjects oneself to unusual expense and makes little profit under adverse conditions, does not afford a basis for declaring arbitrary, prohibitory, confiscatory, and void an ordinance imposing an occupational tax as applied to a business which admittedly is in its infancy. *National Linen Serv. Corp. v. City of Gainesville*, 181 Ga. 397, 182 S.E. 610 (1935).

Local ordinance levying sales and use tax on nonresidents of county while doing business within that county does not violate equal protection under U.S. Const., amend. 14. *Camp v. Metropolitan Atlanta Rapid Transit Auth.*, 229 Ga. 35, 189 S.E.2d 56 (1972).

Excise tax on some but not all oleomargarine upheld. — Ga. L. 1935, p. 81, imposing an excise tax on all oleomargarine sold in this state containing any fat or oil other than certain specified fats or oils, was not violative of U.S. Const., amend. 14 in that it set up an arbitrary classification between persons engaged in the sale of products of a similar nature, providing a tax enforceable against some members of a class and unenforceable against other members of a class, or in that it provided no reasonable, uniform, or rational ground for distinction between the various members of the same class, in order to determine who should be taxed, and who should be exempt, or in that it did not provide equal protection of the laws of the state for property of a similar nature, by making certain oleomargarine liable for and exempting certain other oleomargarine of a similar nature from the tax. *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936).

City ordinances fixing different water rates for those outside corporate limits not violative of equal protection. — The plaintiffs with no right to demand water service from the city may purchase it at the city's charge therefor, or they may decline to do so, at their will; but they are in no position which authorizes them to complain of an excessive charge or a discriminating rate. There was no merit in the contention that the city's ordinances which fixed different water rates for those who resided outside of its corporate limits offended U.S. Const., amend. 14 or the equal protection clause of

Equal Protection (Cont'd)**2. Statutory Classifications (Cont'd)**

Georgia's Constitution. *City of Moultrie v. Burgess*, 212 Ga. 22, 90 S.E.2d 1 (1955).

Ordinance increasing rates and fixing higher rates for nonresident water users not violative of due process and equal protection. — Where the city has the right under its charter to furnish water to resident and nonresident users, and to classify the rates for such service, an ordinance, increasing the rates and fixing rates for nonresident users higher than for resident users, is not violative of the due process and equal protection clauses of the federal and state Constitutions. *Messenheimer v. Windt*, 211 Ga. 575, 87 S.E.2d 402 (1955).

Statute authorizing municipality's assessing different costs in like circumstances violative of equal protection. — A statute which authorizes a municipality to pave streets similarly situated and alike in all respects, or similarly situated portions of the same street, and to assess a different portion of the cost of the improvement of abutting landowners is discriminatory and violative of the guaranty of equal protection of the laws of the Constitutions of the United States and of Georgia. *Dorsey v. City of Atlanta*, 216 Ga. 778, 119 S.E.2d 553 (1961).

Municipal ordinance using gross sales of preceding year as basis for license fees with no provision for new markets violative of equal protection. — A municipal ordinance which uses the gross sales of the preceding year as a basis on which to fix a graduated scale of license fees for meat markets, and makes no provision for fees for meat markets not in business the preceding year, is unconstitutional in that it is discriminatory and violates the equal protection clauses of the state and federal Constitutions. *Elder v. Smith*, 188 Ga. 65, 2 S.E.2d 670 (1939).

Tax based on number of stores one operated held arbitrary, unreasonable classification violative of equal protection. — Ga. L. 1929, p. 71, Para. 109 which imposed a tax on one operating six stores or more, and refused to tax one who operated five or less stores, is an arbitrary and unreasonable classification and is void because it is in conflict with Ga. Const. 1983, Art. VII, Sec. I, Para. III, (tax uniformity), Ga. Const. 1983, Art. I, Sec. I, Para. II (government duty to protect

property), and U.S. Const., amend. 14. *F.W. Woolworth Co. v. Harrison*, 172 Ga. 179, 156 S.E. 904 (1931).

Ordinance imposing license tax on butcher shop and grocery operation according to graduated scale valid. — Ordinance imposing a license tax on the right to operate butcher shops and retail grocery stores, classified according to a graduated scale based on the number meat blocks, or value of stock and fixtures, respectively, and number of hours operated, and applicable to all persons operating businesses of the designated classes within the city, were reasonable revenue measures, and not violative of U.S. Const., amend. 14. *Ard v. City of Macon*, 187 Ga. 127, 200 S.E. 678 (1938).

Former bank share tax scheme constitutional. — The 1975 Georgia bank share tax scheme did not subject banks to a tax classification that was so "palpably arbitrary" or "invidious" as to run afoul of the constitutional equal protections of the equal protection clause of the United States Constitution and the due process clauses of the United States and Georgia Constitutions. *Roberts v. Gunter*, 251 Ga. 276, 304 S.E.2d 369 (1983).

Classification exempting owners but penalizing dealers in sale of securities is reasonable. — The state may constitutionally make reasonable classifications, and a classification which exempts owners but penalizes dealers in the sale of securities is reasonable and not arbitrary. *Saunders v. State*, 172 Ga. 770, 158 S.E. 791, appeal dismissed sub nom. *Saunders v. Georgia*, 284 U.S. 591, 52 S. Ct. 140, 76 L. Ed. 509 (1931).

Classification of cash and carry grocery and cash and credit grocery not reasonable basis for taxation. — The difference in operating a retail grocery store on the cash and carry system, where all sales are for cash and no deliveries made outside the store, and operating the same kind of store on a system of cash and credit sales and making deliveries of goods in the store and at other places, is not a reasonable basis of classification, for the purpose of taxing the former a higher rate than the latter, and such tax is discriminatory and void and inhibited by the equal protection clauses of the state and federal Constitutions. *City of Douglas v. South Ga. Grocery Co.*, 180 Ga. 519, 179 S.E. 768 (1935).

Classification of hotels by daily charge with regard to requirement for fire escapes

arbitrary. — Where provisions of statute require hotels and inns charging \$2.00 per day or more to provide outside fire escapes and making violation a misdemeanor, because the amount charged the guests has no conceivable relation to the danger of fire, to avoid which is the sole purpose of the law, the classification here is arbitrary, rendering the law unconstitutional as denying equal protection of the law. *Geele v. State*, 202 Ga. 381, 43 S.E.2d 254 (1947).

Former O.C.G.A. § 34-8-40(o)(11) did not deny equal protection in exempting independent salespersons such as real estate agents and insurance agents and solicitors from the unemployment tax, while not exempting securities salespersons, in the absence of proof that securities salespersons were in fact similarly situated to the real estate and insurance agents who were exempted. *Stuart-James Co. v. Tanner*, 259 Ga. 289, 380 S.E.2d 257 (1989).

Different pre-judgment and post-judgment interest percentages constitutional. — Where no suspect class of condemnees is involved, application of different statutory percentages to prejudgment and post-judgment interest in condemnation cases is not unconstitutional. *Brooks v. DOT*, 254 Ga. 60, 327 S.E.2d 175 (1985).

Plaintiff's inability to recover punitive damages in a wrongful death action does not violate the plaintiff's right to equal protection of the laws. *Berman v. United States*, 572 F. Supp. 1486 (N.D. Ga. 1983).

Distinguishing between voluntary patients with legal guardians and those without in the state's procedure for discharge from a state mental hospital does not violate equal protection since there is a rational basis for the distinction. *Heichelbech v. Evans*, 798 F. Supp. 708 (M.D. Ga. 1992), *aff'd*, 995 F.2d 237 (11th Cir.), *cert. denied*, 510 U.S. 947, 114 S. Ct. 389, 126 L. Ed. 2d 338 (1993).

Review of Department of Natural Resources decisions — The Georgia Administrative Procedure Act and O.C.G.A. § 12-2-1 govern the procedure for judicial review of final decisions of the Department of Natural Resources and, where a party seeking review failed to make a timely request therefor, affirmance of the final decision of the department did not violate equal protection. *Nix v. Long Mtn. Resources, Inc.*, 262 Ga. 506, 422 S.E.2d 195 (1992).

Billboard restrictions. — Denial of permission to a landowner to raise a billboard following reconstruction of a highway which reduced visibility of the billboard to traffic was not a denial of equal protection where the landowner failed to show that it received treatment dissimilar to others similarly situated. *Moreton Rolleston, Jr. Living Trust v. DOT*, 242 Ga. App. 835, 531 S.E.2d 719 (2000).

Disability. — With regard to equal protection, the United States Supreme Court has not determined that the physically disabled constitute a "suspect" or "quasi-suspect" class, and unlike race or gender, disability may legitimately affect a person's ability to serve as a juror; permitting disabled people selected for grand jury service to voluntarily seek and be granted excusal on a medical hardship basis if they provide supporting documentation from their doctor is not unreasonable or illegal. *Sallie v. State*, 276 Ga. 506, 578 S.E.2d 444, *cert. denied*, 540 U.S. 902, 124 S. Ct. 251, 157 L. Ed. 2d 185 (2003).

3. Race Discrimination

State must not discriminate against person because of race. *Shelton v. GECC*, 359 F. Supp. 1079 (M.D. Ga. 1973).

State flag. — The Georgia state flag, which incorporated the stars and bars of the Confederate flag, did not violate an African-American citizen's equal protection rights, even though a discriminatory purpose was a motivating factor in the passage of O.C.G.A. § 50-3-1, since the evidence failed to show a sufficiently concrete, present-day discriminatory impact on African-Americans. *Coleman v. Miller*, 885 F. Supp. 1561 (N.D. Ga. 1995), *aff'd*, 117 F.3d 527 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011, 118 S. Ct. 1199, 140 L. Ed. 2d 328 (1998); *Coleman v. Miller*, 912 F. Supp. 522 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011, 118 S. Ct. 1199, 140 L. Ed. 2d 328 (1998).

Display of the Georgia state flag did not violate an African-American citizen's constitutional rights to equal protection and freedom of expression. *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011, 118 S. Ct. 1199, 140 L. Ed. 2d 328 (1998).

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to the traditions and

Equal Protection (Cont'd)**3. Race Discrimination (Cont'd)**

hence constitutionally suspect. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir.), on rehearing, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

Discrimination due solely to race or color constitutes infringement of constitutional right, and in a case properly coming within this rule, a declaratory judgment is proper and an injunction should issue requiring equality of treatment. The fact that salary schedules and rules are fair upon their face, is not a defense if they are, in their practical application, administered in a discriminatory manner. *Davis v. Cook*, 80 F. Supp. 443 (N.D. Ga. 1948), rev'd on other grounds, 178 F.2d 595 (5th Cir. 1949), cert. denied, 340 U.S. 811, 71 S. Ct. 38, 95 L. Ed. 596 (1950).

National origin discrimination not actionable. — A federal civil rights claim under 42 U.S.C. § 1981 that the plaintiff was discriminatorily discharged not because of any "racial" distinctions such as skin color, but because of the plaintiff's national origin as a person of Hispanic descent, had to be dismissed. *Davis v. Boyle-Midway, Inc.*, 615 F. Supp. 560 (N.D. Ga. 1985).

U.S. Const., amend. 14 forbids any distinction in voting process based upon race or color irrespective of whether such distinction involves the actual denial of the vote. *United States v. Bibb County Democratic Executive Comm.*, 222 F. Supp. 493 (M.D. Ga. 1962).

Refusing person right to vote in primary because of race or color unconstitutional. — Defendants, acting as the duly constituted authorities of the Democratic Party, in refusing to permit plaintiff to vote in said primary election solely on account of the plaintiff's race and color, deprived the plaintiff of a right secured to the plaintiff by the Constitution and laws of the United States. *King v. Chapman*, 62 F. Supp. 639 (M.D. Ga. 1945), aff'd, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800, 66 S. Ct. 905, 90 L. Ed. 1025 (1946).

Segregation of polling places, although involving no actual denial of vote, is constitutionally impermissible as the elective fran-

chise is a function of utmost importance in the process of government and so intrinsically characteristic of the dignity of citizenship. *Anderson v. Courson*, 203 F. Supp. 806 (M.D. Ga. 1962).

Marriage not to be restricted by racial discrimination. — U.S. Const., amend. 14 requires that freedom of choice to marry not be restricted by invidious racial discriminations. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir.), rev'd on other grounds en banc, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

Racially disproportionate impact of government activity. — Even if government activity has racially disproportionate impact, that alone does not sustain claim of racial discrimination. Proof of racially discriminatory intent or purpose is required to show a violation. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir.), rev'd on other grounds en banc, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

Although a plaintiff may demonstrate a statistical over-representation of black students in lower level classrooms and in educable mentally retarded programs, a court cannot presume that this current condition results from prior de jure segregation in the school system where none of the students involved have attended a school segregated by law, and the school system has been unitary for at least a decade. Consequently, proof and finding of subsequent discriminatory intent on the part of the educational authorities is necessary to establish a present constitutional violation. *Georgia State Conference v. Georgia*, 570 F. Supp. 314 (S.D. Ga. 1983).

Affirmative action programs. — Plaintiffs, a white male and a white female and their company, had standing to challenge the constitutionality of a county's minority and female business enterprise program. *Webster v. Fulton County*, 44 F. Supp. 2d 1359 (N.D. Ga. 1999).

Legitimate classification causing racial disadvantage. — Otherwise legitimate classification not constitutionally "suspect" simply because greater numbers of racial minority fall in group disadvantaged by classification.

Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976).

Statistical evidence of disparate racial impact alone may establish prima facie case of racial discrimination, shifting to the defendant the burden of demonstrating that invidious discrimination was not among the reasons for his actions. *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976).

Denial of seat to black representative-elect because of race would amount to invidious discrimination under the equal protection clause of U.S. Const., amend. 14. *Bond v. Floyd*, 251 F. Supp. 333 (N.D. Ga.), rev'd on other grounds, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

That no black person has ever been appointed to particular position as indicative of purposeful discrimination. — In an appointment case, the fact that no black person has ever been appointed to a particular position, offered without explanation, is an indicator of purposeful discrimination. *Searcy v. Williams*, 656 F.2d 1003 (5th Cir. 1981), aff'd, 455 U.S. 984, 102 S. Ct. 1605, 71 L. Ed. 2d 844 (1982).

Refusal to admit blacks by restaurant leased from city-owned airport sufficiently involved state action to invoke requirements of U.S. Const., amend. 14. *Coke v. City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960).

State statute or policy that child of mixed parentage cannot be adopted by white family cannot be countenanced under the United States Constitution. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir.), on rehearing, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

State court enforcement of private agreement exclude certain race from residential real estate violative of equal protection. — It is a violation of the equal protection clause of U.S. Const., amend. 14 of the United States Constitution for a state court to enforce a private agreement to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. *Evans v. Abney*, 224 Ga. 826, 165 S.E.2d 160 (1968), aff'd, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970).

Trust fails where discriminatory purpose. — Where an order of the Supreme Court of the United States would require the trustees of a park to operate and maintain it as to whites and blacks on a nondiscriminatory basis contrary to and in violation of the specific purpose of the trust property as provided in the will of the grantor, the trust fails and is terminated. *Evans v. Newton*, 221 Ga. 870, 148 S.E.2d 329 (1966).

County officials prohibited from exercising discretion to deny building permits to exclude low-income blacks. — U.S. Const., amend. 14 prohibits county officials from exercising whatever discretion allowed by municipal law to deny building permits for the avowed purpose of excluding low-income blacks from apartments proposed for construction on land zoned for apartments. *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972).

Municipal zoning laws excluding low-income blacks. — U.S. Const., amend. 14 prohibits county officials from exercising whatever discretion allowed by municipal zoning laws for purpose of excluding low-income blacks from apartments proposed for construction on land zoned for apartments. *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972).

County action or inaction toward confinement of public housing to racially compacted areas unconstitutional. — In the absence of supervening necessity, any county action or inaction intended to perpetuate or which in effect does perpetuate the confinement of public housing to racially compacted areas cannot stand. *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972).

Submitting package bond issue to voters. — In requesting the county board of commissioners to submit a package bond issue to the voters instead of three separate bond issues, the county board of education did not time and structure the school bond referendum with the intent of diluting minority voting strength and manipulating the minority vote in violation of the first, thirteenth, fourteenth, and fifteenth amendments to the Constitution of the United States. *Lucas v. Townsend*, 783 F. Supp. 605 (M.D. Ga.), aff'd, 967 F.2d 549 (11th Cir. 1992).

Approval of landfill in area with majority black population. — County planning and

Equal Protection (Cont'd)**3. Race Discrimination (Cont'd)**

zoning commission's decision to approve a landfill in a census tract containing a majority black population was not motivated by the intent to discriminate against black persons, where the evidence did not establish a background of discrimination in the commission's decisions. *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

Property owners' equal protection claim was properly denied, where they failed to demonstrate that a county zoning and planning commission acted with a discriminatory intent when it approved a conditional land use permit to operate a "nonputrescible" landfill in a census tract where 3,367 black residents and 2,149 white residents lived. *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989).

Refusing blacks substantially equal-use of municipal facilities with whites is forbidden discrimination. — Refusing to allow plaintiffs and others similarly situated because they are blacks, to make use, on a substantially equal basis with white citizens of municipal facilities is to practice a forbidden discrimination. *Holmes v. City of Atlanta*, 124 F. Supp. 290 (N.D. Ga. 1954), *aff'd*, 223 F.2d 93 (5th Cir.), *vacated on other grounds*, 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 776 (1955).

Discrimination in use of municipally owned recreational facilities is violative of U.S. Const., amend. 14. *Wesley v. City of Savannah*, 294 F. Supp. 698 (S.D. Ga. 1969).

Staging of golf tournament on segregative basis upon municipally-owned golf course falls short of equal protection and is prohibited under U.S. Const., amend. 14. *Wesley v. City of Savannah*, 294 F. Supp. 698 (S.D. Ga. 1969).

University affirmative action program held unconstitutional. — The University of Georgia's freshman admissions policy, more specifically that policy's preferential treatment of non-white applicants, violated the right of the plaintiff white females to equal protection since, even assuming that student body diversity can be a compelling interest,

the university's policy was not narrowly tailored to serve that interest. *Johnson v. Board of Regents*, 263 F.3d 1234 (11th Cir. 2001).

Aim of equal protection is to assure state supported educational opportunity without regard to race; it is not to achieve racial integration in public schools. *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975).

Intentionally segregated schools are per se illegal. *Georgia State Conference v. Georgia*, 570 F. Supp. 314 (S.D. Ga. 1983).

State is not strictly liable for any alleged unlawful segregation activities by local schools. However, it has continuing authority and obligation to insure that local education agencies have completely eliminated all vestiges of the dual system and have not adopted practices that will cause racial separation. *Georgia State Conference v. Georgia*, 570 F. Supp. 314 (S.D. Ga. 1983).

Action of county perpetuating or reestablishing dual school system violates desegregation order. — In light of the affirmative duty of the DeKalb County Board of Education to desegregate its dual school system, under a 1969 desegregation order, it was error for the district court to hold that the planned expansion of a high school could only be enjoined if it was motivated by discriminatory intent. Until the school system achieved unitary status, official action that had the effect of perpetuating or reestablishing a dual school system violated the board's duty to desegregate — regardless of the board's lack of discriminatory intent. *Pitts v. Freeman*, 755 F.2d 1423 (11th Cir. 1985), *aff'd in part and rev'd in part on other grounds*, 887 F.2d 1438 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 954, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992).

Duty of school district to remedy demographic imbalance. — Once the racial imbalance due to the constitutional violation has been remedied, a school district is under no duty to remedy imbalance that is caused by demographic factors. *Freeman v. Pitts*, 503 U.S. 467, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992).

School de jure segregation eliminated. — The district court's conclusions that the school board had eliminated the vestiges of de jure segregation as far as practicable and that the school board had shown a good faith commitment to and compliance with the desegregation plan was not clearly erro-

neous. *Lockett v. Board of Educ.*, 111 F.3d 839 (11th Cir. 1997).

Procedures utilized by local school districts to assign students to ability groupings did not violate the equal protection clause, despite the substantial racial disparity in the lower ability groups, because the procedures were not based on the present effects of past segregation, and because the procedures remedied the consequences of prior segregation through better educational opportunities. *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985).

Withdrawal of judicial supervision of school system. — A district court may relinquish its supervision and control over those aspects of a school system in which there has been compliance with a desegregation decree if other aspects of the system remain in noncompliance. *Freeman v. Pitts*, 503 U.S. 467, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992).

Practice of arbitrarily segregating races in state, county and city penal facilities is unconstitutional. *Stroman v. Griffin*, 331 F. Supp. 226 (S.D. Ga. 1971).

Racial segregation of prisoners. — Danger to security, discipline, and good order must presently exist and be apparent to justify racial segregation of prisoners. *Stroman v. Griffin*, 331 F. Supp. 226 (S.D. Ga. 1971).

Where action of voluntary association made state agency to extent of nominating power violative of equal protection. — The Georgia Legislature, by giving to voluntary associations of dentists the right to nominate members of various state agencies made it an agency of the State of Georgia to that extent. By excluding black dentists from its membership it thereby deprived them of the right to vote in connection with the nomination of dentists to fill places in the agencies. The result of such action therefore is that only dentists approved by those of the white race can be elected to such offices and black dentists can have no voice in their selection. This seems to be a clear violation of the equal protection clause. *Bell v. Georgia Dental Ass'n*, 231 F. Supp. 299 (N.D. Ga. 1964).

Draft induction orders de facto valid. — A claim of racial discrimination in the composition of a draft board, even if factually sustained, is not a defense to a criminal charge based on refusing to submit to an

induction order, because the orders of such draft are de facto valid. *Gee v. Smith*, 479 F.2d 642 (5th Cir. 1973), cert. denied, 415 U.S. 932, 94 S. Ct. 1446, 39 L. Ed. 2d 491 (1974).

Removal of prosecutions to federal court. — Civil Rights Act of 1964 entitles defendants to remove prosecutions to federal court if the right upon which they rely is a right under any law providing for equal civil rights and they are denied or cannot enforce that right in the state courts. *Georgia v. Rachel*, 384 U.S. 780, 86 S. Ct. 1783, 16 L. Ed. 2d 925 (1966).

Discrimination in parole requires similar situation. — A prisoner alleging racial discrimination in the denial of parole failed to provide the “exceptionally clear proof” of discrimination which is required where the prisoner did not show that the prisoner was similarly situated with white inmates who were paroled. *Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307 (11th Cir. 1988).

Death penalty statute. — Even if the studies enumerated by petitioner in a motion for federal habeas corpus relief were to establish conclusively that the present Georgia death penalty statute has had a racially disproportionate impact, such a showing in itself would not establish an equal protection violation. *Ross v. Hopper*, 538 F. Supp. 105 (S.D. Ga. 1982), aff'd in part, rev'd in part, 756 F.2d 1483 (11th Cir. 1985).

A petitioner is entitled to the grant of a writ of habeas corpus if the petitioner establishes that the petitioner was singled out for the imposition of the death penalty by some specific act or acts evidencing an intent to discriminate against the petitioner on account of the petitioner's race or the race of the petitioner's victim. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984), rev'd on other grounds sub nom. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), cert. denied, 501 U.S. 1282, 112 S. Ct. 38, 115 L. Ed. 2d 1118, 501 U.S. 1224, 111 S. Ct. 2841, 115 L. Ed. 2d 1010 (1991).

No relief for conclusionary statement that sentence discriminatory. — Where defendant contended that the defendant's death sentence was a result of an unconstitutional pattern and practice of discrimination against poor white males accused of killing

Equal Protection (Cont'd)**3. Race Discrimination (Cont'd)**

white victims, the defendant's bald, conclusory assertions of discrimination merited no habeas relief. *Williams v. Kemp*, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931, cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 103 L. Ed. 2d 931 (1989).

4. Election and Voting Rights

Unconstitutionality of Second Congressional District. — The Second Congressional District was drawn to segregate voters according to their race and so violated equal protection. *Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga. 1995).

Power of states to determine qualifications of voters and candidates. — Each state has the sole right to determine the qualifications of those seeking state or local offices and the qualifications of voters in state elections as long as the laws of a state do not deny to the citizens of the state their rights under the federal Constitution. *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595, appeal dismissed and cert. denied, 397 U.S. 149, 90 S. Ct. 999, 25 L. Ed. 2d 183 (1970).

States have broad powers to regulate voting, which may include laws relating to the qualifications and functions of electors. *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595, appeal dismissed and cert. denied, 397 U.S. 149, 90 S. Ct. 999, 25 L. Ed. 2d 183 (1970).

The right to vote, as intended to be protected by U.S. Const., amend. 14, refers to the right to vote as established by the laws and Constitution of the state, which has broad powers to determine the conditions under which such right of suffrage may be exercised, such as residence requirements, age or previous criminal record, absent of course, any discrimination which U.S. Const., amend. 14 condemns. *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595, appeal dismissed and cert. denied, 397 U.S. 149, 90 S. Ct. 999, 25 L. Ed. 2d 183 (1970).

Equal protection violations generally involve purposeful denial, or dilution, of voting rights of segment of electorate. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Because the legislature, at the request of a city council, passed legislation authorizing the city to change its form of government from a strong mayor/weak council system to a weak mayor/strong council system employing a city manager, the mayor, who was African-American, did not show that this was an unconstitutional dilution of African-American voters' political power because the mayor did not show the legislation was conceived or operated as a purposeful means to further racial discrimination. *Griffin v. City Council*, 279 Ga. 835, 621 S.E.2d 734 (2005).

Disenfranchisement of persons convicted of crimes of moral turpitude does not violate U.S. Const., amend. 14 because sec. 2 of U.S. Const., amend. 14 specifically qualifies equal protection guarantees by recognizing the right of a state to disenfranchise persons "for participation in rebellion or other crime." *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

A state may constitutionally disenfranchise otherwise qualified voters because they have been convicted of a felony, since the state has a compelling interest in protecting the integrity of its electoral process. *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

Discrimination against some members of electorate may violate equal protection guarantee. — If state discriminates in favor of some members of electorate and against others, the equal protection guarantee may have been violated. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), aff'd, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Equal protection clause and its "one-person, one vote" sequel applies: (1) in the actual voting process by general or primary election; and (2) in the legislative functions of a state. Conversely, it apparently does not apply in nonlegislative functions of a state or in the administration of the judiciary. *Smith v. State Executive Comm. of Democratic Party*, 288 F. Supp. 371 (N.D. Ga. 1968).

State constitutional provision requiring that county officer be county resident for two years preceding election is reasonable and not a denial of equal protection under U.S. Const., amend. 14. *Griggers v. Moye*, 246 Ga. 578, 272 S.E.2d 262 (1980).

Statute imposing election qualifying fees violative of equal protection where not shown reasonably necessary. — Where the

state does not show that the imposition of election qualifying fees is reasonably necessary to accomplishing any legitimate state objectives, the statute requiring payment of such a fee violates the equal protection clause of U.S. Const., amend. 14. *Stoner v. Fortson*, 359 F. Supp. 579 (N.D. Ga. 1972).

State or political party can impose filing fee in amount reasonably approximating cost of processing candidate's application for a place on the ballot. *Stoner v. Fortson*, 359 F. Supp. 579 (N.D. Ga. 1972).

Right to appear on ballot. — State statute creating the presidential candidate selection committee, by identifying three logically representative members of each party to serve on the committee, and by providing a check against arbitrariness by allowing only one member of the party on the committee to override the unanimous decision of the committee, is narrowly tailored to advance the interests of the state in conducting orderly and efficient elections and allowing the parties to choose their candidates, and is not violative of the first and fourteenth amendments. *Duke v. Cleland*, 884 F. Supp. 511 (N.D. Ga. 1995), *aff'd*, 87 F.3d 1226 (11th Cir. 1996).

Prohibiting candidates from getting names on ballot due to lack of funds. — To prohibit candidates from getting names on ballot solely because they cannot post certain amount of money is unconstitutional and illegal. This unconstitutionality does not attach, where the candidate can get his name on the ballot in some other fashion, either by nominating petition, primary election, or pauper's affidavit. *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970), *aff'd sub nom. Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971).

Right to appear on general election ballot is constitutionally favored but less than fundamental, and may be burdened, but only by means reasonably necessary to limit the field to serious candidates. "Seriousness" comprehends two factors, the first of which is a candidate's actual popularity and, by implication, his reasonable chances of success, and the second of which is a candidate's subjective desire and motivation. *Belluso v. Poythress*, 485 F. Supp. 904 (N.D. Ga. 1980).

Interests behind right-to-access rule: the right of individuals to associate for the ad-

vancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. *Belluso v. Poythress*, 485 F. Supp. 904 (N.D. Ga. 1980).

Concept of political equality in voting booth extends to all phases of state elections. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

One-person, one-vote test as to constitutionality of election system. — To test the constitutionality of an election system, the first step is to determine the geographical unit, and then to see if the voters in the unit are treated equally. This is the one-person, one-vote admeasurement. Where it is plain that every voter in the county is treated equally, the test is satisfied. *Reed v. Mann*, 237 F. Supp. 22 (N.D. Ga. 1964).

Proper judicial approach toward legislative apportionment at issue. — The proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination. *Toombs v. Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965), *aff'd*, 384 U.S. 210, 86 S. Ct. 1464, 16 L. Ed. 2d 483 (1966).

Constitutionality of Eleventh Congressional District. — Race was the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations, thereby giving rise to a valid equal protection claim under the principles announced in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2819, 125 L. Ed. 2d 511 (1993), and the district could not be sustained as narrowly tailored to serve a compelling governmental interest. *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995).

Mathematical formula fixing maximum variance by which population of district may differ from average district population is not possible, but a variance of more than 15 percent would be difficult, if not impossible, to justify. The court will base any test as to the reasonableness of variances on the departure figure of 15 percent. Of course, this

Equal Protection (Cont'd)**4. Election and Voting Rights (Cont'd)**

does not mean a deliberate built-in variance of this degree but a good faith effort to meet the average with departure only where necessary to afford individual representation to as many counties as possible. *Toombs v. Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965), *aff'd*, 384 U.S. 210, 86 S. Ct. 1464, 16 L. Ed. 2d 482 (1966).

Deviations in district populations allowed if redistricting plan good faith effort toward equality of voting strength. — Deviations in the populations of legislative districts will be allowed only if a redistricting plan represents a good faith effort to attain the goal of equality of voting strength. *Millican v. Georgia*, 351 F. Supp. 447 (N.D. Ga. 1972), vacated on other grounds *sub nom.* *Fortson v. Millican*, 413 U.S. 909, 93 S. Ct. 3045, 37 L. Ed. 2d 1019 (1973).

Legislative districts must come as close to equality of voting strength as practicable. — Although mechanical exactitude in the drawing of legislative districts is not a constitutional requirement and each district need not have precisely the same number of individuals per elected representative, the districts created must come as close to the ideal of equality of voting strength as is practicable. *Millican v. Georgia*, 351 F. Supp. 447 (N.D. Ga. 1972), vacated on other grounds *sub nom.* *Fortson v. Millican*, 413 U.S. 909, 93 S. Ct. 3045, 37 L. Ed. 2d 1019 (1973).

Once significant deviations in populations of legislative districts are shown, burden shifts to state to justify these deviations by showing that there has been a good faith adherence to a plan of population based representation, with only such deviations as occur in recognizing certain factors of state interest which are free from any signs of arbitrariness or discrimination. *Millican v. Georgia*, 351 F. Supp. 447 (N.D. Ga. 1972), vacated on other grounds *sub nom.* *Fortson v. Millican*, 413 U.S. 909, 93 S. Ct. 3045, 37 L. Ed. 2d 1019 (1973).

Agreement for appointment of certain number of black judges unconstitutional. — In an action challenging Georgia's judicial election system under the Voting Rights Act and the Federal Constitution, a proposed consent decree that would require the state to have a certain number of black judges was

a violation of equal protection. *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994), appeal dismissed, 59 F.3d 1114 (11th Cir. 1995).

Test whether rights violated under system of legislative representation is invidious discrimination. — The test that must be applied in determining whether the plaintiffs' rights under the equal protection clause have been violated by a system of legislative representation in either or both of the chambers of the state legislature is that of "invidious discrimination." The elements of such a test are the rationality of the state policy, whether or not the system is arbitrary, the historical basis in the political system, and the possible remedies for the inequality. *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), vacated on other grounds, 379 U.S. 621, 85 S. Ct. 598, 13 L. Ed. 2d 527 (1965).

Discrimination in political rights actionable where invidious. — Political rights, such as the right to vote, are protected by the equal protection clause; but discrimination must reach the point of invidiousness to become actionable, and discrimination is not invidious if there is a reasonable chance that political relief can be obtained. *Spahos v. Mayor of Savannah Beach*, 207 F. Supp. 688 (S.D. Ga.), *aff'd*, 371 U.S. 206, 83 S. Ct. 304, 9 L. Ed. 2d 269 (1962).

Multi-member districts not per se illegal. — Multi-member districts, even though they have certain undesirable features, are not per se illegal under the equal protection clause. In the absence of factual proof of dilution or cancellation, multi-member districts do afford citizens the equal protection of the law that comes from U.S. Const., amend. 14 and are not unconstitutional under the equal protection clause. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977).

Election process equality established by U.S. Const., amend. 14 includes not only the "one-person, one-vote" rule, but also includes, as to state created multi-member election district schemes, the prohibition that such districts may not operate to minimize or cancel out the voting strength of racial or political elements of the voting population. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977).

To sustain claim that multi-member election districts are unconstitutional, plaintiffs' burden is to produce evidence to support

findings that the political processes leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977).

Burden on challengers to prove multi-member districts dilute or cancel voting strength of racial or political elements.

— To sustain a challenge that multi-member election districts are unconstitutional because they operate to minimize or cancel out the voting strength of racial or political elements of the voting population, the challengers must carry the burden of proving that multi-member districts operate to dilute or cancel the voting strength of racial or political elements. Such proof focuses not on population-based apportionment “one-man, one-vote” rule but on the quality of representation afforded the challengers by the multi-member district arrangement as compared with single-member districts. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977).

Constitutionality of multi-member election districts evaluated according to actual performance. — In evaluating the constitutionality of multi-member election district schemes, factual proof of dilution or cancellation is derived from an examination of the manner in which the multi-member system has performed or actually worked in past years — the real-life impact of multi-member districts on individual voting power. It is not derived from a theoretical projection of the effect that a multi-member system will have in years to come. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977).

When challengers factually prove that multi-member districts operate to dilute or cancel voting strength of racial or political elements, they thereby establish that such a scheme denies them the inalienable right derived from the equal protection clause of U.S. Const., amend. 14 that each and every citizen has full and effective participation in the political processes of his state’s legislative bodies. *Paige v. Gray*, 437 F. Supp. 137 (M.D. Ga. 1977).

Proof of improper assignment of voters. — Parties alleging that a state has assigned voters on the basis of race are neither con-

fined in their proof to evidence regarding the district’s geometry and makeup nor required to make a threshold showing of bizarreness. *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995).

Discrepancy in population of militia districts from which members of county board of education are elected denies fair and equal vote and violates the “one person, one vote” principle of the equal protection clause. *Grimes v. Clark*, 226 Ga. 195, 173 S.E.2d 686 (1970).

Statutory referendum procedure to remove county from fluoridation requirement constitutional. — The construction of § 12-5-175(a) by a county board of elections, to the effect that a referendum petition to remove the county from the statutory requirement of fluoridation of public water must be signed by 10 percent of the registered voters who actually voted in the election, did not violate the constitutional rights of the petitioners to equal protection and the right to vote. *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F. Supp. 1036 (M.D. Ga. 1985).

Evidence of intent to discriminate. — A speech favoring “white primary bill” made by the sponsor of the 1947 Single-Commissioner Act for Carroll County, which act he later sponsored in 1951, was evidence of an intent to discriminate against black voters in any voting legislation before the General Assembly during that session, and a finder of fact might well infer that such intent continued until 1951 when the bill was re-introduced under the same sponsorship. *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 485 U.S. 936, 108 S. Ct. 1111, 99 L. Ed. 2d 272 (1988).

Evidence of racial prejudice excluded. — In discrimination action by black employees, the district court did not abuse its discretion in excluding evidence of plant managers’ racial prejudice where employees’ counsel failed to explain adequately the importance of the evidence. *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648 (11th Cir. 1993), cert. denied, 513 U.S. 814, 115 S. Ct. 69, 130 L. Ed. 2d 24 (1994).

Right to exclude candidate from publicly broadcast political debate. — Georgia Public Telecommunications Commission’s decision to air a debate between Democrat and Re-

Equal Protection (Cont'd)**4. Election and Voting Rights (Cont'd)**

publican candidates for Governor, while excluding a Libertarian candidate, was rational, and did not constitute an equal protection violation. *Chandler v. Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), cert. denied, 502 U.S. 816, 112 S. Ct. 71, 116 L. Ed. 2d 45 (1991).

5. Selection of Juries

Jury service is not right or privilege, but burden which state summons certain of citizens to bear. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

Standards of intelligence, uprightness and experience for jurors are not violative of the Constitution. *White v. State*, 230 Ga. 327, 196 S.E.2d 849, appeal dismissed, 414 U.S. 886, 94 S. Ct. 222, 38 L. Ed. 2d 134 (1973).

Youth as justification for striking juror. — Youth and lack of experience can be a race-neutral reason for striking a juror. *Robert v. State*, 227 Ga. App. 26, 488 S.E.2d 105 (1997).

"Reverse Batson" challenges. — In a federal habeas corpus case, a Caucasian state death row inmate's equal protection challenge to the prosecutor's striking of African-American venirepersons from the jury at the inmate's murder trial failed because, at the time of trial, the U.S. Supreme Court had not yet ruled that a "reverse Batson" challenge to the use of peremptory challenges to strike jurors of a different race than the defendant was possible; because a "reverse Batson" challenge was not clearly established federal law at the time, it did not form a proper basis for federal habeas relief. *Ford v. Schofield*, F. Supp. 2d , 2007 U.S. Dist. LEXIS 34958 (N.D. Ga. May 11, 2007).

When right to jury trial exists, jury's proper composition is fundamental. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

Artistic tendencies as justification for juror striking. — Trial court did not err in denying defendant's Batson challenge regarding the state's peremptory strike of an African-American juror who was a dance

instructor, as the prosecutor explained that the prosecutor struck the juror because people in artistic professions had "a different slant," discriminatory intent was not inherent in this race-neutral explanation, and the juror was not similarly situated to other jurors who were not stricken. *White v. State*, 258 Ga. App. 546, 574 S.E.2d 629 (2002).

Impartial venires representative of community as a whole required. — Very integrity of fact-finding process depends on impartial venires representative of community as whole. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

Just and fair trial by unbiased, unprejudiced and impartial tribunal is great American constitutional principle. There can be no due process or equal protection unless that principle remains inviolate. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

Constitutional principle that juries must be selected from fair cross section of community is well-established. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

Affirmative duties of jury commissioners, including list that is fairly representative cross section. — The United States Constitution casts upon jury commissioners, as judicial administrators, affirmative duties which must be carried out in order to have a constitutionally secure system. A list that is fairly representative cross section of the community is both a constitutional standard as well as a duty in jury selection procedures in Georgia. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

Jury roll need not accurately reflect proportionate strength of every identifiable group. — A jury roll need not be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group, for while the cross-sectional concept is firmly imbedded in the law, the constitution does not require that the jury or jury venire be a statistical mirror of the community. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

In determining whether particular discrepancy is substantial or significant, some

allowance may be made for the imprecision of the jury selection process and the operation of constitutionally inoffensive factors such as exemptions from jury duty based on occupation. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Consideration of percentages not determinative. — The consideration of percentages of minorities on a jury panel and on the jury is relevant but not determinative. *Gooden v. State*, 204 Ga. App. 62, 418 S.E.2d 632 (1992).

Guarantee of equal protection applies to any identifiable group in community. — The constitutional guarantee of equal protection of the laws is not directed solely against discrimination between whites and blacks. It applies to any identifiable group in the community. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

State cannot deliberately exclude identifiable, distinct groups from jury lists. — A defendant is not constitutionally entitled to a venire or jury roll of any particular composition, but U.S. Const., amend. 14, equal protection and due process clause, and U.S. Const., amend. 6, right to a jury trial, do require that the state not deliberately and systematically exclude identifiable and distinct groups from their jury lists. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Failure to show actual under-representation of a claimed cognizable group. — Supreme Court of Georgia found no need to address the trial court's finding regarding whether Hispanic persons were a cognizable group in Cobb County in order to decide the defendant's jury composition claim, because: (1) the defendant failed to show any actual under-representation of Hispanic persons; (2) a slight over-representation of Hispanic persons who were citizens, in comparison to the total county population, was shown by the evidence; and (3) the defendant's own expert belied the defendant's claim of under-representation. *Rice v. State*, 281 Ga. 149, 635 S.E.2d 707 (2006).

Burden of proof regarding discriminatory peremptory challenges. — The ultimate burden of persuasion in a challenge to a peremptory strike is on the opponent rather

than the proponent of the strike. *Hinson v. State*, 237 Ga. App. 366, 515 S.E.2d 203 (1999).

Defendant may now complain of exclusion from jury of distinct class to which he does not belong. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Accused entitled to demand no exclusion of race and no discrimination because of race in grand and petit juries. — What an accused is entitled to demand, under the Constitution of the United States, is that, in organizing the grand jury as well as in the impaneling of the petit jury, there shall be no exclusion of the accused's race, and no discrimination against them, because of their race or color. The question of unlawful exclusion is one of fact. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Method of jury selection does not have to guarantee all groups in community will be fully represented in order to meet equal protection standards. *Brookins v. State*, 221 Ga. 181, 144 S.E.2d 83 (1965).

State's use of peremptory challenges to dismiss males not unconstitutional. — In a prosecution for the murder of a homosexual victim, the state's exercise of peremptory strikes against male members of the jury pool was not unconstitutional as being gender based where, during voir dire, several of the stricken male jurors expressed hostile attitudes toward gay men, and thus may have been unsympathetic toward the victim. *Tedder v. State*, 265 Ga. 900, 463 S.E.2d 697 (1995).

In a prosecution for cruelty to children by maliciously causing physical pain through failing to seek medical attention, the trial court did not improperly allow the state to exercise its jury strikes in a discriminatory manner to exclude males. *Herrin v. State*, 221 Ga. App. 356, 471 S.E.2d 297 (1996).

Proportionate representation of races on grand or petit jury is not necessary to guarantee equal protection of the law to the accused. *Brookins v. State*, 221 Ga. 181, 144 S.E.2d 83 (1965).

The trial court did not err by ruling that the composition of the grand and traverse

Equal Protection (Cont'd)**5. Selection of Juries (Cont'd)**

jury pools did not violate the Constitution, O.C.G.A. § 15-12-40, and the Unified Appeal Procedure where, in a comparison of the 1990 Census numbers for Hispanics in the county with the percentage of Hispanics on the jury lists, it was shown that the absolute disparities were within the legal limit. *Morrow v. State*, 272 Ga. 691, 532 S.E.2d 78 (2000), cert. denied, 532 U.S. 944, 121 S. Ct. 1408, 149 L. Ed. 2d 350 (2001).

Waiver of jury of 12. — It is not necessary for an accused to personally waive the accused's right to a jury of 12 and agree to be tried by a jury of less than 12; counsel for accused may validly waive this right for the accused if (1) waiver is made, without objection, in accused's presence or (2) accused otherwise acquiesces in waiver. *Hudson v. State*, 250 Ga. 479, 299 S.E.2d 531 (1983).

Record sufficient to establish prima facie case of discrimination. — Evidence that the state exercised a disproportionate percentage of its strikes against blacks, by using 50 percent of its allotted strikes in selecting from a venire that was 20 percent black, was sufficient to establish a prima facie inference of discriminatory intent. *Griffeth v. State*, 224 Ga. App. 462, 480 S.E.2d 889 (1997).

Discrepancy in number on selection panel. — Appellant's constitutional rights to due process of law and a jury trial were not violated where his jury was selected from one panel of 14 and one panel of ten, rather than from two panels of 12 persons each. *Hester v. State*, 164 Ga. App. 871, 298 S.E.2d 292 (1982).

Results speak for themselves and jury commissioners must be held to have intended natural result of conduct. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

Record insufficient to establish prima facie case of discrimination. — Colloquies between court and counsel and argument of counsel, though included in the record, were not competent evidence of the facts observed therein, and did not suffice to make a proper record of facts required to establish a prima facie case of discrimination. *Shaw v. State*, 201 Ga. App. 438, 411 S.E.2d 534 (1991).

Evidence that the state exercised a disproportionate percentage of its strikes against blacks, by using 50 percent of its allotted strikes in selecting from a venire that was 20 percent black, was sufficient to establish a prima facie inference of discriminatory intent. *Griffeth v. State*, 224 Ga. App. 462, 480 S.E.2d 889 (1997).

Upon appellate review of an order denying defendant's Batson challenge, the appeals court found that after considering that the ratio of African-American jurors to white jurors exceeded the ratio of potential African-American jurors to potential white jurors, defendant failed to make out a prima facie showing of racial discrimination in jury selection. *Goldberg v. State*, 280 Ga. App. 600, 634 S.E.2d 419 (2006).

Burden on challenger to establish purposeful racial discrimination by satisfactory evidences. — The proposition that a defendant in a criminal case is entitled to a proportionate number of the defendant's race on the jury which tries the defendant, or that the venire or jury list accurately reflect the proportionate strength of every identifiable group is not law since the challenger must establish by satisfactory evidence purposeful racial discrimination, even if the figures are not proportionate, except that a gross and unexplained disparity may be sufficient alone to demonstrate such discrimination. *Talley v. State*, 120 Ga. App. 365, 170 S.E.2d 444 (1969).

Burden is upon defendant to demonstrate that a particular class was the subject of discrimination in the jury selection procedures. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Threshold question that must be answered by the defendant is whether the particular class constitutes an identifiable and distinct class for purposes of a jury challenge based on U.S. Const., amend. 14. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Defendant has initial burden of proving existence of systematic racial exclusion in selection of jurors. *Sullivan v. State*, 225 Ga. 301, 168 S.E.2d 133 (1969), vacated on other grounds, 408 U.S. 935, 92 S. Ct. 2854, 33 L. Ed. 2d 749 (1972).

Burden of proof regarding discriminatory peremptory challenges. — Prosecutor must

demonstrate the racial neutrality of the prosecutor's peremptory challenges only if the defendant establishes a prima facie case of racial discrimination in the prosecutor's exercise of peremptory challenges. *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987).

Failure to apply the three-step Batson/McCollum test was error. — While the trial court found that the state established a prima facie case of defendant's use of racial discrimination in using peremptory challenges, asked defense counsel to explain the basis for each strike, and listened to rebuttal by the prosecuting attorney, based on the assumption that defense counsel used peremptory strikes to remove all white males from the venire, it erred by failing to apply the three-step Batson/McCollum process in disallowing defendant's exercise of peremptory strikes against jurors 5, 7, and 10 and in ordering those panel members reseated. *Moon v. State*, 280 Ga. App. 84, 633 S.E.2d 418 (2006).

Underrepresentation not unconstitutional absent discrimination. — The defendant's allegations that the venire from which the grand and petit juries were drawn was unconstitutionally composed because both women and African-Americans were underrepresented did not establish a prima facie violation of either the sixth amendment or the fourteenth amendment, because there was no showing that the underrepresentation was due to the systematic exclusion of the groups in the jury-selection process or that the venire was selected under a practice providing an opportunity for discrimination. *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).

No inference arises because no member of defendant's race on jury trying the defendant. — The arbitrary, systematic and purposeful exclusion of members of the defendant's race from the defendant's jury cannot be inferred merely from the fact that no one of that race is on such jury. *Heard v. State*, 210 Ga. 523, 81 S.E.2d 467 (1954).

Inference of discriminatory behavior. — Where the state used its peremptory strikes to eliminate only black veniremen and eliminated all but one for an unarticulated reason, the inference of discriminatory behavior is sufficiently raised. *Barton v. State*, 184 Ga. App. 258, 361 S.E.2d 250 (1987).

Race-neutral explanation for peremptory strikes. — The prosecutor, who used three of

six peremptory challenges to strike the only three black members of the jury pool, did not use the peremptory strikes to challenge members of the venire on the basis of race, where the prosecutor offered a racially neutral explanation for the exercise of each peremptory strike. *United States v. Williams*, 936 F.2d 1243 (11th Cir. 1991), cert. denied, 503 U.S. 912, 112 S. Ct. 1279, 117 L. Ed. 2d 504 (1992).

The state's striking of the only African-American venireperson because the individual was a practicing attorney was properly found to be a race-neutral reason. *Collins v. State*, 239 Ga. App. 11, 520 S.E.2d 542 (1999).

Trial court did not err in denying defendant's Batson challenge even though the state did use all of its peremptory strikes against African-American jurors, as defendant did not rebut the state's race-neutral reasons for the strikes, that each of the jurors who were struck said that they had close friends or family members whom the state mistreated or falsely accused of crimes. *Daniels v. State*, 276 Ga. 632, 580 S.E.2d 221 (2003).

Prosecutor's explanation that the prosecutor decided to use peremptory challenges to strike one African-American venireperson because the venireperson knew defendant, a second African-American venireperson because that individual was unemployed, and a third African-American venireperson because that individual was related to a defendant previously prosecuted by the prosecutor's office and was friends with other defendants prosecuted by the prosecutor's office established race-neutral reasons for striking all three people, and the trial court did not violate defendant's right to equal protection by granting the prosecutor's motions to strike. *Floyd v. State*, 263 Ga. App. 3, 587 S.E.2d 166 (2003).

Despite defendant's ostensibly race-neutral reason for a single contested peremptory strike, after failing to express any reason why the juror's friendship with a district attorney was case-related, and the record failed to indicate that defendant did not challenge at least one other juror with a friend who worked as a prosecutor in the same judicial circuit, upon a showing by the state of a prima facie case of racial discrimination by virtue of defendant's use of all of

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defendant's peremptory strikes to remove whites from the jury, the trial court's finding that defendant's reliance on non-racial explanations to defend the strike was implausible and a mere pretext to disguise discrimination against white males was not clearly erroneous. *Allen v. State*, 280 Ga. 678, 631 S.E.2d 699 (2006).

Appeals court rejected the defendant's claim that the state committed a Batson violation in peremptorily striking two jurors, as: (1) the state's reasons in striking the first juror appeared concrete and race-neutral and any question of doubt was decided in favor of the state, given the great deference to the determination that the state's reason was not so wholly fantastic as to be pretextual; and (2) a second juror was properly stricken based on evidence that that juror worked nights, appeared to be extremely fatigued, and actually slept through portions of the voir dire. *Woolfolk v. State*, Ga. , S.E.2d , 2007 Ga. LEXIS 359 (May 14, 2007).

State may provide race-neutral explanations upon remand. — The equal protection clause prohibits a prosecutor from using the state's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. Where the record on appeal contains no transcription of the voir dire, but the state asserts that it could have provided explanations for its strikes, but did not do so at the time of the trial, the case will be remanded to provide an opportunity for the state to establish, if it can, that its strikes of veniremen were racially neutral. *Congdon v. State*, 261 Ga. 398, 405 S.E.2d 677 (1991).

Discrimination cannot be established by merely proving that no one of defendant's race was on jury. An accused person cannot, of right, demand a mixed jury, some of whom are of the defendant's race, nor is a jury of that kind guaranteed to any race. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Nonwhite defendant not entitled to racially mixed jury with members of his race. — A black person or member of any other

race, who is on trial is not entitled to a mixed jury composed of members of the defendant's own race and members of the white race; no such right to a mixed jury is guaranteed by the due process and equal protection clauses of either the Constitution of the United States or of Georgia. *Heard v. State*, 210 Ga. 523, 81 S.E.2d 467 (1954).

Discriminatory selection of grand and petit juries in state courts may be challenged under the equal protection clause of U.S. Const., amend. 14. *Wilson v. State*, 250 Ga. 630, 300 S.E.2d 640, cert. denied, 464 U.S. 865, 104 S. Ct. 199, 78 L. Ed. 2d 174 (1983); *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983).

Discriminatory selection of grand and traverse juries in state court may be challenged under the equal protection clause of U.S. Const., amend. 14. *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983), rev'd on other grounds, 752 F.2d 1515 (11th Cir.), cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed. 2d 707 (1985).

Prima facie case of discrimination. — Two things need be shown to make out a prima facie case of discrimination: (1) an infected source of jurors such as racially segregated tax returns; and (2) an impermissible disparity between the venire and the source of jurors. *Johnson v. Caldwell*, 228 Ga. 776, 187 S.E.2d 844 (1972).

Improper basis for excluding juror. — Where prosecutor stated that he was "not comfortable" with the excluded juror, the court held it not appropriate to deal with the prosecutor's level of comfort other than to say that such was too vague, too subjective, non-specific, noncase related, and as such failed to meet Batson's requirement of "clear and reasonably specific." *Covin v. State*, 215 Ga. App. 3, 449 S.E.2d 550 (1994).

Showing of substantial underrepresentation of cognizable class can establish prima facie case of discriminatory selection of jurors. *Mann v. Cox*, 487 F. Supp. 147 (S.D. Ga. 1979).

No constitutional guarantee of representative cross-section in particular case. — The fact that the jury panel in a particular case actually contained a lower percentage of blacks is not especially significant. There is no constitutional guarantee that the grand or petit juries impanelled in a particular case will constitute a representative cross-section

of the entire community. *Truitt v. State*, 212 Ga. App. 286, 441 S.E.2d 800 (1994).

Underrepresentation of women. — When the jury commissioners have selected persons at random directly from the voter registration list, in such mechanical manner as to virtually eliminate the possibility of bias in that selection, it is not sufficient to establish a prima-facie equal protection violation to establish that women are underrepresented on a single grand jury list by some undetermined amount. *Dobbs v. Kemp*, 809 F.2d 750 (11th Cir. 1987), cert. denied, 481 U.S. 1059, 107 S. Ct. 2203, 97 L. Ed. 2d 751 (1987), rev'd on other grounds, 506 U.S. 357, 113 S. Ct. 835, 122 L. Ed. 2d 103 (1993).

Striking of women not pretextual. — Defendant failed to show that the striking of two female jurors by the prosecutor was gender based since the explanations proffered by the prosecutor, that the prosecutor feared that the jurors would be distracted or preoccupied by their impending moves, were not so implausible or fantastic as to render them pretextual. *Shell v. State*, 264 Ga. App. 547, 591 S.E.2d 450 (2003).

Underrepresentation of young persons on grand jury list did not violate the requirement that the grand jury be drawn from a fair cross section of the community; the underrepresentation was explained by the jury commissioner's compliance with the legal requirement that only a limited number of the most experienced persons on the traverse jury list be selected for inclusion on the grand jury list. *Parks v. State*, 254 Ga. 403, 330 S.E.2d 686 (1985).

Systematic exclusion of blacks from jury rolls where blacks constitute sizeable part of population is violation of equal protection clause. *Mann v. Cox*, 487 F. Supp. 147 (S.D. Ga. 1979).

No purposeful discrimination found in exclusion of blacks from jury. — Although due to the notoriety of the case in the black community, more blacks than whites had some prior knowledge of the case and were excluded for cause, this fact did not reflect "purposeful discrimination." *Hughes v. State*, 257 Ga. 200, 357 S.E.2d 80 (1987).

State's peremptory challenges of seven black veniremen was not purposefully discriminatory, where the state struck three veniremen on the basis of their employment (unemployed or recently employed) and the

remaining four veniremen because they did not appear to be particularly interested in or responsive to the selection process. *Evans v. State*, 183 Ga. App. 436, 359 S.E.2d 174 (1987).

Where a black defendant argued that the numerical ratios reflected by the government's strikes constituted a prima-facie showing that the prosecutor acted with discriminatory racial intent in exercising peremptory strikes, and specifically, the government struck two-thirds of the blacks from the regular panel and one-half of the blacks from the alternate panel, it was held that although the percentage of black jurors struck from a jury panel might establish a prima-facie case in some instances, it did not because of the coincidence of two factors: (1) the number of black persons on the regular panel was small and (2) the prosecutor could have, but did not, strike all of the black members of that panel. In such a case a more appropriate analysis focuses on the prosecutor's decision-making process as to each of the seven strikes (six strikes for the regular panel and one for the alternate panel), and since the prosecutor's statement of reasons was clear and reasonably specific, and, since the prosecutor's explanation was credible, no discrimination was found. *United States v. David*, 662 F. Supp. 244 (N.D. Ga. 1987), aff'd, 844 F.2d 767 (11th Cir. 1988).

Assuming, arguendo, that the striking of both black jurors on the panel raised a prima-facie showing of discrimination, the record amply supported the trial court's finding that the prosecutor used peremptory challenges to remove those jurors for legitimate, racially-neutral reasons, including that the two prospective jurors knew key witnesses in the case, and that one of the jurors gave contradictory responses, and one gave no response, to questions concerning their knowledge about the case. *Henderson v. State*, 257 Ga. 434, 360 S.E.2d 263 (1987).

Defendant failed to make a prima-facie case for unlawful discrimination in showing prosecution's use of 10 peremptory challenges to strike seven blacks from a jury panel where the prosecution accepted five black jurors prior to exhausting its strikes and there were at least three blacks on the jury; even if a prima-facie case was established, a race-neutral explanation was given

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as to all potential jurors stricken. *Mincey v. State*, 257 Ga. 500, 360 S.E.2d 578 (1987).

Facts did not support defendant's contention that jury was selected in racially discriminatory manner. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

Where prosecution used five of its strikes to remove black jurors from the venire, one black juror remained on the panel and served on the jury, and legitimate, race-neutral reasons were presented by the assistant district attorney for the exercise of each strike, giving "great deference" to the trial court, it cannot be said its conclusion that the strikes were not motivated by intentional discrimination was clearly erroneous. *Hamm v. State*, 187 Ga. App. 318, 370 S.E.2d 158, cert. denied, 187 Ga. App. 907, 370 S.E.2d 158 (1988).

State's use of three of its peremptory challenges to strike prospective jurors who were black, and one peremptory challenge to strike a prospective alternate juror who was black, was for legitimate, racially-neutral reasons. *Lee v. State*, 258 Ga. 481, 371 S.E.2d 389 (1988).

Where the record indicated that after the jury selection had ended, the percentage of blacks on the jury had increased from the number of blacks on the panel, there was no prima facie case of discrimination, and the trial court did not err in failing to require that the prosecutor provide an explanation for using eight of his ten peremptory jury challenges against young black men. *Willis v. State*, 201 Ga. App. 727, 411 S.E.2d 714, cert. denied, 201 Ga. App. 904, 411 S.E.2d 714 (1991).

In a Batson challenge, the trial court found that defendant made a prima facie showing of racial discrimination and proceeded to an evaluation of the state's explanations for its strikes against two African-American members of the jury venire, but the state's explanations that: (1) it struck the first prospective juror because that juror's answers did not relate to the questions asked of the juror and were not well articulated, leading the prosecutor to suspect that the juror possessed limited intelligence; and (2)

it struck the second juror because the second juror's perceptions of an incident at a water fountain with another juror and the second juror's decision to report it indicated undue attention to issues of race, and that it would have struck any potential juror who reported such an incident, regardless of that juror's race were race neutral and did not show any discriminatory intent; therefore, the trial court's ruling that defendant did not carry defendant's burden of proof to show a discriminatory purpose in the state's exercise of its peremptory strikes was not clearly erroneous. *Roberts v. State*, 278 Ga. 541, 604 S.E.2d 500 (2004).

Establishing prima facie equal protection case of arbitrary, systematic exclusion of blacks from jury service. — A prima facie equal protection case of arbitrary and systematic exclusion of blacks from jury service on the basis of race may be established by proof of a long and continued history of the exclusion of blacks from local juries. *Brookins v. State*, 221 Ga. 181, 144 S.E.2d 83 (1965).

In order to establish prima facie case of discrimination, the defendant must demonstrate that there exists a substantial disparity between the proportion of blacks chosen for jury duty and the proportion of blacks in the eligible population and that the selection procedures themselves are not racially neutral. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Prima facie case of purposeful racial discrimination can be established solely on evidence of the prosecutor's exercise of peremptory challenges at trial; once the defendant makes this prima facie showing, then the burden shifts to the state to come forward with a neutral explanation for its challenges to black jurors. *Hillman v. State*, 182 Ga. App. 47, 354 S.E.2d 673, aff'd, 184 Ga. App. 712, 362 S.E.2d 417 (1987).

To make out a prima facie case of unconstitutional exclusion of a cognizable group from the jury selection process, a defendant must show more than mere exclusion of a distinct group; the defendant must show: that the group alleged to have been excluded was a distinctive group in the community; that the representation of this group on the jury venire was not fair and reasonable in relation to the number of such

persons in the community; and that this underrepresentation was due to the state's systematic exclusion of the group from the venire. *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983), cert. denied, 467 U.S. 1256, 104 S. Ct. 3546, 82 L. Ed. 2d 849, cert. denied, 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984), cert. denied, 489 U.S. 1059, 109 S. Ct. 1328, 103 L. Ed. 2d 596 (1989).

Prima facie case of racially discriminatory peremptory challenges. — Prima facie case of racial discrimination was established, where prosecutor used all ten peremptory challenges to strike all ten blacks from the venire. *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987).

Trial court's finding that defense counsel's explanation for a prima facie racially discriminatory peremptory strike was pretextual was not clear error based on defense counsel's demeanor while explaining the strike, counsel's misstating what the juror's response was during voir dire, counsel's failure to excuse similarly situated jurors, and counsel's exercise of 11 of 12 strikes against Caucasians. *Nelson v. State*, 271 Ga. App. 870, 611 S.E.2d 147 (2005).

No prima facie showing of discrimination was established, where, although the state used six of its ten peremptory challenges to strike six of the ten prospective jurors who were black, the proportion of blacks on the selected jury (one-third) was greater than the proportion of blacks on the panel (one-fourth). *Williams v. State*, 258 Ga. 80, 365 S.E.2d 408 (1988).

Prosecutor's use of all ten peremptory challenges to strike blacks from the jury, leaving an all-white petit jury, did not establish a prima facie equal protection violation, where although the prosecutor had previously used peremptory challenges to strike 70 black jurors, the prosecutor had allowed 72 blacks to sit as jurors, even though 65 could have been excluded through the use of peremptory challenges. *Willis v. Kemp*, 838 F.2d 1510 (11th Cir. 1988), cert. denied, 489 U.S. 1059, 109 S. Ct. 1328, 103 L. Ed. 2d 596 (1989).

Where percentage of blacks on the jury was, as a result of the use of peremptory strikes, higher than that of the panel from which they were chosen, defendant did not show a prima facie case of discrimination. *Harris v. State*, 186 Ga. App. 756, 368 S.E.2d 527 (1988).

The fact that the state exercised nine peremptory strikes alone did not establish a disproportionate exercise of strikes sufficient to raise a prima facie inference that the strikes were exercised with discriminatory intent. *Whitaker v. State*, 269 Ga. 462, 499 S.E.2d 888 (1998).

A white defendant lacked standing to make an equal protection claim regarding the absence of blacks on the jury where the claim was based on the fact that the defendant's black defense counsel was a member of a minority and this may have adversely influenced the jury. *Heaton v. State*, 180 Ga. App. 718, 350 S.E.2d 480 (1986).

White defendant lacked standing to make an equal protection claim against the state for excluding all black jurors by use of peremptory challenges. *McGuire v. State*, 185 Ga. App. 233, 363 S.E.2d 850 (1987).

Once prima facie case of racial exclusion made, burden shifts. — Once a prima facie case of racial exclusion in the selection of jurors is made, the burden shifts to the prosecution to disprove the existence of racial exclusion. *Sullivan v. State*, 225 Ga. 301, 168 S.E.2d 133 (1969), vacated on other grounds, 408 U.S. 935, 92 S. Ct. 2854, 33 L. Ed. 2d 749 (1972).

To shift burden of proof. — Statistical evidence establishing that blacks are underrepresented, together with evidence that the jury selection procedures are not radically neutral, establishes a prima facie case of invidious racial discrimination thus shifting the burden of proof to the state. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Fact that jury commissioners have acted in good faith is not defense to the failure to discharge the affirmative constitutional duties cast upon them to compose a list of intelligent and upright jurors who represent a cross section of such persons. *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), rev'd on other grounds, 478 F.2d 321 (5th Cir. 1973).

Mere assertions by public officials that they did not exclude prospective jurors because of race are not sufficient to meet a prima facie equal protection case of arbitrary and systematic exclusion of blacks from juries. *Brookins v. State*, 221 Ga. 181, 144 S.E.2d 83 (1965).

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Statements by jury commissioners that selection was made without regard to race does not destroy prima facie case of discrimination based on historical statistics. *Mann v. Cox*, 487 F. Supp. 147 (S.D. Ga. 1979).

Inquiry concerns procedures for compiling jury lists, not actual jury composition. — In determining whether there has been a denial of defendant's U.S. Const., amend. 6 right to have a jury venire selected from fairly representative cross-sections of the community, and in determining whether the defendant's rights under the equal protection clause of U.S. Const., amend. 14 have been violated because members of the defendant's race have been deliberately excluded from the jury lists, the inquiry concerns the procedures for compiling the jury lists and not the actual composition of the grand or traverse jury in a particular case. *Patterson v. Balkcom*, 245 Ga. 563, 266 S.E.2d 179 (1980).

Inquiry into use of peremptory challenges denied. — No reversible error for trial judge's denial of defense counsel's request for an opportunity to cross-examine the prosecutor after the prosecutor had offered a race-neutral justification for each exercise of his peremptory challenges, whereby he struck five African-American males, given that seven of the twelve jurors empanelled were African-Americans. While this statistic did not negate the possibility of race discrimination, it was significant to the highly deferential undertaken review. *United States v. Jiminez*, 983 F.2d 1020 (11th Cir.), cert. denied, 510 U.S. 925, 114 S. Ct. 330, 126 L. Ed. 2d 276 (1993).

The court did not err in refusing to allow defense counsel to question the prosecutor with regard to the prosecutor's reasons for peremptory challenges since there is no requirement that the prosecutor's explanations for peremptory challenges be supported by facts ascertained during voir dire, and it is the duty of the trial court, rather than the party opposing the challenges, to inquire as to any suspected impropriety in determining credibility. *Chavarria v. State*, 248 Ga. App. 398, 546 S.E.2d 811 (2001).

Jury list to be supplemented if voter list used for jury selection procedures substan-

tially racially disparate list. — If the voter list used for the selection of jurors produces a jury list showing substantial racial disparity with the voter list, U.S. Const., amend. 14 and Code 1933, § 59-106 (see O.C.G.A. § 15-12-40) require that the jury list be supplemented by other sources. *Broadway v. Culpepper*, 439 F.2d 1253 (5th Cir. 1971) (decided under former version of O.C.G.A. § 15-12-40).

Exclusions and exemptions from jury duty. — There is nothing in U.S. Const., amend. 14 which prevents a state from excluding and exempting from jury duty certain classes (lawyers, ministers, doctors, etc.) on the bona fide ground that it is for the good of the community that their regular work should not be interrupted; provided, the exclusion is not the result of race or class prejudice. *Allen v. State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

Blanket exclusion of women from jury duty is unconstitutional. *Mann v. Cox*, 487 F. Supp. 147 (S.D. Ga. 1979).

Statute authorizing judge to excuse homemaker with young children from jury not unconstitutional. — The Georgia statute authorizing the trial judge to excuse a juror who is a homemaker with children 14 years of age or under does not violate U.S. Const., amend. 6 or U.S. Const., amend. 14 to the United States Constitution, for a state may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. *Willis v. State*, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Blacks not on panel because all struck or otherwise disqualified. — Because there is no constitutional right to trial jury of any particular racial composition, evidence showing that although blacks were on the panel, none were on the trial jury because all were struck or otherwise disqualified, is not sufficient to show an improperly composed grand or petit jury. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

Prosecutor's use of peremptory strikes to exclude blacks from the jury did not deny defendant the right to equal protection, where one juror was excused because the juror attended the same church as the defendant's parent and another was excused because the juror failed to indicate, when

asked, that the juror's child had been arrested on numerous occasions. *Killens v. State*, 184 Ga. App. 717, 362 S.E.2d 425 (1987).

Race-neutral explanation for peremptory strikes. — Where the prosecuting attorney offered a racially neutral motivation for the exercise of peremptory strikes, that only those black prospective jurors who knew the defendant or knew of the defendant had been removed, even if a *prima facie* case had been made, a review of the explanations offered by the prosecutor revealed that a race-neutral explanation was given as to all of the potential jurors, accordingly, the trial court properly denied the defendant's Batson motion. *Adams v. State*, 186 Ga. App. 599, 367 S.E.2d 871, cert. denied, 186 Ga. App. 917, 367 S.E.2d 871 (1988).

Where the district court found that the prosecutor articulated a neutral explanation for the prosecutor's challenges for each of the excluded black jurors, since the district court's determination that the government has rebutted the *prima facie* case typically turns on an evaluation of the prosecutor's creditability, so a reviewing court must give the district court's findings great deference, it was held that the district court's findings was not clearly erroneous. *United States v. David*, 844 F.2d 767 (11th Cir. 1988).

The court properly rejected the defendant's race-neutral reason for striking a juror inasmuch as the court found, with regard to that juror, no objection to jury service because of a new job or otherwise, and found an implicitly unacceptable "pattern" relevant to the strike by the defense; thus, the trial court's upholding of the state's challenge to the peremptory strike of that juror by the defense cannot be found to be clearly erroneous. *Wolfe v. State*, 273 Ga. 670, 544 S.E.2d 148 (2001).

State's use of peremptory challenges to dismiss blacks not unconstitutional. — There being an absence of any pattern of systematic exclusions of blacks from juries within the jurisdiction and a reasonable explanation of record for the exercise of the peremptory challenges of two black jurors, there is no merit in the enumeration that the state pursued racially motivated practices. *Johnson v. State*, 179 Ga. App. 467, 346 S.E.2d 903 (1986).

Prosecutor's reasons for striking black ju-

rors were racially neutral, where peremptory challenges were used to remove nine blacks who knew defendant and one black person whose family was known to the sheriff. *McCormick v. State*, 184 Ga. App. 687, 362 S.E.2d 472 (1987).

Prosecutor's failure to ask same questions of white juror as asked of black juror did not evidence racial animus in the exercise of a peremptory challenge. *Turner v. State*, 267 Ga. 149, 476 S.E.2d 252 (1996).

The striking of one black juror for a racial reason violates the equal protection clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown. *United States v. David*, 803 F.2d 1567 (11th Cir. 1986).

State cannot deprive class of persons of privilege of serving on juries by "perverted" use of peremptory challenges, although a particular defendant does not have an equal protection right to be tried by jurors of any particular race. *United States v. Carlton*, 456 F.2d 207 (5th Cir. 1972).

Jury from which persons with scruples against death penalty excluded not fair cross section of community. — In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), the Supreme Court decided that a jury from which persons with scruples against the death penalty have been excluded does not represent a fair cross section of the sentiment of the community. *Witherspoon*, however, concerns only the exclusion of persons who merely assert conscientious scruples against capital punishment; it does not proscribe the exclusion of a person who states unequivocally that the person would never impose the death penalty or that the person's attitude toward the death penalty would prevent the person from making an impartial decision as to the defendant's guilt. *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968), cert. denied, 393 U.S. 1105, 89 S. Ct. 908, 21 L. Ed. 2d 799 (1969), later appeal, 431 F.2d 70 (5th Cir. 1970), vacated on other grounds, 408 U.S. 938, 92 S. Ct. 2867, 33 L. Ed. 2d 758 (1972).

Challenging for cause any juror stating reservations about death penalty. — State has right to challenge for cause any prospective juror stating reservations about capital punishment would prevent impartial decision as to a defendant's guilt of rape. *Massey*

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v. Smith, 224 Ga. 721, 164 S.E.2d 786 (1968), cert. denied, 395 U.S. 912, 89 S. Ct. 1756, 23 L. Ed. 2d 225 (1969), later appeal, Massey v. State, 229 Ga. 846, 195 S.E.2d 28 (1972).

State has right to exclude from jury any juror who states the juror could never vote to impose death penalty or that the juror would refuse even to consider its imposition in the case before the juror. Massey v. Smith, 224 Ga. 721, 164 S.E.2d 786 (1968), cert. denied, 395 U.S. 912, 89 S. Ct. 1756, 23 L. Ed. 2d 225 (1969), later appeal, Massey v. State, 229 Ga. 846, 195 S.E.2d 28 (1972).

Exclusion of jurors with scruples against death penalty invalidates death sentence, not conviction. — Exclusion of jurors with scruples against the death penalty in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), does not invalidate a conviction, but only the death sentence. Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), cert. denied, 393 U.S. 1105, 89 S. Ct. 908, 21 L. Ed. 2d 799 (1969), later appeal, 431 F.2d 70 (5th Cir. 1970), vacated on other grounds, 408 U.S. 938, 92 S. Ct. 2867, 33 L. Ed. 2d 758 (1972).

Racial considerations in capital sentencing. — A complex statistical study that indicated a risk that racial considerations enter into capital sentencing determinations did not prove that a particular defendant's capital sentence was unconstitutional under the eighth amendment or the equal protection clause of the fourteenth amendment. McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Death sentence cannot be executed where those opposed to capital punishment removed for cause. — A death sentence cannot constitutionally be executed if imposed by a jury from which have been removed for cause those who are opposed to capital punishment or have conscientious scruples against imposing the death penalty. Clark v. Smith, 224 Ga. 766, 164 S.E.2d 790 (1968), rev'd on other grounds, 403 U.S. 946, 91 S. Ct. 2279, 29 L. Ed. 2d 859 (1971).

Defendant has no right to have capital punishment objectors serve on guilt determination phase of trial as part of the "cross section of the community" to which the defendant is entitled. Corn v. State, 240 Ga.

130, 240 S.E.2d 694 (1977), cert. denied, 436 U.S. 914, 98 S. Ct. 2255, 56 L. Ed. 2d 415 (1978).

Indictment of the defendant by grand jury from which members of the defendants' race are systematically excluded is denial of equal protection of the laws. Reece v. Georgia, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77 (1955).

Conviction cannot stand if based on indictment of grand jury or verdict of petit jury from which blacks excluded by reason of their race. Whitus v. Georgia, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967); Brown v. State, 239 Ga. 435, 238 S.E.2d 21 (1977).

Jury must be impartially drawn from cross section of community. — Equal protection clause prohibits convicting person by jury not impartially drawn from cross section of community. Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

Action of jury invalid when impaneling not in compliance with law. — When the impaneling of a jury is not in compliance with law, the jury as a body is not competent to act, and its action is invalid. Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

Member of minority group whose race was systematically excluded from jury service entitled to new trial before a legally constituted jury. Watson v. United States, 350 F. Supp. 57 (N.D. Ga. 1972), aff'd, 484 F.2d 34 (5th Cir. 1973), cert. denied, 416 U.S. 940, 94 S. Ct. 1944, 40 L. Ed. 2d 291 (1974).

White person indicted and convicted by juries from which blacks were systematically excluded entitled to have conviction set aside without a showing of actual bias. Watson v. United States, 350 F. Supp. 57 (N.D. Ga. 1972), aff'd, 484 F.2d 34 (5th Cir. 1973), cert. denied, 416 U.S. 940, 94 S. Ct. 1944, 40 L. Ed. 2d 291 (1974).

Standard of review of trial courts' rulings. — Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985) is not controlling authority as to the standard of review to be applied by state appellate courts reviewing trial courts' rulings on jury selection. Greene v. Georgia, 117 S. Ct. 578 (1996).

Jury discrimination claims must be raised in a timely fashion. One who tardily brings the claim must make a showing of cause for the failure and must also make a showing of

actual prejudice. *Tennon v. Ricketts*, 574 F.2d 1243 (5th Cir. 1978), cert. denied, 439 U.S. 1091, 99 S. Ct. 874, 59 L. Ed. 2d 57 (1979).

Defendant granted more peremptory challenges than state. — Equal protection clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man, and thus the law provides a remedy for jurors who are struck for illegal reasons by the defense; *O.C.G.A. § 15-12-165*, which grants a criminal defendant twice as many peremptory juror challenges as the state, is not unconstitutional. *Robinson v. State*, 278 Ga. 134, 598 S.E.2d 466 (2004).

Time for raising claim of racial discrimination in use of peremptory challenges. — Where the record reflected that following voir dire, the jury was selected, sworn, given preliminary instructions by the trial court, and excused for lunch, and following the recess and a lengthy hearing on an unrelated defense motion, counsel for defendant moved for mistrial, claiming that defendant's constitutional rights had been violated by the prosecutor's use of peremptory challenges to exclude blacks from the jury panel, the motion should have been deemed to be timely, since there were no judicial guidelines regarding the time and manner in which such a claim is to be presented and since the defendant's motion in this regard was made relatively promptly in the course of the proceedings. Henceforth, however, any claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), should be raised prior to the time the jurors selected to try the case are sworn. *State v. Sparks*, 257 Ga. 97, 355 S.E.2d 658 (1987); *Ford v. State*, 257 Ga. 661, 362 S.E.2d 764 (1987), reversed on other grounds, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

A contention that the prosecutor exercised peremptory challenges in a racially discriminatory manner must be raised in a timely manner, and after trial is too late. *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

The rule announced by the Georgia Supreme Court in *State v. Sparks*, 257 Ga. 97,

355 S.E.2d 658 (1987), regarding the time for raising a claim of racial discrimination in the use of peremptory challenges, did not bar federal judicial review of petitioner's equal protection claim, where the rule had not been firmly established at the time of petitioner's trial. *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

A state court may adopt a general rule that a claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected. In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

The requirement that any claim under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), be raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule. The imposition of this rule is nevertheless subject to the United States Supreme Court's standards for assessing the adequacy of independent state procedural grounds to bar all consideration of claims under the U.S. Constitution. *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

Timely challenge of composition of grand jury required. — A state prisoner who fails to make a timely challenge to the composition of the grand jury that indicts the prisoner cannot challenge the composition in a subsequent federal habeas corpus attack of the prisoner's state conviction. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

Time for challenge of array of grand jurors. — A challenge to the array of grand jurors may not be entertained by a trial court unless it is made prior to the return of the indictment or the defendant has shown that the defendant had neither actual nor constructive knowledge of the alleged illegal composition of the grand jury prior to the time the indictment was returned. *Tennon v. Ricketts*, 574 F.2d 1243 (5th Cir. 1978), cert. denied, 439 U.S. 1091, 99 S. Ct. 874, 59 L. Ed. 2d 57 (1979).

Failure to object at trial waives objection. — An objection on the grounds of systematic

Equal Protection (Cont'd)**5. Selection of Juries (Cont'd)**

racial exclusion on grand jury should have been presented in a proper way at the trial, and upon failure to do so it is to be considered as waived and does not present a ground for habeas corpus. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

In order for the defendant's motion to quash the indictment and challenge to the array of the grand jurors to be entertained by the trial court, it must be made prior to the return of the indictment or the defendant must show that the defendant had no knowledge, either actual or constructive, of such alleged illegal composition of the grand jury prior to the time the indictment was returned; otherwise, the objection is deemed to be waived. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800 (1976).

Objection to composition of grand jury or traverse jury. — Objection to the composition of a grand jury must be raised by challenge to the array duly presented before the indictment is returned or by plea in abatement filed before arraignment. A like objection to the traverse jury in a criminal case must be raised by challenge to the array at the earliest opportunity the defendant has to avail the defendant of that right. *Cobb v. State*, 218 Ga. 10, 126 S.E.2d 231 (1962), cert. denied, 371 U.S. 948, 83 S. Ct. 499, 9 L. Ed. 2d 497 (1963).

Complaint of exclusion of blacks from jury requires timely challenge. — In the absence of a timely challenge to the grand jury or the traverse jury, the complaint of exclusion of blacks therefrom is not reviewable. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Batson challenge not preserved. — Defendant failed to preserve defendant's Batson claim for review where, following the initial Batson challenge, defendant and the state agreed to the seating on the jury of a woman and an African-American, and defendant did not object when the African-American was later removed due to the African-American's failure to disclose a recent arrest.

Carter v. State, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Objection to grand jury and petit jury waived as basis for habeas relief where no objection at trial. — A defendant, by failing to object at his trial to a grand jury and petit jury subsequently adjudicated unconstitutional, thereby waived the objection as a basis for habeas relief. *Stewart v. Ricketts*, 451 F. Supp. 911 (M.D. Ga. 1978).

When accused not afforded opportunity to object to composition of jury, motion for new trial of habeas corpus proceedings available. — Where a person accused of a crime is not afforded the opportunity to make appropriate objections to the illegal composition of the grand jury or the traverse jury before indictment or during the progress of the trial, the person may raise the issue by motion for new trial or by habeas corpus proceedings. *Cobb v. State*, 218 Ga. 10, 126 S.E.2d 231 (1962), cert. denied, 371 U.S. 948, 83 S. Ct. 499, 9 L. Ed. 2d 497 (1963).

Six-person limitation for petit juries in certain civil actions not violative of equal protection. — The six person limitation in Code 1933, §§ 59-703 and 59-704 (see O.C.G.A. §§ 15-12-122 and 15-12-123) for petit juries in civil actions seeking recoveries of less than \$5,000 exclusive of interest and costs does not deny equal protection of the laws. *Wall v. Citizens & S. Bank*, 247 Ga. 216, 274 S.E.2d 486 (1981).

No challenge as to selection of foreperson. — Discrimination in the selection of grand jury foremen can have little, if indeed any, appreciable effect upon a defendant's due process rights to fundamental fairness and therefore provides no basis upon which to reverse a conviction or dismiss an indictment. *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984), cert. denied, 473 U.S. 911, 105 S. Ct. 3538, 87 L. Ed. 2d 661 (1985).

6. Criminal Procedure

Differing terms of court. — O.C.G.A. §§ 15-6-3(15.1) and 17-7-171 did not combine to deprive a criminal defendant of equal protection of the law by permitting the county of adjudication to operate with only two terms of court, while other similar-sized counties operate with more terms of court. Although the defendant may have had to wait months longer for trial than similarly

situated defendants in other counties, the presumptive validity of the statutes stood. *Henry v. State*, 263 Ga. 417, 434 S.E.2d 469 (1993).

No actual prejudice shown in 24-year delay. — Defendant's fifth and fourteenth amendment due process rights were not violated by the 24-year delay between the crimes and the indictment as defendant failed to show actual prejudice; that the defense was weakened by the absence of witnesses who had died or could not be found and by the faded memories of witnesses who testified did not satisfy the actual prejudice prong of the Wooten test. *Jackson v. State*, 279 Ga. 449, 614 S.E.2d 781 (2005).

Selective enforcement of criminal statute. — To be a constitutional violation, selective enforcement of a criminal statute must represent an intentional and purposeful discrimination based upon some unjustifiable standard such as race, religion, or other arbitrary classification. *Sabel v. State*, 250 Ga. 640, 300 S.E.2d 663 (1983), overruled on other grounds, *Massey v. Meadows*, 253 Ga. 389, 321 S.E.2d 703 (1984).

Prosecutors are vested with discretion in deciding what charges to bring against what defendants based on evidentiary considerations and, where there was no evidence tending to show that the decision to prosecute defendant was based upon invidious discrimination or upon a desire to punish him for the exercise of his legal rights, there was no violation of his equal protection rights. *Russell v. State*, 222 Ga. App. 475, 474 S.E.2d 673 (1996).

Prosecution of defendant for retaliatory purpose. — There was no presumption that prosecution of defendant was undertaken for retaliatory purpose after defendant had filed a civil lawsuit against the investigating officer in a burglary case. *Lee v. State*, 177 Ga. App. 698, 340 S.E.2d 658 (1986).

Admission of child witness' testimony. — Statute allowing a child who did not understand the meaning of an oath to testify in a child molestation case did not violate due process and equal protection principles, where the defendant had the opportunity to cross-examine the child witness and the statute applied equally to all those accused of child molestation. *Sims v. State*, 260 Ga. 782, 399 S.E.2d 924 (1991).

Revocation of indigent defendant's probation for failure to pay fine. — U.S. Const.,

amend. 14 prohibits a state court from automatically revoking an indigent defendant's probation for failure to pay a fine and restitution without determining that the defendant did not make sufficient bona fide efforts to pay or that alternative forms of punishment were inadequate. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

Sentencing court could not revoke defendant's probation for failure to pay imposed fine and restitution, absent evidence and findings that defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

Forfeiture of seized controlled substances. — O.C.G.A. § 16-13-49(c), which requires prompt institution of forfeiture proceedings in cases involving the seizure of controlled substances does not violate the equal protection and due process clauses. *Porter v. State*, 196 Ga. App. 31, 395 S.E.2d 360 (1990).

Distinction between crack and powder cocaine valid. — Federated sentencing scheme for defendants convicted of possession of crack cocaine with intent to distribute did not violate equal protection, as defendant failed to produce any evidence whatsoever of discriminatory purpose by Congress or the Sentencing Commission in establishing harsher sentencing penalties for base or crack cocaine than for powder cocaine, and as rational basis requirements were met because the sentencing statutes serve legitimate government interests. *United States v. Byse*, 28 F.3d 1165 (11th Cir. 1994), cert. denied, 513 U.S. 1097, 115 S. Ct. 767, 130 L. Ed. 2d 663 (1995).

Sentencing of habitual violators. — Because the equal protection clause does not deny a state the power to treat different classes of people in different ways, the General Assembly could have reasonably concluded that habitual violators are more dangerous than those who have had their licenses suspended or revoked. Thus, a defendant was not denied equal protection when the defendant was sentenced as an habitual violator under O.C.G.A. § 40-5-58(c) rather than being sentenced under O.C.G.A. § 40-5-121. *Gaines v. State*, 260 Ga. 267, 392 S.E.2d 524 (1990).

Equal Protection (Cont'd)**6. Criminal Procedure (Cont'd)**

Basis of sentence. — Defendant was not denied due process in sentencing because the record indicated that the trial judge did not rely on the victim's apparently false testimony in imposing the sentence, but relied on the severity of the crime. *Stephenson v. State*, 261 Ga. App. 402, 582 S.E.2d 492 (2003).

Exclusion of murder from those crimes to which coercion would be a defense does not deny a defendant the right to equal protection of the law. *Luther v. State*, 255 Ga. 706, 342 S.E.2d 316 (1986).

The feticide statute, O.C.G.A. § 16-5-80, does not violate equal protection by creating two classifications that are arbitrary and capricious, although O.C.G.A. § 16-12-140 punishes the offense of criminal abortion with imprisonment for not less than one year nor more than 10 years, while the Georgia feticide statute requires a life sentence, as the distinction between the sentences required by the Georgia feticide statute and the Georgia criminal abortion statute are rationally related to legitimate governmental purposes. *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987).

Implied consent statute, O.C.G.A. § 40-5-67.1, does not violate the dictates of equal protection set forth in the Georgia and federal constitutions. *Lutz v. State*, 274 Ga. 71, 548 S.E.2d 323 (2001).

Pay-day lender statutes. — The trial court did not err in rejecting both the defendants' equal protection and vagueness challenges to O.C.G.A. § 16-17-1 et seq., after they were charged with violating O.C.G.A. § 16-17-2, as both the defendants, as in-state lenders, were not similarly situated with out-of-state banks designated in O.C.G.A. § 16-17-2(a)(3), and hence were subject to state regulation restricting high interest rates on loans, whereas the out-of-state banks were not; the Georgia legislature had a rational basis for creating a class based on those in-state payday lenders who were subject to state regulation, and moreover the prohibition against payday loans in whatever form transacted, was sufficiently definite to satisfy due process standards. *Glenn v. State*, Ga. , S.E.2d , 2007 Ga. LEXIS 346 (May 14, 2007).

Jury instructions did not violate the equal protection clause. — Equal protection

clause was not violated in charging the jury to convict if defendant was under the influence of alcohol to the extent that it was "less safe" for defendant to drive, rather than if defendant was "rendered incapable of driving safely"; the standards were legally equivalent. *Johnson v. State*, 268 Ga. App. 426, 602 S.E.2d 177 (2004).

Georgia witness competency statutes present a reasonable requirement regarding the minimal level of understanding for people participating in one of the most important functions of government and do not violate the equal protection clause. *Ambles v. State*, 259 Ga. 406, 383 S.E.2d 555 (1989).

State had standing to challenge Georgia witness competency statutes. *Ambles v. State*, 259 Ga. 406, 383 S.E.2d 555 (1989).

Black defendant's death sentence for the murder of a white person did not violate the eighth and fourteenth amendments, where, although the jurors possessed some racial prejudices, and some more so than others, defendant did not show that the jurors, either individually or as a whole, were influenced by prejudices that would make them favor the death penalty for a black person who murdered a white person. *Dobbs v. Zant*, 720 F. Supp. 1566 (N.D. Ga. 1989), aff'd, 963 F.2d 1403 (11th Cir. 1991), rev'd on other grounds, 506 U.S. 357, 113 S. Ct. 835, 122 L. Ed. 2d 103 (1993).

Mandatory life sentence constitutional. — Provision that mandates a sentence of life imprisonment upon a second conviction for selling cocaine, O.C.G.A. § 16-13-30(d), does not violate due process or equal protection and does not violate state or federal constitutional guarantees against cruel and unusual punishment. *Isom v. State*, 261 Ga. 596, 408 S.E.2d 701 (1991).

The life-without-parole statute, O.C.G.A. § 17-10-16, does not violate the equal protection clause because it places the discretion to withhold the presentation of a life-without-parole sentence in cases of crimes committed before May 1, 1993, in the hands of the prosecutor. *Freeman v. State*, 264 Ga. 27, 440 S.E.2d 181 (1994).

Mandatory minimum sentences. — O.C.G.A. § 17-10-6.1, imposing mandatory minimum sentences in certain cases, does not violate equal protection because that section bears a reasonable relationship to the legitimate legislative concern of deter-

ring crime and ensuring that a court imposed sentence will be served in its entirety. *Campbell v. State*, 268 Ga. 44, 485 S.E.2d 185 (1997).

Prior convictions in sentencing. — In an action in which the defendant was convicted of shoplifting as a felon in accordance with O.C.G.A. § 16-8-14(b)(1)(C), there was no requirement that the prior convictions upon which the conviction and sentence were based be proved beyond a reasonable doubt, as there was an exception under Appendi for such prior convictions based upon the general principle that prior convictions were generally already proved beyond a reasonable doubt; further, there was no due process violation under U.S. Const., amend. 14 because defendant received notice of the state's intent to use the prior convictions for sentencing and the defendant had an opportunity to challenge the convictions pursuant to former O.C.G.A. § 17-10-2(a). *Redd v. State*, 281 Ga. App. 272, 635 S.E.2d 870 (2006).

Allowable conditions of probation. — The court had the authority to impose as a condition of probation the requirement that defendant wear a fluorescent pink plastic bracelet imprinted with the words "D.U.I. CONVICT." Such a requirement did not impose cruel and unusual punishment or deprive defendant of equal protection and it was not an impermissibly indeterminate condition. *Ballenger v. State*, 210 Ga. App. 627, 436 S.E.2d 793 (1993).

Decisions by parole board. — The doctrine of qualified immunity does not shield defendants Chairman of the Board of Pardons and Paroles and Parole Decisions Guidelines employee from liability for plaintiff's equal protection claim. When making a parole decision, members of a parole board may not engage in invidious discrimination based on race, religion, national origin, poverty, or some other constitutionally protected interest. *Parisie v. Morris*, 873 F. Supp. 1560 (N.D. Ga. 1995).

OPINIONS OF THE ATTORNEY GENERAL

U.S. Const., amend. 14 prohibits state action only; — state inaction is the opposite of state action and cannot be converted into the latter through the actions of lawless individuals whose acts are nowhere included in the amendment. 1957 Op. Att'y Gen. p. 14.

Hearing required before administrative agency action to revoke license. — The due process clauses of U.S. Const., amend. 14 and Ga. Const. 1983, Art. I, Sec. I, Para. I, require notice and a hearing before an administrative agency before any action may be taken to revoke a license; this constitutional requirement must be met, even though the act granting the right to revoke the license provides for an appeal to the superior court. 1958-59 Op. Att'y Gen. p. 1.

Procedure for serviceman stationed overseas to change name. — Serviceman, citizen of Georgia stationed overseas, cannot submit to jurisdiction of Japanese Family Court in order to have his name changed without relinquishing his Georgia and United States citizenship but must petition superior court in county in which the name to be changed is recorded. 1962 Op. Att'y Gen. p. 345.

Statutory construction. — Statutes which possibly infringe on U.S. Const., amends. 1

and 14's rights should be narrowly construed, and construed as explicit, not vague, so as to avoid the question of the statute's constitutionality whenever possible. 1977 Op. Att'y Gen. No. 77-15.

Provisions concerning livestock running at large or straying (see O.C.G.A. § 4-3-1 et seq.) not void for ambiguity. — 1952-53 Op. Att'y Gen. p. 381 (rendered prior to amendment by Ga. L. 1953, Nov-Dec. Sess., p. 395).

Regulatory license tax on newspapers. — The constitutional guarantee of a free press prohibits a municipality from levying a regulatory license tax on newspapers where such a levy subjects the newspaper to operational and expression control by the municipality. 1950-51 Op. Att'y Gen. p. 115.

While there is no statute dealing specifically with the question of prohibition against the levying of a license tax on newspapers by a municipality, if such a levy is determined to be regulatory in nature it would be in contravention to U.S. Const., amends. 1 and 14, and would therefore be null and void. 1950-51 Op. Att'y Gen. p. 115.

Contributions by public utility corporations. — O.C.G.A. § 21-5-10 (see now O.C.G.A. § 21-5-30(f)), which prohibits

contributions to a political campaign by persons acting on behalf of a public utility corporation regulated by the Public Service Commission, does not unconstitutionally deny equal protection to common carriers. 1982 Op. Att'y Gen. No. 82-56.

The differential treatment between regulated and nonregulated corporations imposed by O.C.G.A. § 21-5-10 (see now O.C.G.A. § 21-5-30(f)) can be justified on the ground that in granting and protecting the monopolies of public utilities, the state has the duty also to see that the power so granted is not abused and does not even appear to have a corrupting influence on the political process. 1982 Op. Att'y Gen. No. 82-56.

Regulation making vehicles entering state hospital grounds subject to search valid. — A regulation established by the Department of Human Resources which makes vehicles entering on the grounds of Central State Hospital subject to search is a valid exercise of the department's power, and does not violate U.S. Const., amend. 14. 1974 Op. Att'y Gen. No. 74-15.

Selection of a county board of education — can be changed from an appointive method to an elective one by complying with Ga. Const. 1983, Art. VIII, Sec. V, Para. IV; where this is done, the one-man, one-vote principle of U.S. Const., amend. 14 is not violated by a requirement that members reside in particular militia districts, so long as their election is on a county-wide basis. 1971 Op. Att'y Gen. No. U71-14.1.

Employment of aliens. — Provisions excluding aliens from employment (see O.C.G.A. § 45-2-7) cannot be constitutionally applied to exclude aliens from public employment except to bar them from positions that participate directly in the formulation, execution, or review of broad public policy or from positions where citizenship otherwise bears some rational relationship to the special demands of the particular position. 1976 Op. Att'y Gen. No. 76-74.

Admission of aliens to public schools. — Local school systems may not deny free public education to resident alien students, legally admitted to the United States or not, solely on the basis of their status as aliens; however, a local school district may charge tuition to nonresident students, citizens and aliens alike, so long as the definition of

residency found in Georgia law is applied to all. 1982 Op. Att'y Gen. No. 82-81.

Citizenship requirement for licensure by State Examining Board for Certified Public Accountants — is unenforceable under equal protection clause of U.S. Const., amend. 14. 1974 Op. Att'y Gen. No. 74-4.

Rule of merit system of personnel administration requiring applicants to be United States citizens. — Rule of State Merit System of Personnel Administration providing that applicants must be citizens of the United States to be eligible to take an examination violates the equal protection clause of U.S. Const., amend. 14. 1974 Op. Att'y Gen. No. 74-10.

Due process clause inapplicable to resignations of state classified employees. — Since employees in classified services of State Merit System have no property interest in continuing employment or ownership over any position, due process clause of the fourteenth amendment does not require that any specific procedure be followed when such an employee resigns, whether pursuant to formal letter of resignation or by abandoning his position for more than five workdays. 1981 Op. Att'y Gen. No. 81-104.

Allowing students moving into Greek housing to void university housing contracts violative of equal protection. — Allowing students who move into Greek housing to void their contracts binding them to pay rent for university housing for the entire school year while not extending the same privilege to other students is state action which denies equal protection of the laws and as such is contrary to U.S. Const., amend. 14. 1971 Op. Att'y Gen. No. 71-93.

Freedom of religion guaranteed against state encroachment. — Freedom of religion constitutes one of those "fundamental principles of liberty and justice" embraced within the concept of substantive due process and hence guaranteed against state encroachment by U.S. Const., amend. 14. 1960-61 Op. Att'y Gen. p. 349.

Continued incarceration of defendant for failure to pay fine. — A criminal defendant may not be incarcerated beyond the period of imprisonment imposed by the defendant's sentences based solely upon the defendant's failure to pay a contemporaneously imposed fine. A separate sentence for contempt may be imposed, however, upon a

judicial finding that the individual is capable of paying the fine, but has willfully refused to do so. 1983 Op. Att'y Gen. No. U83-32.

Laws governing administrative hearings must prescribe notice and hearing. — It is necessary that law under which administrative hearings are conducted prescribe notice and hearing, and it is not sufficient that a

notice and hearing are given, even though not required by law. 1958-59 Op. Att'y Gen. p. 1.

Constitutionality of fingerprint requirement. — Requiring applicants for driver's license or identification card to submit fingerprints does not violate constitutional rights. 1997 Op. Att'y Gen. No. U97-7.

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Constitutionality of statute as affected by discrimination in punishments for same offense based upon age, color, or sex, 8 ALR 854.

Constitutionality of statute requiring railroad to construct and maintain private crossing, 12 ALR 227.

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Validity of commercial rent control legislation as applied to pre-existing leases, 162 ALR 202.

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Sufficiency of notice of intention to discharge or not to rehire teacher, under statutes requiring such notice, 52 ALR4th 301.

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 ALR4th 1063.

Statutes authorizing removal of body parts for transplant: validity and construction, 54 ALR4th 1214.

Validity of Nonclaim Statute or Rule Provision for Notice by Publication to Claimants Against Estate—Post-1950 Cases, 56 ALR4th 458.

Change in area or location of nonconforming use as violation of zoning ordinance, 56 ALR4th 769.

Tax on hotel-motel room occupancy, 58 ALR4th 274.

Local government tort liability: minority as affecting notice of claim requirement, 58 ALR4th 402.

AIDS infection as affecting right to attend public school, 60 ALR4th 15.

Addition of another activity to existing nonconforming use as violation of zoning ordinance, 61 ALR4th 724.

Change in volume, intensity, or means of performing nonconforming use as violation of zoning ordinance, 61 ALR4th 806.

Change in type of activity of nonconforming use as violation of zoning ordinance, 61 ALR4th 902.

Closed-circuit television witness examination, 61 ALR4th 1155.

Civil action for damages under state Racketeer Influenced and Corrupt Organizations Acts (RICO) for losses from racketeering activity, 62 ALR4th 654.

Age group underrepresentation in grand jury or petit jury venire, 62 ALR4th 859.

Criminal law: dog scent discrimination lineups, 63 ALR4th 143.

Alteration, extension, reconstruction, or repair of nonconforming structure or structure devoted to nonconforming use as violation of zoning ordinance, 63 ALR4th 275.

Alcohol-related vehicular homicide: nature and elements of offense, 64 ALR4th 166.

Validity and construction of statutes, ordinances, or regulations requiring competency tests of schoolteachers, 64 ALR4th 642.

Nature and elements of offense of conveying contraband to state prisoner, 64 ALR4th 902.

Validity, construction, and effect of statutes establishing shoplifting or its equivalent as separate criminal offense, 64 ALR4th 1088.

Validity, construction, and application of nonsmoking regulations, 65 ALR4th 1205.

Validity and construction of prison regulation of inmates' possession of personal property, 66 ALR4th 800.

Workers' compensation: recovery for home service provided by spouse, 67 ALR4th 765.

Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 ALR4th 638.

"Guilty but mentally ill" statutes: validity and construction, 71 ALR4th 702.

Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 ALR4th 874.

Validity and construction of state statute abrogating collateral source rules as to medical malpractice actions, 74 ALR4th 32.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 ALR4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis, 74 ALR4th 388.

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public, 74 ALR4th 476.

Validity of state and local air pollution administrative rules, 74 ALR4th 566.

Validity, construction, and effect of municipal residency requirements for teachers, principals, and other school employees, 75 ALR4th 272.

Validity, construction, and effect of body execution statutes allowing imprisonment based on judgment, debt, or the like — modern cases, 79 ALR4th 232.

Right of indigent defendant in state criminal case to assistance of investigators, 81 ALR4th 259.

Validity, construction, and effect of juvenile curfew regulations, 83 ALR4th 1056.

Necessity that waiver of accused's right to testify in own behalf be on the record, 90 ALR4th 586.

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges, 2 ALR5th 262.

Propriety of telephone testimony or hearings in prison proceedings, 9 ALR5th 451.

Actions by state official involving defendant as constituting "outrageous" conduct violating due process guaranties, 18 ALR5th 1.

Validity and application of statute or regulation authorizing revocation or suspension of driver's license for reason unrelated to use of, or ability to operate, motor vehicle, 18 ALR5th 542.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury — post Batson state cases, 20 ALR5th 398.

Validity of state or local enactment regulating sound amplification in public area, 122 ALR5th 593.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 ALR5th 245.

Zoning authority as estopped from revok-

ing legally issued building permit, 26 ALR5th 736.

Validity, construction, and application of state statutes prohibiting sale or possession of controlled substances within specified distance of schools, 27 ALR5th 593.

Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision. 31 ALR5th 229.

Right of accused to have evidence or court proceedings interpreted, because accused or other participant in proceedings is not proficient in the language used, 32 ALR5th 149.

Validity, construction, and application of state statute criminalizing possession of contraband by individual in penal or correctional institution, 45 ALR5th 767.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 ALR5th 639.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 ALR5th 423.

Voir dire exclusions of men from state trial jury or jury panel — *Post-J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, cases, 88 ALR5th 67.

Failure of state prosecutor to disclose fingerprint evidence as violating due process, 94 ALR5th 393.

Federal and state constitutional provisions as prohibiting discrimination in employment on basis of gay, lesbian, or bisexual sexual orientation or conduct, 96 ALR5th 391.

Failure of state prosecutor to disclose exculpatory medical reports and tests as violating due process, 101 ALR5th 187.

Federal and state constitutional provisions and state statutes as prohibiting employment discrimination based on heterosexual conduct or relationship, 123 ALR5th 411.

Adoption and application of “tainted” approach or “dual motivation” analysis in determining whether existence of single discriminatory reason for peremptory strike results in automatic Batson violation when neutral reasons also have been articulated, 15 ALR6th 319.

Construction and application of 18 USCS § 922(e), prohibiting delivery of firearms to common carrier, 125 ALR Fed. 613.

Eligibility for discretionary admission under § 212(c) of Immigration and Nationality

Act of 1952 (8 USCS § 1182(c)), of alien returning to unrelinquished domicile after trip abroad, 80 ALR Fed. 8.

Validity, under federal constitution, of regulations, rules or statutes allowing drug testing of students, 87 ALR Fed. 148.

Constitutional right of prisoners to abortion services and facilities — federal cases, 90 ALR Fed. 683.

Artist’s speech and due process rights in artistic production which has been sold to another, 93 ALR Fed. 912.

Circumstances warranting judicial determination or declaration of unitary status with regard to schools operating under court-ordered or -supervised desegregation plans and the effect of such declarations, 94 ALR Fed. 667.

Availability of qualified immunity defense to private parties in action under 42 USCS § 1983, 95 ALR Fed. 82.

What conduct of federal law enforcement authorities in inducing or co-operating in criminal offense raises due process defense distinct from entrapment, 97 ALR Fed. 273.

Excessiveness or adequacy of awards of compensatory damages in civil actions for deprivation of rights under 42 USCS § 1983 — modern cases, 99 ALR Fed. 501.

Immunity of federal tax agent from suit based upon agent’s effort to enforce or collect tax, 99 ALR Fed. 700.

Application of 42 USCS § 1981 to private discrimination against aliens, 99 ALR Fed. 835.

Standing of state, local government, or agency thereof to bring suit under Civil Rights Act of 1871 (41 USCS § 1983), 106 ALR Fed. 586.

Use of peremptory challenges to exclude ethnic and racial groups, other than black americans, from criminal jury — post-Batson federal cases, 110 ALR Fed. 690.

Seeking of variance as prerequisite for ripeness of challenge to zoning ordinance under due process clause of federal constitution’s Fifth and Fourteenth Amendments — post-Williamson cases, 111 ALR Fed. 483.

Substitution, under Rule 24c of Federal Rules of Criminal Procedure, of alternate juror for regular juror before jury retires to consider verdict in federal criminal case, 115 ALR Fed. 381.

Eligibility of illegitimate child for survivor’s benefits under Social Security Act, pur-

suant to § 216(h)(2)(A) of Act (42 USCS § 416(h)(2)(A)), where state intestacy law denying inheritance right, or application of that state law to § 216(h)(2)(A), may violate child's right to equal protection of laws, 116 ALR Fed. 121.

Who is "prevailing party" for purposes of awards of attorneys' fees under 42 USCS § 19731(e), providing for such awards to prevailing parties in actions or proceedings to enforce voting guarantees under fourteenth or fifteenth amendment, 127 ALR Fed. 1.

When is intervention as matter of right appropriate under Rule 24(a)(2) of Federal

Rules of Civil Procedure in civil rights action, 132 ALR Fed. 147.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement — modern cases, 132 ALR Fed. 415.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes — public employment cases, 168 ALR Fed. 1.

Construction and application of constitutional rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) — United States Supreme Court cases, 8 ALR Fed. 2d 547.

[AMENDMENT XV]

Section 1.

[Negro Suffrage]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2.

[Power to Enforce This Article]

The Congress shall have power to enforce this article by appropriate legislation.

Law reviews. — For article suggesting county unit system discriminates against classes of voters in violation of equal protection clause of U.S. Const., amend. 14, see 14 Ga. B.J. 28 (1951). For article discussing concept of judicial neutrality in relation to the school desegregation cases, see 11 J. of Pub. L. 48 (1962). For article, "Reapportionment and Local Government," see 1 Ga. L. Rev. 596 (1967). For article "The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments," see 18 Mercer L. Rev. 367 (1967). For article, "Law and Social Change: The Dynamics of the 'State Action' Doctrine," see 17 J. of Pub. L. 258 (1968). For article discussing functional broadening of Congress' delegated powers and its effect on civil liberties, see 18 J. of Pub. L. 103 (1969). For article, "Federalizing Through the Franchise: The Supreme Court and Local Government," see 6 Ga. L. Rev. 34 (1971). For article, "State Action and Civil

Rights," see 23 Mercer L. Rev. 519 (1972). For article, "Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determinations Under the Voting Rights Act," see 22 J. of Pub. L. 37 (1973). For article, "Toward a Constitutional Definition of Racial Discrimination," see 25 Emory L.J. 509 (1976). For article discussing constitutional challenges to at-large elections on grounds of dilution of the vote, see 10 Ga. L. Rev. 353 (1976). For article discussing the impact on bond issues of challenges to voting procedures, see 15 Ga. St. B.J. 15 (1978). For article discussing federal civil litigation, with respect to U.S. Const., Art. III and Amendments. 1, 14, and 15, issues, see 30 Mercer L. Rev. 821 (1979). For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982). For article, "Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?," see 36 Emory L.J. 1 (1987).

For note on "State Action and White Primaries," see 2 J. of Pub. L. 463 (1953). For note, "ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979). For note, "Towards Proportional Representation?: The Strange Bedfellows of Racial Gerrymandering and Equal Protection in *Easley v. Cromartie*," see 53 Mercer L. Rev. 945 (2002).

For comment on *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944), holding unconstitutional denial of right to vote in primary to black citizen, see 7 Ga. B.J. 245 (1944). For comment on *Turman v. Duckworth*, 68 F. Supp. 744 (N.D. Ga. 1946), appeal dismissed, 329 U.S. 675, 67 S. Ct. 21, 91 L. Ed. 596, rehearing denied, 329 U.S. 829, 67 S. Ct. 296, 91 L. Ed. 704 (1946), see 9 Ga. B.J. 335 (1947). For comment discussing discrimination against black voters manifested in voter registration requirements, in light of *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd* without opinion, 336 U.S. 933, 69 S. Ct. 749, 93 L. Ed. 1093 (1949), see 12 Ga.

B.J. 94 (1949). For comment discussing Supreme Court treatment of political questions, in light of *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960), see 23 Ga. B.J. 545 (1961). For comment on *Anderson v. Martin*, 206 F. Supp. 700 (D. La. 1962), holding designation of race of candidates on ballot does not violate constitutional rights, see 25 Ga. B.J. 416 (1963). For comment discussing *Gaston County v. United States*, 288 F. Supp. 678 (D.C. Cir. 1968), as to the propriety under U.S. Const., Amend. 15, as well as the federal Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq.*, of reinstating the literacy requirement for voting in a county which had maintained a racially segregated school system, see 3 Ga. L. Rev. 485 (1969). For comment on the right to vote as affected by state residency requirements, in light of *Blumstein v. Ellington*, 337 F. Supp. 323 (M.D. Tenn. 1970), *aff'd* sub nom. *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), see 5 Ga. L. Rev. 389 (1971).

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Right to vote generally. — The right of suffrage is a political right, as compared with a property or civil right. In the absence of an express constitutional grant of suffrage, it is not a vested, absolute, or natural right such as it is deemed a citizen cannot be deprived of except by due process of law. The right to vote is not granted to a citizen by the United States Constitution. Nor is it a privilege of a citizen of the United States under U.S. Const., amend. 14. Nor does U.S. Const., amend. 15 abridge a state's power over suffrage, but only denies to the states any action which discriminates against citizens of the United States to qualify or vote, by reason of race, color, or previous condition of servitude. Though the Constitution of this state guarantees the right of suffrage to those who meet its qualifications, and they are entitled to register, and this right cannot be absolutely denied or taken away by legislative enactment, the Legislature has the right to prescribe reasonable regulations as to how these qualifications shall be determined. The fact that a citizen who meets one of several tests provided by the Constitution had to register or reregister does not deprive

him of his constitutional right of suffrage, but is only a reasonable regulation under which the right may be exercised. *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221 (1949), appeal dismissed, 339 U.S. 946, 70 S. Ct. 804, 94 L. Ed. 1361 (1950).

Protection of right to vote extends to state and federal elections. — Constitution of the United States protects right of all qualified citizens to vote in state as well as in federal elections. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Any alleged infringement of voting rights must be carefully and meticulously scrutinized. — Since right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights, any alleged infringement of right of citizens to vote must be carefully and meticulously scrutinized. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Right to vote includes right to have vote counted. — Qualified citizens not only have a constitutionally protected right to vote, but also the right to have their votes counted, a

right which can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot box stuffing. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Voter equality generally. — Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

The concept of political equality in the voting booth extends to all phases of state elections. *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

Inapplicable to party primaries. — A party primary merely chooses candidates or nominees of a political party to be submitted to the entire electorate in the general election, and is not an "election" within the meaning of that term as used in the statutory and constitutional provisions of Georgia conferring upon its citizens the right to vote in an election. The right to participate in such a primary does not come within the protection of U.S. Const., amend. 15 and U.S. Const., amend. 14. *Cox v. Peters*, 208 Ga. 498, 67 S.E.2d 579 (1951), appeal dismissed, 342 U.S. 936, 72 S. Ct. 559, 96 L. Ed. 697 (1952).

Distinctions based on race or color unconstitutional. — U.S. Const., amend. 15 forbids any distinction in the voting process based upon race or color irrespective of whether such distinction involves the actual denial of the vote. *United States v. Bibb County Democratic Executive Comm.*, 222 F. Supp. 493 (M.D. Ga. 1962).

Source of congressional power to eliminate discrimination. — Congressional power to legislate in furtherance of the elimination of racial discrimination is derived from U.S. Const., amend. 13, the power over interstate commerce, and the power under U.S. Const., amend. 14 and 15. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826, 94 S. Ct. 131, 38 L. Ed. 2d 59 (1973).

Constitutionality of voter registration laws. — Ga. L., 1949, p. 1204 (see O.C.G.A. Art. 6, Ch. 2, T. 21), as against the attack on the act as a whole, does not violate U.S. Const., amend. 14, nor U.S. Const., amend. 15. *Franklin v. Harper*, 205 Ga. 779, 55

S.E.2d 221 (1949), appeal dismissed, 339 U.S. 946, 70 S. Ct. 804, 94 L. Ed. 1361 (1950).

Grounds for attacking constitutionality of voter registration laws. — The mere possibility that a board of registrars may act arbitrarily or recklessly in administering the law and thereby violate constitutional rights is not a ground for declaring a voter registration act as a whole unconstitutional. *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221 (1949), appeal dismissed, 339 U.S. 946, 70 S. Ct. 804, 94 L. Ed. 1361 (1950).

Every state official is bound by U.S. Const., amend. 14, and U.S. Const., amend. 15. *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

Segregation of polling places, although involving no actual denial of the vote, is constitutionally impermissible as the elective franchise is a junction of interest importance in the process of government and so intrinsically characteristic of the dignity of citizenship. *Anderson v. Courson*, 203 F. Supp. 806 (M.D. Ga. 1962).

Impact of qualifying fee statute on exercise of franchise. — Where a state qualifying fee statute has a real and appreciable impact on the exercise of the franchise and where this impact is related to the resources of the voters supporting a particular candidate, the statute must be closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster. *Stoner v. Fortson*, 359 F. Supp. 579 (N.D. Ga. 1972).

At-large election system constitutional. — African-American residents of a city failed to establish that, by retaining an at-large election system for city officials, the city acted with a discriminatory purpose in violation of the federal constitution. *Cofield v. City of LaGrange*, 969 F. Supp. 749 (N.D. Ga. 1997).

Elements of proof of claim that minority votes have been diluted. — Four factors are of primary importance in determining whether a plaintiff in a voting rights suit has met the burden of proving that a minority's votes are being diluted: whether minority group members have equal access to the political process; whether past discrimination has the present effect of discouraging participation by minority members in the political process; whether the policy underlying the use of the at-large district is rooted

in racial discrimination; and whether the government body in question is unresponsive to the needs of the minority community. *McIntosh County Branch of NAACP v. City of Darien*, 605 F.2d 753 (5th Cir. 1979).

Evidence of intent to discriminate. — A speech favoring a “white primary bill” made by the sponsor of the 1947 Single-Commissioner Act for Carroll County, which act was later sponsored in 1951, was evidence of an intent to discriminate against black voters in any voting legislation before the General Assembly during that session, and a finder of fact might well infer that such intent continued until 1951 when the bill was re-introduced under the same sponsorship. *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 485 U.S. 936, 108 S. Ct. 1111, 99 L. Ed. 2d 272 (1988).

When a county board of education called for a school board referendum to provide funds to build a new high school and middle school and to air condition existing school buildings and submitted the issues as separate questions to be voted on individually during the general election rather than holding the referendum on Super Tuesday, March 8, 1988, the date of the presidential primary in which Jesse Jackson was a candidate, plaintiffs, representing black citizens, failed to prove a violation of the first, thirteenth, fourteenth, and fifteenth amendments of the Constitution because their expert’s conclusion dealt with only candidate elections, plaintiffs did not demonstrate racially polarized voting, the totality of the circumstances did not show a discriminatory effect, and there was no evidence that the

board purposefully chose the general election date so as to dilute the black vote. *Lucas v. Townsend*, 967 F.2d 549 (11th Cir. 1992).

Submitting package bond issue to voters. — In requesting the county board of commissioners to submit a package bond issue to the voters instead of three separate bond issues, the county board of education did not time and structure the school bond referendum with the intent of diluting minority voting strength and manipulating the minority vote in violation of the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States. *Lucas v. Townsend*, 783 F. Supp. 605 (M.D. Ga.), aff’d, 967 F.2d 549 (11th Cir. 1992).

Cited in *King v. Chapman*, 62 F. Supp. 639 (M.D. Ga. 1945); *South v. Peters*, 89 F. Supp. 672 (N.C. Ga. 1950); *United States v. Raines*, 189 F. Supp. 121 (M.D. Ga. 1960); *United States v. Raines*, 203 F. Supp. 147 (M.D. Ga. 1961); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); *Barnum v. Chambliss*, 247 F. Supp. 794 (M.D. Ga. 1965); *Georgia v. Rachel*, 384 U.S. 780, 86 S. Ct. 1783, 16 L. Ed. 2d 925 (1966); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1966); *Smith v. State Executive Comm. of Democratic Party*, 288 F. Supp. 371 (N.D. Ga. 1968); *Georgia v. United States*, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973); *Paige v. Gray*, 538 F.2d 1108 (5th Cir. 1976); *Bruck v. City of Temple*, 240 Ga. 411, 240 S.E.2d 876 (1977); *Thomasville Branch of NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978); *United States v. King*, 587 F.2d 209 (5th Cir. 1979); *Thomasville Branch of NAACP v. Thomas County*, 639 F.2d 1384 (5th Cir. 1981); *Bailey v. Vining*, 514 F. Supp. 452 (M.D. Ga. 1981).

RESEARCH REFERENCES

ALR. — Constitutionality, construction, and application of statutes regarding party affiliations or change thereof as affecting eligibility to nomination for public office, 153 ALR 641.

Racial segregation, 38 ALR2d 1188.

Who is “prevailing party” for purposes of

awards of attorneys’ fees under 42 USCS § 19731(e), providing for such awards to prevailing parties in actions or proceedings to enforce voting guarantees under fourteenth or fifteenth amendment, 127 ALR Fed. 1.

[AMENDMENT XVI]

[Authorizing Income Taxes]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Cross references. — Income taxes, Ch. 7, T. 48.

Editor's notes. — U.S. Const., amend. 16 modifies U.S. Const., art. I, sec. IX, cl. 4.

Law reviews. — For articles, "The Supreme Court's Approach to Annual and

Transactional Accounting for Income Taxes: A Common Law Malfunction in a Statutory System?," see 21 Ga. L. Rev. 329 (1986).

For note "Taxation of Illegally Received Income," see 1 J. of Pub. L. 473 (1952).

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Congress does not have an unlimited right to tax the citizenry. — A federal statute passed under the taxing power may be so arbitrary and capricious as to violate the due process of law clause of the U.S. Const., amend. 5. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), *aff'd*, 518 F.2d 1405 (5th Cir. 1975).

Congress bears the responsibility for establishing the rules of taxation, and as long as Congress has acted within its constitutional powers, the judiciary cannot use its broad powers to frustrate specific statutory language. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), *aff'd*, 518 F.2d 1405 (5th Cir. 1975).

Within constitutional limitations, there is no equity in tax law. *Fears v. United States*, 386 F. Supp. 1223 (N.D. Ga. 1975), *aff'd*, 518 F.2d 1405 (5th Cir. 1975).

Unconstitutionality of a tax measure derives neither from unequal imposition nor from unequal incidence, but rather from that special instance where the act is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. *Fears v. United States*,

386 F. Supp. 1223 (N.D. Ga. 1975), *aff'd*, 518 F.2d 1405 (5th Cir. 1975).

General principle underlying the income tax statutes, ever since the adoption of U.S. Const., amend. 16, has been the computation of gains and losses on the basis of an annual accounting for the transactions of the year. *Woolford Realty Co. v. Rose*, 286 U.S. 319, 52 S. Ct. 568, 76 L. Ed. 1128 (1932).

"Income" not to be restrictively construed. — The power to lay and collect taxes on incomes "from whatever source derived," are words of enlargement indicating an intention that the meaning of "income" should not be restricted. *Magness v. Commissioner*, 247 F.2d 740 (5th Cir. 1957), *cert. denied*, 355 U.S. 931, 78 S. Ct. 412, 2 L. Ed. 2d 414 (1958).

State courts cannot award federal tax exemption. — Georgia state courts do not have the authority to award the federal income tax dependency exemption to a noncustodial parent. *Blanchard v. Blanchard*, 261 Ga. 11, 401 S.E.2d 714 (1991).

Cited in *In re Cent. of Ga. Ry.*, 47 F. Supp. 786 (S.D. Ga. 1942); *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964); *United States v. Fulton Distillery, Inc.*, 571 F.2d 923 (5th Cir. 1978).

RESEARCH REFERENCES

ALR. — Income tax on profit upon sale by executor or administrator at advance over cost to decedent, 33 ALR 813.

Taxes paid or due to federal government

as deductible in computing state personal property or income tax, 39 ALR 352.

Constitutionality of statute permitting payment of taxes in installments, 157 ALR 338.

[AMENDMENT XVII]

[Popular Election of Senators]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Cross references. — Qualifications of electors, Ga. Const. 1983, Art. II, Sec. I, Paras. II and III; § 21-2-219. Manner of filling vacancies in office, §§ 21-2-542, 45-12-50 through 45-12-52.

Editor's notes. — U.S. Const., amend. 17 supersedes the first paragraph and that part of U.S. Const., art. I, sec. III, cl. 2 dealing with the manner in which senators are chosen and senatorial vacancies filled.

Law reviews. — For note on malapportionment and the implications of *Sanders v. Gray*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), see 14 Mercer L. Rev. 401 (1963).

For comment criticizing *South v. Peters*,

339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950), denying federal jurisdiction in apportionment case under Code 1933, § 34-3212, prior to Ga. L. 1964, Ex. Sess., p. 26, county unit system, see 2 Mercer L. Rev. 274 (1950). For comment on *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950), denying federal jurisdiction in case involving apportionment, see 2 Mercer L. Rev. 275 (1950). For comment on the right to vote as affected by state residency requirements, in light of *Blumstein v. Ellington*, 337 F. Supp. 323 (M.D. Tenn. 1970), *aff'd sub nom. Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), see 5 Ga. L. Rev. 389 (1971).

JUDICIAL DECISIONS

Cited in *King v. Chapman*, 62 F. Supp. 639 (M.D. Ga. 1945); *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834 (1950); *South v. Peters*, 89 F. Supp. 672 (N.D. Ga.

1950); *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963); *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981).

[AMENDMENT XVIII]

Section 1.

[National Liquor Prohibition]

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory

subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2.

[Power to Enforce This Article]

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3.

[Ratification within Seven Years]

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Editor's notes. — U.S. Const., amend. 18 has been repealed by U.S. Const., amend. 21.

Law reviews. — For note, "ERA: The

Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

JUDICIAL DECISIONS

Effect of U.S. Const., amend. 21. — United States Const., amend. 21 took away the power to continue prosecutions begun under the National Prohibition Act before repeal of U.S. Const., amend. 18, or to enforce judgments of conviction which had not become final prior to ratification. *Hosier v. Aderhold*, 71 F.2d 422 (5th Cir. 1934).

Whatever power was granted by U.S. Const., amend. 18 was recalled by U.S. Const., amend. 21 and, with the recall of the

power, necessarily fell acts of Congress adopted thereunder. *Green v. Page*, 9 F. Supp. 844 (S.D. Ga. 1935).

U.S. Const. 21 is prospective. — United States Const., amend. 21 is prospective and does not apply retroactively to a case where a prosecution has been completed and a valid judgment entered before its adoption. *Hosier v. Aderhold*, 71 F.2d 422 (5th Cir. 1934).

RESEARCH REFERENCES

ALR. — Presence of liquor in vehicle at the time of search and seizure as condition

of forfeiture for violating prohibition la; 71 ALR 911.

[AMENDMENT XIX]

[Woman Suffrage]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

Cross references. — Rights of female citizens generally, § 1-2-7. Registration of voters generally, § 21-2-210 et seq.

Law reviews. — For article, "The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civilly Disobedient," see 17 Ga. L. Rev. 109 (1982).

For note, "ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

For comment on Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967) as to constitutionality of public schools regulation of student appearance, see 19 Mercer L. Rev. 252 (1968). For comment on the right to vote as affected by state residency requirements, in light of Blumstein v. Ellington, 337 F. Supp. 323 (M.D. Tenn. 1970), aff'd sub nom Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), see 5 Ga. L. Rev. 389 (1971).

JUDICIAL DECISIONS

Applicability to state elections. — The concept of political equality in the voting booth extends to all phases of state elections. Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

Constitution of the United States protects right of all qualified citizens to vote in state as well as in federal elections. Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Any alleged infringement of voting rights must be carefully and meticulously scrutinized. — Since right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights, any alleged infringement of right of citizens to vote must be carefully and meticulously scrutinized. Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Right to vote includes right to have vote counted. — Qualified citizens not only have a constitutionally protected right to vote, but also the right to have their votes counted, a right which can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot box stuffing. Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Women jurors. — U.S. Const., amend. 19 does not contemplate that the state shall be required to place the names of females in the jury box. Cady v. State, 198 Ga. 99, 31 S.E.2d 38, appeal dismissed and cert. denied, 323 U.S. 676, 65 S. Ct. 190, 86 L. Ed. 549 (1944).

Cited in Wilson v. Harris, 170 Ga. 800, 154 S.E. 388 (1930); South v. Peters, 89 F. Supp. 672 (N.D. Ga. 1950); Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963).

RESEARCH REFERENCES

ALR. — Validity of testamentary trust to promote women's rights, 28 ALR 720.

Women's suffrage amendment to federal and state Constitution as affecting

pre-existing constitutional or statutory provision which limited rights or duties to legal or male voters, 46 ALR 1509.

[AMENDMENT XX]

Section 1.

[Terms of Office]

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of the Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2.

[Time of Convening Congress]

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3.

[Death of President Elect]

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4.

[Election of the President]

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5.

[Effective Date of Sections 1 and 2]

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6.

[Ratification within Seven Years]

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Editor's notes. — Section 2 of U.S. Const., amend. 20 modifies U.S. Const., art. I, sec. IV, cl. 3.

Law reviews. — For note, "ERA: The

Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

[AMENDMENT XXI]

Section 1.

[National Liquor Prohibition Repealed]

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

[Transportation of Liquor into "Dry" States]

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3.

[Ratification within Seven Years]

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Law reviews. — For note discussing this amendment's limitation on state's power to regulate alcoholic beverages, in light of *United States v. State Tax Comm'n*, 412 U.S. 363, 93 S. Ct. 2183, 37 L. Ed. 2d 1 (1973), see 10 Ga. St. B. J. 336 (1973). For note, "ERA:

The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

For comment on *Herbert v. State*, 60 Ga. App. 633, 4 S.E.2d 843 (1939), see 2 Ga. B.J. 55 (1940).

JUDICIAL DECISIONS

U.S. Const., amend. 21 is prospective. — It does not apply retroactively to a case where a prosecution has been completed and a valid judgment entered before its adoption. *Hosier v. Aderhold*, 71 F.2d 422 (5th Cir. 1934).

The application of U.S. Const., amend. 21 was not retroactive, but prospective. Immediately upon its ratification no further powers could be exercised which were dependent solely upon authority given by U.S. Const., amend. 18 or the National Prohibition Act, but it did not make innocent past acts which were crimes when committed, nor

pardon those who had committed them, but merely made acts of such character noncriminal for the future and took away from the courts the power to proceed further in the prosecution of such crimes where final judgment had not been rendered prior to the ratification of U.S. Const., amend. 21. *Ellerbee v. Aderhold*, 5 F. Supp. 1022 (N.D. Ga. 1934).

Effect of amendment. — U.S. Const., amend. 21 takes away, as of date of its ratification, December 5, 1933, the power to continue prosecutions begun under the National Prohibition Act before repeal of U.S.

Const., amend. 18, or to enforce judgments of conviction which had not become final prior to ratification. *Hosier v. Aderhold*, 71 F.2d 422 (5th Cir. 1934).

Whatever power was granted by U.S. Const., amend. 18 was recalled by U.S. Const., amend. 21 and, with the recall of the power, necessarily fell acts of Congress adopted thereunder. *Green v. Page*, 9 F. Supp. 844 (S.D. Ga. 1935).

State control over liquor generally. — Since the passage of U.S. Const., amend. 21, the control of the liquor traffic has been left to the states. *Coon v. Tingle*, 277 F. Supp. 304 (N.D. Ga. 1967).

A state has broad power under U.S. Const., amend. 21 to specify times, places, and circumstances where liquor may be sold. *Levendis v. Cobb County*, 242 Ga. 592, 250 S.E.2d 460 (1978).

Under U.S. Const., amend. 21, a state may absolutely prohibit the importation of alcoholic beverages into the state or it can leave the “wet” or “dry” decision with the individual counties. *Allstate Beer, Inc. v. Julius Wile Sons & Co.*, 479 F. Supp. 605 (N.D. Ga. 1979).

U.S. Const., amend. 21 denies to liquor the full protection of the commerce clause, U.S. Const., art. I, sec. VIII, cl. 3, in order to allow states to burden it with regulatory laws. *Redwine v. Schenley Indus., Inc.*, 210 Ga. 769, 83 S.E.2d 16 (1954).

U.S. Const., amend. 21 removes spirituous liquors and alcohol from the protection of the commerce clause to the extent necessary to allow the states to adopt and enforce appropriate laws and regulations dealing with the subject, and thus to burden interstate commerce to this extent. *Atkins v. Manning*, 206 Ga. 219, 56 S.E.2d 260 (1949).

Even in the absence of any protection under U.S. Const., amend. 21, the sovereign states in the exercise of their reserve police power may, without offending the commerce clause, U.S. Const., art. I, sec. VIII, cl. 3, adopt and enforce necessary laws and regulations to effectuate their own protection against illegal traffic and trade in such liquors. *Atkins v. Manning*, 206 Ga. 219, 56 S.E.2d 260 (1949).

Under U.S. Const., amend. 21, states and municipalities located therein are vested with broad, sweeping authority to refuse to license the sale of liquor in establishments in

which even nonobscene naked dancing is performed. *Jackson v. Three Acres Co.*, 249 Ga. 395, 291 S.E.2d 522 (1982).

Although a city issued the appellee building permits authorizing renovation of a building that would house a restaurant/lounge in which nude or partially nude dancing would be performed, and the appellee expended approximately \$40,000 in renovating the building, but due to subsequently enacted adult-business zoning ordinance, was denied an alcoholic beverage license, the appellee could not compel the issuance of such license under a vested right theory. *Jackson v. Three Acres Co.*, 249 Ga. 395, 291 S.E.2d 522 (1982).

Imposition of strict liability for injury resulting from sale of liquor has been found to be constitutional on basis that state enjoys a particularly broad police power as a result of U.S. Const., amend. 21, repealing prohibition. *Reeves v. Bridges*, 248 Ga. 600, 284 S.E.2d 416 (1981).

Amendment does not confer other powers. — Although a state may, under U.S. Const., amend. 21, discriminate against imports of intoxicating beverages, the amendment does not confer any other powers. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

States do not escape the operation of U.S. Const., amend. 14 in dealing with intoxicating beverages by reason of U.S. Const., amend. 21. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

U.S. Const., amend. 21 confers upon the states broad regulatory power over the liquor traffic within their territories. However, even in the regulation of the sales of liquor, arbitrary or unreasonable licensing procedures are in violation of the due process and equal protection clauses of U.S. Const., amend. 14. *Parks v. Allen*, 409 F.2d 210 (5th Cir. 1969), later appeal, 426 F.2d 610 (5th Cir. 1970).

Act imposing excise tax on wines and malt beverages is within the state's authority to determine conditions upon which liquor can come into its territory and what will be done with it after it gets there, and other alleged discriminatory provisions of the act were outside the pale of protection of the due process and equal protection clauses of U.S. Const., amend. 14, and the commerce clause, U.S. Const., art. I, sec. VIII, cl. 3, by

reason of U.S. Const., amend. 21. Capitol Distrib. Co. v. Redwine, 206 Ga. 477, 57 S.E.2d 578 (1950).

Regulations pertaining to the sale of alcohol are entitled to special deference when challenged in court. The broad sweep of U.S. Const., amend. 21 has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. Trustees of Mtg. Trust of Am. v. Holland, 554 F.2d 237 (5th Cir. 1977).

Time, place and manner of sale. — Local governing bodies have broad power under U.S. Const., amend. 21 to regulate the time, place and manner of the sale of liquor. Illusions on Peachtree St., Inc. v. Young, 257 Ga. 142, 356 S.E.2d 510 (1987).

Offer of sexually-oriented communication where alcohol served. — Although a state may have a certain amount of its police power restored to it under the twenty-first amendment that would otherwise be limited

under the first amendment, the expression involved in an establishment offering sexually-oriented communication where alcohol is served is still within the purview of the first amendment, and is still protected by Georgia's free expression guarantees. Because Georgia has no constitutional equivalent to the twenty-first amendment, the state's police power, though possibly not limited under the U.S. Constitution, is limited by Georgia's Constitution. Harris v. Entertainment Sys., 259 Ga. 701, 386 S.E.2d 140 (1989).

Cited in Cox v. McConnell, 80 F.2d 258 (5th Cir. 1935); Bandy v. Zerbst, 99 F.2d 583 (5th Cir. 1938); Scott v. State, 187 Ga. 702, 2 S.E.2d 65 (1939); Herbert v. State, 60 Ga. App. 633, 4 S.E.2d 843 (1939); United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981).

RESEARCH REFERENCES

ALR. — Webb-Kenyon Act as affected by federal Constitution amendments or legislation relating to intoxicating liquor, 48 ALR 362.

Validity and construction of statute or

ordinance requiring return deposits on soft drink or similar containers, 73 ALR3d 1105.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented business, 10 ALR4th 524; 10 ALR5th 538.

[AMENDMENT XXII]

Section 1.

[Terms of Office of the President]

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2.

[Ratification within Seven Years]

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the

several States within seven years from the date of its submission to the States by the Congress.

Law reviews. — For note, “ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications,” see 28 Emory L.J. 71 (1979).

JUDICIAL DECISIONS

Cited in *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595 (1970).

[AMENDMENT XXIII]

Section 1.

[Electors for President and Vice President in District of Columbia]

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2.

[Power to Enforce Article]

The Congress shall have power to enforce this article by appropriate legislation.

Law reviews. — For note, “ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications,” see 28 Emory L.J. 71 (1979).

[AMENDMENT XXIV]

Section 1.

[Poll Tax Payment Not Required to Vote in Federal Elections]

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2.

[Power to Enforce Article]

The Congress shall have power to enforce this article by appropriate legislation.

Cross references. — Registration of voters generally, § 21-2-210 et seq.

Law reviews. — For note, "ERA: The

Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

JUDICIAL DECISIONS

Protection of right to vote extends to state and federal elections. — Constitution of the United States protects right to vote in state as well as federal elections. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Any alleged infringement of voting rights must be carefully and meticulously scrutinized. — Since right to exercise the fran-

chise in a free and unimpaired manner is preservative of other basic civil rights, any alleged infringement of right of citizens to vote must be carefully and meticulously scrutinized. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Cited in *Edwards v. Sammons*, 437 F.2d 1240 (5th Cir. 1971).

RESEARCH REFERENCES

ALR. — Constitutionality, construction, and application of constitutional or statutory

provisions which make payment of poll tax condition of right to vote, 93 ALR 1449.

[AMENDMENT XXV]

Section 1.

[Succession upon Death, Resignation or Removal of President]

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2.

[Vacancy in Office of Vice President]

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3.

[Declaration by President of Inability to Perform Duties]

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his

office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4.

[Declaration of President's Disability by Vice President and Other Officers; Determination of Issue]

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Editor's notes. — U.S. Const., amend. 25 supersedes U.S. Const., art. II, sec. I, cl. 6, concerning the disability of President or the vacancy of that office.

Law reviews. — For note, "ERA: The Effect of Extending the Time for Ratification of Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

[AMENDMENT XXVI]

Section 1.

[Voting by Persons Eighteen Years of Age]

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2.

[Power to Enforce Article]

The Congress shall have power to enforce this article by appropriate legislation.

Cross references. — Rights of minors generally, § 1-2-8. Registration of voters generally, § 21-2-210 et seq. Age of majority, § 39-1-1.

Law reviews. — For article, "Federalizing Through the Franchise: The Supreme Court

and Local Government," see 6 Ga. L. Rev. 34 (1971).

For note, "ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications," see 28 Emory L.J. 71 (1979).

JUDICIAL DECISIONS

Cited in McCoy v. McLeroy, 348 F. Supp. 1034 (M.D. Ga. 1972).

OPINIONS OF THE ATTORNEY GENERAL

Residence for voting purposes. — A citizen over 18 years but under 21 years is sui juris for voting purposes and can establish a residence apart from the residence of the citizen's parents. However, such citizen must still fulfill the residence requirements established by law and each application should be decided by the voter registrars in accordance

with established principles of determining residence. 1971 Op. Att'y Gen. No. 71-151.

If citizens under 21 years are prohibited from establishing a residence of their own for voting purposes while citizens over 21 years are not, then voting rights are being denied to those under 21 on account of their age. 1971 Op. Att'y Gen. No. 71-151.

[AMENDMENT XXVII]

[Laws Varying Compensation for Services of Senators and Representatives]

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Editor's notes. — The amendment above was proposed by Congress in 1789 and ratified by the required majority of states by virtue of the 38th ratification in 1992.

The amendment was certified by the Archivist of the United States on May 18, 1992. See 57 Fed. Reg. 21,187 (1992).

RESEARCH REFERENCES

ALR. — Construction and operation of Twenty-Seventh Amendment to United

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